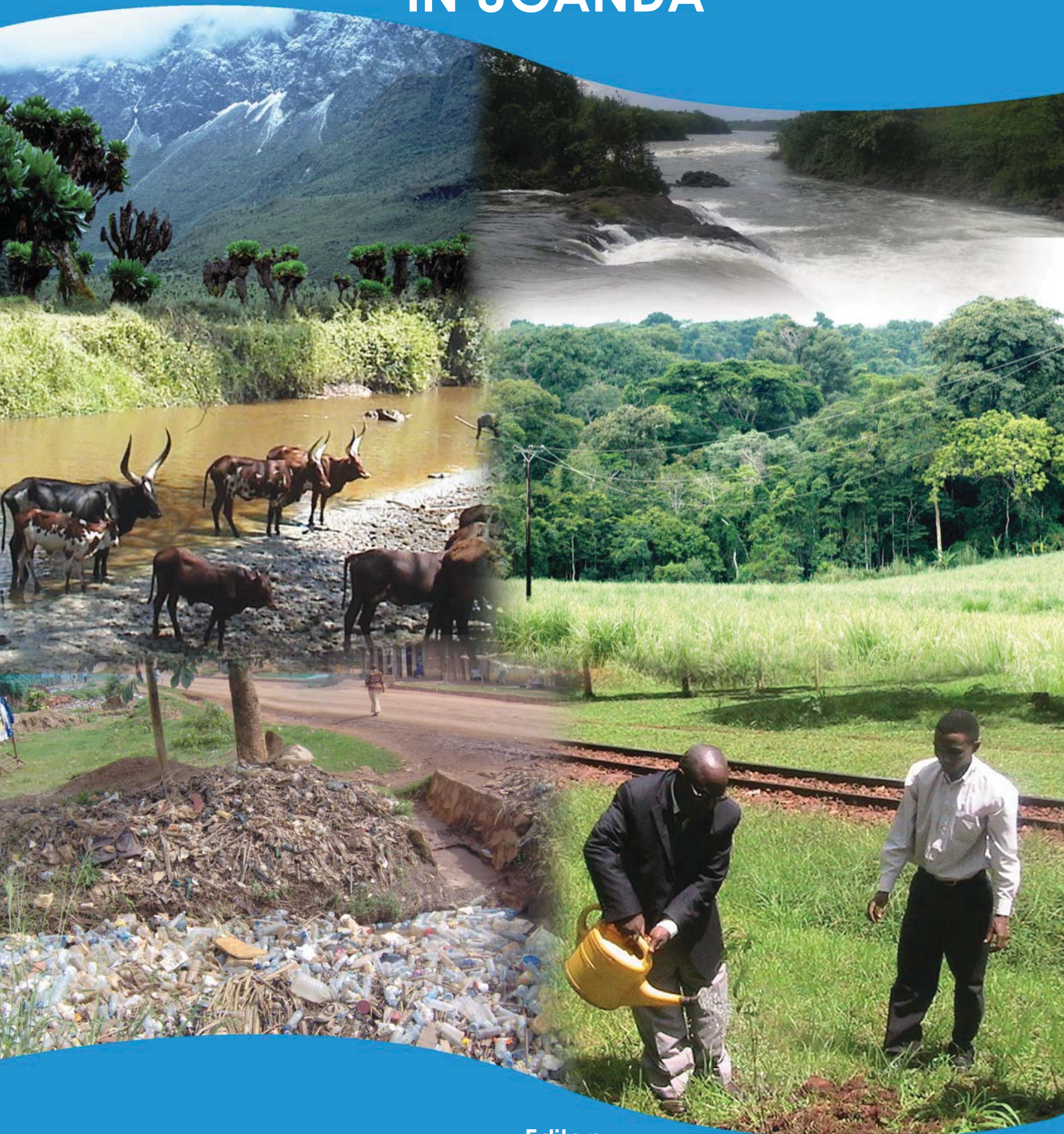


# HANDBOOK ON ENVIRONMENTAL LAW IN UGANDA



Volume I

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Irene Ssekyaana



**HANDBOOK**

**ON**

**ENVIRONMENTAL LAW**

**IN**

**UGANDA**

*Volume I*



*If we all did little, we would do much*



**Second Edition**

**February 2009**

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**Kenneth Kakuru**

## **Foreword**

Where policies, institutions and laws exist for the management of environmental resources, there is bound to be conflicts of interest, hence litigation. These conflicts are usually complex and their resolution should lead to ensuring sustainable development.

It has also been shown that environmental problems and socio-economic challenges are a matter of urgency and usually have widespread effect. It is therefore the continuing responsibility of lead agencies, private investors, the public and Government to use all practical means, consistent with other essential considerations of national policy, to avoid environmental degradation and to promote sustainable development. It is on the basis of this responsibility that procedural provisions, among others, have been developed to establish a standard of compliance.

This Handbook, therefore, is a result of efforts to develop and enhance the legal and institutional framework for management of the environment in Uganda. The Handbook is made as a part of the training tools for the training programme in environmental law for judicial officers and practitioners in Uganda that was sponsored by the United Nations Environment Programme (UNEP) under a project known as the Partnership for the Development of Environmental Law and Institutions in Africa (PADELIA).

The objectives of PADELIA are to assist selected African countries to develop their capacity in environmental laws and institutions. PADELIA is supported by the Netherlands, Luxembourg, Norway, Switzerland, Germany through the UNEP, for which help NEMA is very appreciative and grateful. PADELIA has the objective to enhance capacity of the participating countries for sustainable development and enforcement of environmental law and related institutions. UNEP works in partnership with the National Environment Management Authority (NEMA-Uganda) in building the capacity of Government, Non-Governmental organisations, civil society, private sector, the public, the regulated community and other stakeholders on complying with environmental laws of Uganda. The mandate of NEMA includes, among others, disseminating environmental information to stakeholders.

The training in environmental law for judicial officers was carried out by Greenwatch, a local environmental law advocacy NGO focusing on promoting and enhancing public participation in the management and sustainable utilisation of natural resources. Greenwatch is also supporting legal and institutional framework for environmental management in Uganda and elsewhere.

This Handbook is meant to facilitate legal practitioners, judicial officers and other stakeholders who are or may be involved in the legal matters of environmental law. It is also intended to serve as a resource material on the conceptual framework utilized in interpreting environmental law. It is also meant to ease the work of academicians, practitioners and judicial officers in finding judicial precedents on environmental law.

The information contained in this Handbook is as of 2003. It is hoped that as more practical materials become available, a second edition will be published.

I do hope you will find this handbook useful in your day-to-day work.

Aryamanya-Mugisha, Henry (Ph.D)  
**EXECUTIVE DIRECTOR, NEMA, UGANDA**



## **Executive Summary**

The study and practice of environmental law in Uganda has reached a level that requires concerted efforts in documenting and analyzing what has been achieved.

The efforts of documenting the practice of environmental law, however, has not reached the same level as that taught in academic institutions or practiced in courts of law.

This Handbook, therefore, attempts to guide practitioners on how to practice environmental law from both an educative and practical manner. The Handbook is essentially composed of two areas: a concise summary of the principles and norms known globally, and the evolution and current practice of environmental law in Uganda.

In the first two chapters of the Handbook, an attempt is made to examine how environmental law evolved in the global arena. The examination of the evolution of environmental law stems from the religious, cultural and historical points of view. It is well known that African customary and traditional norms effectively regulated our natural resources and their sustainable use. With the advent of industrialization in the northern hemisphere, protection of the environment took a different turn. The law then developed to regulate different areas of what we now know as the law of torts, nuisance and negligence.

As society developed, man increased his consumption of goods and services which led to degradation and pollution. The turning point was in 1972 and later on in 1992 when two global conferences were held on how to tame global environmental degradation and pollution. In reaching global consensus, new treaties, principles and norms of international law evolved and these principles have since guided the development of environmental law and its practice in Uganda as well as elsewhere in the world. The new principles, such as, environmental impact assessment, precautionary principle, public trust doctrine, interest litigation, among many others, are shaping the practice of environmental law in Uganda.

The Handbook also narrates international legal protection of segments of the environmental law from a global perspective. It further narrates the international guiding principles in the development of legal frameworks for environmental management. This is intended to show the principles that guided the development of Uganda's environmental laws.

Constitutional law, being the mother of all national laws, has a strong foundation for the development and practice of environmental law in Africa. The Handbook therefore picks a few examples where Constitutional law has played the role of enabling the practice of environmental law in Africa.

In the second chapter of this Handbook, attempts are also made to trace the evolution of environmental policy and law in Uganda. Essentially, modern environmental policy and law starts from 1985 onwards. The development of environmental law in Uganda also benefited from the general socio-economic transformation that reformed the major economic sectors, including the environment sector and decentralization.

The Handbook also shows how environmental crimes and public interest litigation have developed or are being practiced in Uganda. Public interest litigation in environmental law in Uganda appears to have advanced and has shaped the development and implementation of environmental law. Cases of secondary tobacco smoking, pollution and environmental impact assessment have been tested in courts of law with varying areas of success. The Handbook concludes with how Uganda deals with access to environmental information as a tool to environmental governance. Practicing access to information litigation has also led to the shaping of jurisprudence on the subject.

## CHAPTER ONE

### INTRODUCTION TO ENVIRONMENTAL LAW<sup>1</sup>

Environmental law touches on practically every facet of society. It seeks to protect human health, manage natural resources and sustain the biosphere. This is frequently done, among other ways, through laws that set standards for environmental planning, wildlife, plant, mineral resources, land use management and other activities that can affect the air, water and soil.

Given the wide range of human activities that can impact on the environment, environmental law increasingly utilises everything from tax law (which can provide incentives or disincentives) to criminal law (which punishes individuals or corporate bodies for actions that can harm human health or the environment), to corporate law (which increasingly recognizes the need to respect environmental priorities), to administrative law (setting the ground rules as to how government agencies make and implement decisions). As such, environmental law becomes as much a perspective, as any body of law.

#### 1.1 A Brief History of Environmental Law

##### 1.1.1 Religious, cultural and historical roots

Religious traditions entail an evolving body of norms that govern most aspects of life. At the same time, different passages in the Bible have been invoked to justify and explain the conquest of nature.<sup>2</sup> The *Shari'ah*- the body of Islamic law- mentions the environment in more than 300 places. Most of these provisions are general, commanding respect for the environment. When combined with Islamic emphasis on cleanliness (and thus constraining pollution), the *Shari'ah* can be a powerful source of norms for environmental protection.

One important limitation common to different religious norms and principles –including the Buddhist and Hindu principle of *ahimsa* (do not harm) - is their frequent lack of standards applicable and necessary in a modern and increasingly urban context. Most of these norms evolved in rural areas, where population densities are relatively low, and human activities generally do not provide for the carrying capacity of the surrounding ecosystem.

African customary or traditional tribal law frequently governs important natural resources such as water, grazing, timber and minerals. Some tribes seek to protect the quality of their drinking water by prohibiting livestock from the vicinity of wells and other sources of portable water.

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<sup>1</sup> By Carl Bruch and John Pendergrass. Carl Bruch is a staff Attorney and Director of the Africa Programme at Environmental Law Institute (ELI), Washington, USA. John Pendergrass is a Senior Attorney at ELI.

<sup>2</sup> Genesis chapt. 1, v.27-28 (“so God created man in his own image.... And God said to them, ‘Be fruitful and multiply, and fill the earth and subdue it; and have domain over the fish of the sea, and over the birds of the air, and over everything that moves above the earth’”; see also Lynn White, the Historical roots of our Ecological Crisis, SCIENCE 1203-07(Mar. 10 1967)

The rise of large urban centers saw the development of laws seeking to allow people to live harmoniously in close proximity. Thus, medieval England saw such a development. First, there is considerable judicial unanimity in considering the precautionary principle as of sanitation ordinances for urban areas.<sup>3</sup> And legislation requiring chimneys to be built to prevent excessive smoke or threat of fire.<sup>4</sup>

The Industrial Revolution in the northern hemisphere greatly increased the impact of human beings on their surrounding environment. In Europe and North America, the atmosphere and water were fouled and natural resources drained in the name of development. The Industrial Revolution also had a profound effect on Africa and Asia, as the raw materials necessary as inputs e.g. timber, rubber, plant fibre, animal pelts and minerals were plundered from colonies. The industrial revolution saw some modest attempts to control the worst impacts of industrialization, but both the legislatures and courts were reluctant to impede the progress realized by industrialization (perhaps, not very different from the current social and political context in a number of developing countries).<sup>5</sup>

### **1.1.2 The Green Revolution**

The Green Revolution came as a result of unchecked industrialization. Industries developed new chemical compounds and emitted dramatically larger quantities of the older chemicals. Organic compounds used as pesticides and herbicides, bio-accumulated in fish and birds, threatening various species (such as the bald eagle and California condor) with extinction. In addition to causing cancer and birth defects in human beings, many of these organic compounds are suspected of being “endocrine disrupters” that interfere with the body’s hormone systems. Bioaccumulation of lead, mercury and other heavy metals is very dangerous to human health and a threat to the environment. Chlorofluorocarbons (CFCs) initially thought to be stable and efficient refrigerants, cleaners and propellants for aerosols have led to the thinning of the protective ozone layer.

At the same time, “wild” nature –a part of the heritage, culture, and religious tradition of most peoples - was disappearing. Old growth forests were cleared and free flowing rivers dammed. Wild lands were converted to agriculture to support growing populations, and fertile agricultural land was converted to residential land and recreational sites as cities sprawled, particularly in developed countries. At the national and international levels, this led to calls to set aside areas of particular natural importance.<sup>6</sup>

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<sup>3</sup> Robert Percival et al., *Environmental Regulation: Law Science, and Policy*(1992), 103(citing 12 Rich. 2c. 13 of 1338, which prohibited” the throwing of dung, filth, or garbage into ditches, rivers, or the waters near any city or borough or town.”).

<sup>4</sup> Frank P. Grad, *Environmental Law*(1971), 1.01; see also D.A.R Williams, *Environmental Law in New Zealand*(1980), 1 (noting that the first smoke abatement law was passed by Edward I[of England] in 1273 prohibiting the use of coal as being detrimental to human health”).

<sup>5</sup> Most laws did not adopt specific standards, and courts were reluctant to apply the laws. E.g. *Sigler v. Cleveland*, Ohio Dec. 166(C.P. Cuyoga 1896) (invalidating an ordinance that prohibited “dense smoke” as it was unconstitutionally overboard and vague).

<sup>6</sup> E.g., World Heritage Convention.

### 1.1.3 Environmental Law in the United States of America (USA)

The United States of America (USA) has one of the oldest and most developed systems of environmental law and policy. As such, the U.S.A experience offers a wealth of lessons to be learned. While many countries have looked to the U.S.A. laws and institutions for guidance on how to protect the environment, it is important to recall that the U.S.A. laws and institutions take place within a political, economic and cultural heritage that may limit the applicability of the U.S.A. experiences to other countries.

Initially, environmental issues were viewed as a primarily local issue, to be addressed by state and local governments. The federal role was largely to facilitate the development and implementation of these activities through financial assistance to states.<sup>7</sup> This led to a number of innovations, such as the first citizen suit provision (in Michigan) that allowed citizens to enforce environmental laws. This structure, however, was largely ineffective because states frequently did not have the political will necessary to impose meaningful constraints on businesses located in the state, particularly, where the impacts were felt in another state. The fear that businesses would relocate if subjected to strict environmental laws perceived as onerous contributed to maintaining the *status quo*.

The 1960s saw an explosion of federal laws designed to preserve natural areas and sustainably manage federal lands.<sup>8</sup> These laws, however, focused on government activities, rather than tackling the environmental impacts of private actions.

A number of pivotal events in the 1960s raised public awareness of the pending “ecological crisis”, and led to consequent proliferation of federal environmental law.<sup>9</sup> In 1962, Rachel Carson published “*Silent Spring*”, a book written for the public that drew attention to the broad range of environmental and public health impacts of pesticides, particularly DDT. Throughout the 1960s, stories rolled in about the impacts of chemicals, for example methyl mercury in swordfish and DDT in mothers’ milk. In 1963, the Federal Bureau of Land Reclamation (whose engineers were described as beavers, “.....because they couldn’t stand the site of running water”),<sup>10</sup> proposed to dam the Colorado River, to flood part of the Grand Canyon. After a nationwide campaign by the Sierra Club, the proposal was dropped.<sup>11</sup> In the late 1960s, the world first saw an image of the brilliant blue and green planet floating in the blackness of space which emphasized the fragility of life on planet earth (the universe). This was followed closely in 1969, by television news images of the Santa Barbara coastline devastated by an oil spill.<sup>12</sup>

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<sup>7</sup> Percival et al., environmental regulation, 105.

<sup>8</sup> e.g., the 1960 multiple use, sustainable yield act, the wilderness act of 1964, and the wild and scenic rivers act of 1968.

<sup>9</sup> e.g., percival et al., environmental regulation, 4.

<sup>10</sup> John Mcphee, encounters with the archdruid.

<sup>11</sup> Philip Shabekoff, fierce greenfire.

<sup>12</sup> Celia Campbell-mohn, petroleum, in Celia Campbell- Mohn, Barry Green, and J. William Futrell(eds.), sustainable environmental law 1108(1993)



Responding to a decade of environmental disasters and portents of disaster, the first Earth Day in 1970 is often credited as being the beginning of the modern environmental era. Conceived and coordinated by then USA Senator Gaylord Nelson and student Dennis Hayes, Earth Day has since grown in the United States of America and around the world, raising public awareness of environmental issues. The Congress of U.S.A. passed the National Environmental Policy Act (NEPA) four months before the first Earth Day, which seeks to infuse environmental considerations. This commenced an unprecedented decade of environmental law making in the United States.<sup>13</sup> Although NEPA does not set any environmental standards such as emission limits, technology requirements, or required practices, it established national environmental policies and goals and is the first national law in the world to require environmental impact assessments.<sup>14</sup>

Subsequently, many environmental laws have been passed in the USA. These laws provided some enforceable standards, but in many cases provided the framework and required EPA, as the competent agency, to develop the specific standards. These were variously based on goals of protecting public health and the environment, availability and affordability of control technology, or a combination of both.

The USA experience with pollution control laws provides a number of lessons. First, outright bans on production or use of specific substances can be effective where there is clear evidence of substantial harm and alternatives are available. Examples include bans on the use of *Dichloro-Diphenyl-Trichloroethane* (DDT) in the USA, the use of lead in paint and gasoline, and on most uses of *Chlorofluorocarbons* (CFCs). The ban of these chemicals did not cause substantial economic dislocation and have led to environmental improvements. In the cases of lead in gasoline and CFCs, the ban was phased in over time in order to reduce the economic effects. Since these substances are all persistent in nature, the environmental improvements take decades to manifest themselves. Nevertheless, peregrine falcons have made a remarkable recovery from the eggshell-thinning effects of DDT and have been removed from the endangered species list.<sup>15</sup> Lead levels in blood remain too high in many children, but now the cause is usually dust from old lead-based paint.

Technology-based limits on pollution have been effective in the USA at inducing polluters to reduce their emissions to the specified level, but they are considered economically inefficient and provide no incentive to reduce pollution below what is required. Standards based on a specified level or type of technology can also discourage technological innovation and pollution prevention activities.

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<sup>13</sup> See id. At 42; see also Richard Lazarus, *The Greening of America and the Graying of United States Environmental Law* (1999) (manuscript on file with author); PERCIVAL ET AL., ENVIRONMENTAL REGULATIONS, 5.

<sup>14</sup> The U.S. EIA requirements are relatively modest: an environmental impact statement is required for a federal project likely to have a significant impact on the environment. Since then, other countries have adopted EIA requirements for all projects, including those by private individuals, not just those by the national government; and for policies and programmes, not just projects.

<sup>15</sup> For dramatic demonstration of the recovery of peregrine falcons, see, [www.dep.state.pa.us](http://www.dep.state.pa.us).

Market-based programmes, particularly so-called “cap and trade” programmes, can be both economically effective and efficient at reducing pollution. The SO<sub>2</sub> trading programme, for example, achieved its initial goals at far lower costs than predicted. Market-based tools, however, depend on command and control mechanisms to be effective. An enforceable cap on total emissions, monitoring of individual emissions, and enforcement of the entire system (including preventing scofflaws) are all necessary elements of a trading programme.

## **1.2 Environmental Law in Africa**

In Africa, a number of factors have contributed to the increased attention to environmental law. The end of colonialism is perhaps the most important predicate condition, as this has allowed Africans to decide whether and how to utilize their natural resources, as well as to set their own priorities for public health and development.<sup>16</sup> In some countries, unfortunately, nepotism and corruption have led to what may be termed as “domestic colonization”, whereby a few (African) people in power have simply assumed the mantle of the old colonial powers.<sup>17</sup> While African nations face many challenges that strain scarce national resources and test the carrying capacity of the land on which so many African people depend. Populations, particularly in urban centers, have boomed. This has placed severe pressure on water resources as well as on forests (for fuel, wood and timber). Forests and other wild lands continue to be cleared to meet agricultural, commercial and settlement needs. African governments, in a bid to alleviate poverty, promote development and to pay national debts, have exploited the natural resource for hard currency.

Lower priority is often given to environmental issues. Governments frequently lack the financial resources necessary to effectively develop, implement, and enforce environmental laws and policies. Thus, for example, the World Bank provides practically all the funding for Uganda’s National Environment Management Authority (NEMA) in the 1990s and 2010s. As a result, governmental agencies often lack professional personnel in the environment sector due to financial constraints. Many government environmental institutions are designed to coordinate efforts between the various line agencies and ministries. These lead agencies, however, usually have priorities that frequently are at odds with environmental protection.

Many African countries have adopted framework environmental laws. These laws usually establish a national agency (or vest powers with the Ministry of Environment), include provisions for environmental impact assessment, and set out a number of basic provisions for different environmental sectors (such as air, water, soil, hazardous waste, wildlife, genetic resources) that require development or harmonization with existing implementing legislation or regulations. In East Africa, Uganda (1995) and Kenya (January 2000) have such framework laws; Tanzania by 2004, was to enact its framework environment legislation.

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<sup>16</sup> See e.g., Benjamin J. Richardson, *Environmental law in Postcolonial Societies: Straddling the Local-Global Institutional Spectrum*, 11 COLO. INT’L ENVTL. L. & POL’Y 1(2000).

<sup>17</sup> Mobutu Sese-Seko, former President of Zaire, is perhaps the most infamous. His systematic plundering of Zaire’s natural wealth led to the term “kleptocracy” – rule of thieves.

## CHAPTER TWO

### ENVIRONMENTAL LAW AS IT EVOLVED FROM THE ENGLISH LAW OF TORT<sup>18</sup>

#### 2.1 The English Law of Tort

The environmental law as we know in common law jurisdictions grew out of the law of tort. It is a modification of tort law and its principles. In Uganda, for example, the question of *locus standi*, the polluter pays principle, the doctrine of public trust are incorporated in the Constitution, the Environment Act and the Land Act. All the other principles are of environmental law and basically tort law. Even the modifications above were specifically included to modify and indeed modified the law of tort. To understand environmental law one has to first appreciate history and nature of the law of tort.

In the 14th Century England had remedies for wrongs that were dependent upon writs. Osborn's Concise Law Dictionary describes a writ as a document in the Queen's (King's) name under the seal of the crown commanding the person to whom it is addressed to do or forebear from doing an act. An original writ was anciently the mode of commencing every action at Common Law.<sup>19</sup> No one could bring an action in the Kings Common Law Courts without the Kings writ and the number of writs available was limited. Where there was no writ there was no right.<sup>20</sup>

Before 1830, every plaintiff had to bring his cause of action within a recognized writ and a mistaken choice or wrong form of action would lead to losing a just suit. After some preliminary amendments of the law in 1832 and 1833 the Common Law Procedure Act 1852 provided that "it shall not be necessary to mention any form or cause of action in any writ of summons"<sup>21</sup>. The Judicature Act of 1873 empowered all courts to apply the principles of law and equity alike in all courts and provided that in case of conflict the principles of equity should prevail.<sup>22</sup> Today the test is that the plaintiff enjoys a right, that the defendant has violated the right and that a remedy is available to the plaintiff.<sup>23</sup>

The growth of the law of tort followed the growth in the mode of production and exchange at the time. With booming industrial revolution, the extensive use of machines, the growth in the number of commodities, in terms of variety and use, made it necessary for the old laws based on feudal economy to change. More people owned more property, chattels and land. Means of communication and transport eased considerably with advancement in technology, making interaction easier and more frequent by narrowing the proximity of persons. Laws had to emerge to take this situation into consideration.

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<sup>19</sup> Osborn's Law Concise Law Dictionary

<sup>20</sup> Salmon on Torts P.1

<sup>21</sup> Salmon on Torts 14th Edition P.1

<sup>22</sup> United Australia LTD Vs Barclays Bank LTD 1941 ACI, P.53

<sup>23</sup> Donoghue vs Stevenson (1932) AC 562 - 580

The conduct of a person that interferes with the sanctity of another's right to private property is referred to as a tort. A tort is a crooked conduct; a wrong.<sup>24</sup> Sir F. Pollock described it as violation of an absolute right. It is a remedy that was not available before ownership of private property assumed a very significant social/political role. Tort is described by what it is not and Salmond describes it as a civil wrong for which the common law remedy is an action for unliquidated damages, and which is not exclusively the breach of contract, or breach of trust, or other merely equitable obligation.<sup>25</sup> The common thread woven into all torts is the idea of unreasonable interference with the interests of others.<sup>26</sup> The law of tort exists for the purpose of preventing man from harming one another whether in respect of their property, their persons, their reputations or anything else in their possession.

## 2.2 The Law of Trespass

In legal terms trespass means, "any legal wrong for which the appropriate remedy is a writ of trespass," that is any direct and forcible injury to person, land or chattels. It is usually used to reinforce forcible or unauthorized entry on land. The underlying principle here is protection of private property. The Feudal order was based on ownership of land by a few individual landlords and protection of their exclusive right to land was of fundamental importance.

The Industrial Revolution made land less important and promoted the ownership of commodities and other forms or means of production such as machinery. Ownership of property became as important as ownership of land, since land had become a commodity on the market like any other. There remained, however, and still remains, a great legal requirement to protect private ownership of property in whatever nature or form.

What is interesting is that the remedy for trespass must be for unliquidated damages. That is unspecific pecuniary claim for compensation. The intention of the law of trespass, it is submitted is not to compensate the plaintiff but rather to punish the defendant and act as a deterrent to others. That is why trespass is actionable *per se*; the defendant is liable even though the plaintiff has suffered not the slightest harm.

The sanctity of the plaintiff's interest is important in such a case given the fact that the onus is on the defendant to justify his conduct. A plaintiff who has been<sup>27</sup> deprived of all normal senses is entitled to substantial damages though he can neither enjoy them nor bequeath them by will. The net effect of the law of trespass was to fortify private ownership of property specifically private ownership of land, to protect the individuals who hold this property, from physical harm and to protect the ownership of property from being brought into dispute.

This also meant that the individual property owners could deal with their property as they wished if their actions did not directly injure the rights of others. This includes the right of a land owner to deal with his/her land in any manner he/she wishes to, including inflicting damage to this land.

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<sup>24</sup> Osborn's Law Dictionary P.327

<sup>25</sup> Salmond on Torts P.15

<sup>26</sup> Prosser Torts P.6 quoted in Salmon on Torts P.15

<sup>27</sup> Prosser Torts P.6 quoted in Salmon on Torts P.15 & Sons (1967) 2 QB1 Cooper Jenkins

It has since been realized that damage to one's property, in the end results in damage to the property of others and that the total damage caused by each person to his own property eventually adds up to gross damage to the property of all, resulting into degradation of the natural habitat. This in turn affects his/her quality of life for which development and private ownership of property was meant to enhance. The need to address this led to the emergency of the modern environmental law.

Trespass to land consists of entering upon land belonging to another and remaining there or placing or projecting material upon it, without lawful justification the proof of which lies with the trespasser. The slightest crossing of the boundary is sufficient, for example, to put one's hand through a window or sit upon a fence. One single stone put against the plaintiff's wall is sufficient to constitute trespass. Any person who has a right of entry on the land of another for a specific purpose commits a trespass if he enters for any other purpose, (for example an electricity meter reader who is only allowed to read meters commits trespass if he enters for any other reason other than that he/she is permitted) this is the case where one abuses a right of way or right of entry given under a contract.

A person who has lawfully entered another person's land, commits trespass if he remains there after his right has ceased. Such trespass continues as long as there is personal presence of the trespasser, and is actionable for as long as it lasts. The same applies where the trespass consists of things placed on the plaintiff's land. But an action for trespass can only be brought by him/her who is in illegal possession of the land, by a person who is entitled to immediate and exclusive possession.<sup>28</sup> This form of injury is essentially a violation of a right to possession, not a right to property. Thus, a landlord cannot sue for trespass on land occupied by a tenant, unless there is physical damage to the land; use of land without possession such as a guest at a hotel gives no rights of action in trespass.

Trespass by nature, therefore, is committed by physical persons moving into or violating the right of another in respect of land. As time went by human beings' ability to harness nature took greater dimensions so did his or her needs. Technology and science brought about many changes to human beings' style that allowed not only the possessions, but was able to move on their own. There was need therefore to contain the intrusions of one man or woman's possessions or actions from another's land. The principle, however, remained the same to protect private property from encroachment. This is how the tort of intrusion emerged.

## **2.3 The Tort of Nuisance**

Trespass requires physical entry of the defendant into the plaintiff's property, but a nuisance is created by acts that do not have to constitute physical and personal presence of the plaintiff's land by the defendant. In other words, it is an extension of the tort of trespass. As man increased his ability to manipulate and harness nature to his benefit he created situations where his activities on his own land, would interfere with the quiet possession of his neighbour's land. In order to protect the right of a land owner to enjoy his right of ownership or occupancy without such interruptions there emerged the tort of nuisance.

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<sup>28</sup> Salmon on Torts P.18



The tort of nuisance later extended to cover any actions committed by any one on land adjoining that of the plaintiff. It does not matter that the land where the nuisance is created does not belong or is not occupied or in possession of the said defendant.<sup>29</sup>

A nuisance is commonly committed for a continuous period, it is a situation where the defendant continuously does something that interferes with the plaintiff's quiet enjoyment of his property or causes irritation to the plaintiff or waste to his property. A site of isolated instance would not normally constitute a nuisance.<sup>30</sup> Since this tort is intended to protect private property rights and is an extension of the tort of trespass, it is actionable only at the instance of that person in possession of the land injuriously affected by it. The earliest remedies for nuisance were the assize of nuisance and the writ of *quod permittit* to authorize the plaintiff to abate the nuisance.

Early actions were only available for and against free holders and later extended to the owner of the land or one who had rights in connection with the land such as a tenant at will. A person who had no possession of land, like in trespass, could not sue for a nuisance even though he has suffered direct personal or pecuniary damage. A person, for example, passing by a factory emitting noxious smoke every morning on his way to work could not bring action in nuisance. In today's environmental setting, this is debatable.

There was certainly a need to balance the conflicting interests of two property owners with adjoining properties. Each enjoys a right unless actual damage is thereby caused. The earlier position was that even if such damage was caused, the plaintiff could not recover if the damage was due to natural growth of the trees, for example. This was in the case of *Reed vs Smith*.<sup>31</sup> It was successfully argued for the defendant that "he did not grow the trees, he did not root them and he did not blow them down. It all happened in the cause of nature." But the law has since moved from this position to cover liability in nuisance from the escape of things from the defendant's land to that of the plaintiff even if they were naturally on the plaintiff's land.

In order to succeed in an action of nuisance, the plaintiff has to prove two things namely-

- (i) Some interference with the beneficial use of land he occupies, and
- (ii) Some physical injury to the land, or property situated thereon.

The first principle of interference with beneficial use requires that action is based not on mere discomfort or inconvenience. It must be substantial, not merely trifling or forceful. *Knight Brace vs the case of Walter Self* expounded this rule as follows-

"Ought this inconvenience to be considered, as more forceful more than one mere delicacy or fastidiousness as an inconvenience materially interfering with the ordinary comfort physically of human not merely modes and habits of or dainty modes and habits of living but according to plain living, sober and simple motions among the English people"<sup>32</sup>

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<sup>29</sup> West (H) and Sons vs Shepherd (1964) AC 326

<sup>30</sup> Gregory Piper (1829) BAG 591

<sup>31</sup> 1914 19 BCR 139 at 140

<sup>32</sup> Thompson vs Ward 1953 2QB 158 - 159

It was held that a church congregation in a poor neighborhood could not succeed on action in nuisance against "buzzing noise" from a power station, but loss of one night's rest constitutes a nuisance.

In such cases of nuisance, the plaintiff need not prove any personal injury, but has to prove interference with beneficial use of his property. The issue of cause remains how much interference constitutes a nuisance. The issue of cause depends on the facts of each case. The opportunity to lie quietly in bed on a Sunday morning, for example, could not constitute a nuisance<sup>33</sup> and the interference with television reception was in 1965 held in England not to constitute a serious nuisance as interference with health and physical comfort.

The test for a nuisance here is not whether the individual suffers what he regards as substantial discomfort or inconvenience, but whether the average man who resides in that locality would take the same view on the matter.

A person living in an apartment on Kampala Road, a city center must be prepared to live with the level of traffic noise there. The second rule in nuisance is interference with property, where the actions of the defendant or his own land are such that they damage the plaintiff's property, the plaintiff's proof of damage must succeed. It does not matter that the plaintiff resides in an industrial area, if fumes from the factory damage his crops or house. The defense of location available in the cases of disturbance and discomfort is not available to the defendant in this case.

Injury has been extended to cover not only physical injury to property but also injury to the value of the property. Noise from adjoining property may reduce the rental value of a residential house for example. But still this kind of injury ought to be proved. In case of physical damage actual not potential damage must be proved. No action, however, will lie for nuisance in respect of damage which ever, though substantial, is due to the fact that the plaintiff is absolutely sensitive or uses his land for exceptionally sensitive purposes.

It is no defence that the plaintiff came to the nuisance and hence consented to the injury. A person is not expected to refrain from buying land or occupying premises because a nuisance exists there. It is no defence that the nuisance although injurious to the individual is beneficial to the public at large. The fact that a Soap Factory in central Kampala produces soap for the benefit of the public, employs many people and pays government taxes is no defense to an individual's suit against it in nuisance, due to fumes emitted from the said factory.

It is also not a defence that the place from which the nuisance emanates is the best location the defendant can get on the best suitable for the purpose or that no other place is available for which less mischief would result. If no place can be found where the action causes no nuisance, then it can only be carried out with the permission or agreement of adjoining proprietors or under the sanction of an Act of Parliament.<sup>34</sup> Lack of negligence is no defense to an action in nuisance. The burden of proof in negligence lies with the plaintiff whereas in nuisance it lies with the defendant.

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<sup>33</sup> Southmpton Corportion vs Esso Petroleum Co., LTD (1954) 2QB 182 and 204

<sup>34</sup> Stone Vs Balton (1904) 2KB 448

It is no defence that the action of the defendant alone could not amount to nuisance without similar actions of many others occurring at the same time. Thus, the general principle is that a factory in Kampala cannot avail itself with a defence that its fumes emitted alone would not constitute nuisance but only together with all other factories, nor can a defence be available to a defendant that he is merely making reasonable use of his property, as no use of one's property is reasonable if it causes discomfort or damage to other person or their property.

## **2.4 Nuisance and Negligence**

The law moved from trespass, which is actionable per se, and requires physical entry by the defendant into the plaintiff's land to nuisance, which is actionable on proof of damage, or disturbance by the plaintiff. In nuisance the plaintiff need not prove fault on part of the defendant.

What is important to note here is the physical proximity of the parties. In trespass to land, one has to physically intrude; however minor the intrusion, it follows that the defendant unlawfully entered the plaintiff's property. In the case of nuisance, the defendant need not enter the plaintiff's land but the use of his own land causing annoyance or disturbance or injury to that of the plaintiff must be proved. Negligence is submitted in the extension of the above two. It became important in the development of law that rules be set up to regulate the activities of man and his neighbour.

The rule of negligence is very simple: that man must take reasonable care in his pursuit for personal well-being so as not to injure others in the process. If one is to blast rocks for weeks to build a road to acquire money, he must not injure others in the process. If one is to cut trees in a forest he must not put others at risk by his activity. If one is selling food to others who have no time to prepare their own food he must ensure that the food is safe.

Nuisance and trespass are not branches of the law of negligence. On one hand, the law of negligence extends the laws of trespass, negligence and nuisance, on the other hand, it tends to restrict it.

Two remedies are available to a plaintiff in an action in nuisance -

- (i) An injunction restraining a defendant from continuing the activity or threatening interference.
- (iii) An action for damages to compensate the plaintiff for the injuries suffered.

On the former, the primary aim of the law is to protect the plaintiff from further damages not to punish the defendant's fault and as such whether the defendant is at fault or not is immaterial.

The liability of the defendant is therefore strict. In the latter case, however, in the event that the plaintiff sues for damages, courts are reluctant to award damages because no fault has been proved.

Two rules seem to have emerged here –

- (i) that private property and enjoyment of it must be protected and no excuse is allowed for any such interference, and
- (ii) that one has to prove fault in form of damages, to seek monetary redress.

Increased industrial production meant increase in all sorts of commodities. This therefore increased the importance and the wide spread use of money as a medium of exchange. Everything could be valued in monetary terms including human suffering, loss of life or limb. Production was for profit, which is in monetary terms, and every man's activity was now for or related to production of commodities for exchange. Even land became a commodity to be bought and sold at a market value. It therefore followed that in this process, any injury to a person would be assessed in monetary terms. This served two purposes, it gave some relief to the victim and punished the culprit who would then be forced to carry out his trade in a way that would not injure others.

In cases where the defendant is claiming damages, there seems to have been a move away from the strict liability rule. It follows, therefore, that rights of enjoyment over land still receive a much higher legal protection than other rights, say of personal security over highways. The strict liability ruling, in this respect, seemed to have been extended. The Privy Council in *The Wagon Mound (2)* [1967 AC 617]<sup>35</sup> seem to have moved away from the strict liability case in nuisance other than land.

In the Australian Court before coming to the Privy Council (*The Wagon Mound No. 1*) Walsh J., held that the plaintiff's claim in negligence failed because fire damage was not reasonably foreseeable, but they succeeded in their claim in nuisance because in his view liability was not dependant on foreseeability. Both parties appealed to the Privy Council who upheld the defendants position that foreseeability was a pre-requisite to the claim in nuisance and also accepted the plaintiff's contention that fire damage was reasonably foreseeable so the plaintiffs succeeded. Lord Reid observed –

"It is quite true that negligence is not an essential element in nuisance. Nuisance is a term used to cover a wide variety of tortious act or omission and so many negligence is the narrow since is not essential and although negligence may not be necessary fault of some kind is almost always necessary and fault generally involves foreseeability."<sup>36</sup>

The rule is in *Rylands vs Fletcher*.<sup>37</sup> This is a case of 1860 England, the facts of which are as follows:

A mill owner, employed independent contractors who were apparently competent to construct a water reservoir on his land to provide water for his mill. In the course of this work the contractors came upon some old shafts and passages on his neighbour's land. These shafts communicated with mines of the neighbour, but no one thought so as the shafts appeared to be filled with earth. The contractors did not block them. So when the reservoir was filled with

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<sup>35</sup> Salmon P.87

<sup>36</sup> *Smith vs Diddy* 1904 2KB 448

<sup>37</sup> 1868 LR 3 HL 330

water, it burst through the shafts and flooded the neighbour's land, the neighbour sued, and the House of Lords upheld the action.

The rule was stated by Blackburn J. in Exchequer Chamber as follows-

"We think that the rule of law is that the person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it at his peril, and if he does not do so is prima facie answerable to all damages which is the natural consequence of its escape"<sup>38</sup>.

The rule is qualified if the defendant can show that the escape was due to the plaintiff's fault or due to an act of God. Needless to say that this rule arose out of the booming industrial revolution where the interference with nature by man had taken hitherto unprecedented proportions. Where every man was capable of dealing with his property in a way that was strange and unknown before to the detriment of his neighbour. This was neither trespass nor negligence.

For purposes of this book, the rule is important for the following reasons:

Unless there is escape of the substance from the land where it is kept, there is no liability under the rule<sup>39</sup> of the thing that inflicted the injury from the place where the defendant has occupation and control over land to a place which is outside his occupation or control. The thing escaping must not be natural on the land of the defendant. It must cause damage or injury to the plaintiff's property.

## **2.5 None Natural User of Land**

The case of Rylands v Fletcher established the rule that as a pre-requisite to liability, the defendant must have brought on the land something that was not naturally there. This was originally an expression of the fact that the defendant has artificially introduced onto the land a new and dangerous substance.

This rule came as a result of the need to protect property owners from their neighbours' dangerous industrial ventures. It was also a recognition that the increased industrial development by necessity requires that land be used for purposes it was never naturally intended to be used for. That more and more natural environment was being replaced with manmade environment and there was need to protect those using their lands naturally from those putting theirs to new use. The environment domain is the crown in England since the days of William I having acquired it by conquest. He distributed it to lords in the way he wished, to extract labour, taxes, among other things.

The rest of the population occupied by rights granted by the landlords. The rule in Rylands v Fletcher seems to have been a reaction to new dangers resulting from industrial revolution that were outside the scope of protection offered by the old remedies of tort. It does not seem to have

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<sup>38</sup> Ibid

<sup>39</sup> 1851 DC & SN 315 at 322 See Salmon P.90



been for the purpose of protecting the environment, as the owner of the land could use it the way he wished provided dangerous material did not escape. It does not seem to have been made to protect the people from injury. Thus, according to Lord Macmillan in *Read vs Lyons*.<sup>40</sup>, the rule derives from a conception of mutual duties of neighbouring land owners and is therefore inapplicable to personal injuries.

The net effect of the rule however was to preserve the environment. It made land owners who wanted to put their lands to new or unnatural use take precautions to avoid damaging neighbouring lands and this not only preserved the lands of their neighbours but theirs' too.

There is no objective universal test of what constitutes a non natural use. Courts have made their own judgment on the defendants conduct taking into account social utility and the care with which it is carried out. The cases considered by courts to determine this are important as this forms a guide in environmental law as to what constitutes harm or likely harm to the environment.

The following have been regarded as natural use of the land;- Water installation in a house or flat,<sup>41</sup> fire in a domestic grate<sup>42</sup>, burning rubber in the natural course of agriculture,<sup>43</sup> electric wiring,<sup>44</sup> gas pipes in a house or shop,<sup>45</sup> trees whether planted or self grown.<sup>46</sup> The occupant is not liable for permitting accumulation of things natural on the land, for example, water and birds or vegetation, but is liable for industrial water under pressure, gas and electricity in bulk.

This developed into a rule to protect the natural environment, hence, one is not held liable for any damage caused by natural means. This can be clearly illustrated by the case of *Crowhurst vs America Burial Board* [1878 4 Ex. D. 5], where the defendants grew a tree poisonous to cattle, when its leaves grew and projected over to the neighbours land they were eaten by his horse and it died. The defendant was held liable under the rule for using the land to plant a poisonous tree, as being unnatural use of the land. But in *Giles vs Walker* [1890 24 QBD 656] the defendants, whistle seed was blown in large quantity to the plaintiffs land, the plaintiff lost because it was held that whistle seed are the natural growth of the soil.

This rule applies only where there is close physical proximity between the plaintiff and the defendant, and where the plaintiff's property suffers damage. The rule is very strict and in the industrial era, has caused great difficulty to developers and industrialists. As this group gained more power, both politically and economically, the rule was pushed aside in favour of the rule in negligence based on foreseeability and remoteness of damage and the duty of care as established by Lord Atkin in the now famous case of *Donoghue Vs Stevenson* [ (1932) AC 562]

*"The liability for negligence whether you style it as such or treat it as in other systems as*

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<sup>40</sup> 1947 AC 156

<sup>41</sup> *Health vs Mayor of Brighton* (1908) 24 T.L.R 414

<sup>42</sup> *Andree vs Selfridge & Co.* 1938 Ch 18

<sup>43</sup> *Haddan vs Lynch* (1911) VLR 230

<sup>44</sup> *Bridlington Rely Ltd vs Yorkshire Electricity Board* (1965) 2 WLR 349

<sup>45</sup> *St. Helen Smelting Co. vs Tipping* (1865) HLC 642

<sup>46</sup> *Winfield & Jolowicz* Pg. 358

*a species of 'culpa' is no doubt based upon a general sentiment of moral wrong doing for which the offender must pay but acts or omissions which any moral code would censure cannot in the practical world be treated as to give a right to every person injured by them to demand relief. In this way rules arise which limit the range of complainants and the extent of their remedy.*

*The rule that you are to love your neighbour becomes law, you must not injure your neighbour and the question who is your neighbour receives a restricted reply you must take reasonable care to avoid acts or omission which you can reasonably foresee would be likely to injure your neighbour, who then in law is my neighbour? The answer seems to be persons who are so closely directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omission which are called in question". At P.580*

In this case, a manufacturer of ginger beer had sold it to a retailer in an opaque bottle the retailer sold it to "A" who gave it to a young woman acquaintance to take. After she took it she found decomposed remains of a snail in the bottle. She became very ill and sued the manufacturer for negligence.

There is no doubt, that this rule restricted the earlier rule in *Ryland vs Fletcher* as far as liability is concerned. In this way rules of law arise, which limit the range of complainants and the extent of their remedy.

The law, therefore, had moved from trespass actionable per se without proof of injury or disturbance, to nuisance where plaintiff required only proving disturbance to enjoyment or damage to property. In *Rylands and Fletcher*, where proof extended to non natural use of the defendant's land, the burden of proof here shifting to the plaintiff to prove only non natural user of the land by the defendant and now the plaintiff had to prove not only damage that was caused by the negligence of the defendant but that the defendant ought to have foreseen such damage.

On the other hand, however, the rule in *Donoghue vs Stevenson* extended physical proximity of the parties. In trespass it was physical entry, in nuisance any material entry in whatsoever form, noise, fumes, smoke, in *Rylands vs Fletcher* physical entry resulting from escape of all unnatural things. In all this the main factors were property rights and land use. So the proximity was physical neighbourhood in terms of possession and occupancy. In *Donoghue Vs Stevenson* the rule extended to cover acts that affect any person irrespective of physical neighbourhood. Thus a neighbour of a beer manufacturer is the person who opens the beer bottle and takes its contents, the physical distance between the two notwithstanding.

This rule also put more emphasis on physical personal injury other than proprietary rights, and is more concerned with use of consumer commodities other than use of land. This reflects the changing situation in the socio-economic set up of the world where more commodities were being produced for public consumption. Hence, the need to protect the consumer, on one hand and the producer on the other. The principles of this rule could, however, still be used in modern

environmental law though clearly it seems it was never formulated for the protection of the environment.

## CHAPTER THREE

### BASIC PRINCIPLES OF ENVIRONMENTAL LAW<sup>47</sup>

#### 3.0 Introduction

While principles of international environmental law have been evolving for almost a century, the greatest strides in articulating and giving force to these principles have been made in the last three decades, particularly since the Stockholm Conference on Environment and the 1992 Earth Summit in Rio de Janeiro, Brazil.

The basic principles of international environmental law include:

- (a) the Precautionary Principle;
- (b) the concept of proportionality;
- (c) the public trust doctrine;
- (d) the Polluter and User –Pays Principle;
- (e) right of access to justice (*see subsequent chapters*).

#### 3.1 The Precautionary Principle

The origin of the now well-pronounced precautionary principle has attracted considerable attention from several legal scholars and publicists. The preoccupation of these writers has been to explore the meaning of the principle and try to define limits within which it can be applied. What is particularly lacking in the ongoing discourse is its theoretical contextualization that tends to permeate well beyond this environmental law discourse.

The first traces of what eventually came to be the precautionary principle can be traced around the early 1980, the German Council of Experts on Environmental Matters considered the principle of precautionary action as a 'requirement for a successful environmental policy for the North Sea Ecosystem.'<sup>48</sup>

Two years later in 1982, the World Charter for Nature re-emphasized this position in its principle 11(b). The Charter states that:

*“That activities which are likely to pose a significant risk to nature shall be preceded by an exhaustive examination; their proponents shall demonstrate that expected benefits outweigh potential damage to nature, and where potential adverse effects are not fully understood, the activities should not proceed.”<sup>49</sup>*

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<sup>48</sup> L. Gundling, “The Status in International Law of the Principle of precautionary action,” 5 International Journal of Estuarine and Coastal Law 23, 26 (1990)

<sup>49</sup> This signified deviation from the traditional tort law liability principles that required proof of causation as the basis for awarding damages. Even in international law, the link between cause and defect had been articulated in the Trail Smelter Arbitration between the US and Canada. In that case that has become a leading precedent on international responsibility, the Tribunal required proof of “substantial injury” demonstrated by “clear and convincing evidence.”

Although the World Charter for Nature did not make any explicit mention of the precautionary principle, it contained the essential ingredients of what eventually evolved into this contentious “legal doctrine.”<sup>50</sup> In particular, the Charter presented the earliest attempt to put the burden of proof on those that proposed the presumed potentially hazardous activity.

Since 1982, the principle has been progressively codified into subsequent soft law and has eventually found itself deposited in major international environmental law agreements.<sup>514</sup> While the language used in different agreements has been largely inconsistent, it still reflects growing unanimity within the international community that there are certain activities, processes, technologies or chemicals that science can not provide sufficient evidence about their ecological impacts. In these cases, the international community has consistently agreed that a precautionary approach be adopted.

In the preamble to the Montreal Protocol, for example, the principle was expressed in terms of “taking precautionary measures.”<sup>52</sup> The protocol states that:

“Parties to this Protocol.....Determined to protect the ozone layer by taking precautionary measures to control equitably total global emissions of substances that deplete it, with the ultimate objective of their elimination on the basis of developments in scientific knowledge, taking into account technical and economic considerations”<sup>6</sup>(*emphasized*)

The principle appears to have stated in more explicit terms in the Ministerial Declaration at the 1987 Second International Conference on the Protection of the North Sea.<sup>53</sup> The Ministerial Declaration of the Conference usually referred to as the London Declaration stated *inter alia*;

“[The Parties]...agree to accept the principle [by using] the best available technology and other appropriate measures. This applies especially when there is reason to assume that certain damage or harmful effects on the living resources of the sea are likely to be caused by [toxic] substances, even where there is no scientific evidence to prove a casual link between emissions and effects.”<sup>54</sup>

In 1990, the Ministerial Declaration on Sustainable Development in the ECE region stated that “in order to achieve sustainable development, policies must be based on the Precautionary Principle... Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.....”

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<sup>50</sup> The World Charter for Nature introduced the elements of the risk assessment, cost benefit analysis of proposed activities and precaution.

<sup>51</sup> The latest of these agreements include: The United Nations Convention on Biological Diversity, 1992, the United Nations Framework Convention on Climate Change, 1992, the Kyoto Protocol to the Climate Change Convention, 1998 and the Cartagena Protocol on Bio-safety, 2000.

<sup>52</sup> Montreal Protocol on Substances that Deplete the Ozone Layer, September 16, 1987. See also vol.26, International Legal Materials at page 1541

<sup>53</sup> North Sea Conference, London, November 24 – 25, 1987

<sup>54</sup> London Declaration, Supra Article XVI(1) cited in Cameron and Abouchar, supra

Under the above Declaration, the countries of the ECE Region committed themselves to base their national policies on the Precautionary Principle. The Declaration states that environmental measures must anticipate, prevent and attack the cause of environmental degradation.<sup>55</sup>

Throughout the 1990s, various international legal instruments have continued to refer to the precautionary principle, albeit in a manner that does not resolve the definitional controversies surrounding its application. The net effect of this ambiguous articulation of the principle has been to create persistent uncertainty in scientific, legal and policy-making circles. No international or national instrument has made an attempt to define the principle or the nature of the obligation or responsibility it imposes on states or environmental managers, or on developers.

The inconsistent wording used in the various multilateral environmental agreements particularly adds to the principle's own vagueness. That wording ranges from the very wide construction such as in the Rio Declaration on Development and Environment to more narrow statements especially those related to the marine environment.

Whatever the formulation of the precautionary principle, it essentially lays down certain responsibilities that ought to be considered by environmental regulators in making development premised on the need to balance risk especially when an issue arises as to who should bear the burden of uncertainty where on a preponderance of scientific evidence may exist possible contamination resulting from a certain type of behaviour.<sup>56</sup> It suggests that it should not be the environment that bears the burden, but rather those who seek to make profit out of the proposed activity.

The Precautionary Principle, the Biosafety Protocol and the biotechnology debate by international efforts to develop an acceptable biosafety legal regime gained momentum from the work of the World Commission on Environment and Development and publication 1987 of their report, *Our Common Future*. At Rio de Janeiro, the global environment plan of action agreed to by the international community and code named Agenda 21 stated thus:

*"There is need for further development of internationally agreed principles on risk assessment and management of all aspects of biotechnology, which should build upon those [principles] developed at the national level. Only when adequate and transparent safety and border-control procedures are in place will the community at large be able to derive maximum benefits from, and be in a much better position to accept the potential benefits and risks of biotechnology."*<sup>57</sup>

The political significance of this statement of Agenda 21 is that within the international community, there was an early realisation that while biotechnology presented great opportunities for humanity and environment, little was known about the possible ground for consensus building and subsequent need to include biotechnology and bio-safety considerations into the

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<sup>55</sup> Also referred to as the Bergen Declaration. Bergen, Norway, May 16, 1990. UN Ddoc.A/CONF.151/pc/10 cited in 30 I.L.M. 800 (1991)

<sup>56</sup> Recourse to the precautionary principle essentially presupposes that potentially hazardous effects deriving from a phenomenon, process or product has been identified, and that scientific evaluation does not allow the risk to be determined with sufficient certainty.

<sup>57</sup> Agenda 21, 16.29

subsequent multilateral agreements. Agenda 21 also became a breeding ground for consensus building and the subsequent need to include biotechnology and emphasized the centrality of transparency to any regime under which biotechnology issues would be handled. The Biodiversity Protocol of 2000 also still could not solve some of the pertinent issues of precaution.

The consistent reference to the precautionary principle in various international instruments has led to the emergence among legal scholars that the principle has qualified to become an international custom. Indeed, Cameroon and Abouchar argued that the “endorsement by thirty four nations at Bergen is an indication that the precautionary principle is merging as a principle of customary international law.”

### **3.1.1 The Precautionary Principle and the Courts**

Existing precedents show that the courts have been rather ambivalent in their application of the precautionary principle. This may be understandable since traditionally, courts insist on “sufficient evidence” to be able to reach a verdict. Consequently, the notion of scientific uncertainty may be at tangent with established judicial practice. Essentially, the precautionary principle appears to question the foundations of common law evidential principles especially when the matter has to do with ecological stewardship and sustainability. None of the available precedents are clearly instructive on such pertinent issues as burden of proof, the scope of liability or even the nature and scope of evidence that has to be adduced when one lies on the principle as a basis for litigation. It therefore appears that the courts are uncertain as to the legal implications of the principle and particularly when to put aside the traditional requirements for discharging the burden of proof either beyond reasonable doubt, or on a preponderance of evidence.

In the case of *Leatch Vs National Parks and Wildlife Service and Shoalhaven City Council Land and Environment Court of New South Wales*(1993) 86 LGERA 270 Australia, the Shoalhaven City Council granted itself a development consent for the construction of a link road within an area under the Council’s jurisdiction. The road construction project would include a bridge over Bomaderry creek. In 1993, the Council applied to the Director General of the National Parks and Wildlife Services for a license to take or kill endangered fauna within the creek. The license application was supported by Fauna Impact Statement pursuant to section 92 A of the National Parks and Wildlife Act. An objection was raised against the grant of the license on the basis that the Fauna Impact Statement was invalid or legally inadequate as failing to comply with section 92 D of the same Act. It was submitted that there had been a failure to include “to the fullest extent reasonably practicable” a description of the fauna affected by the actions and the habitat of the fauna. The objection made very express references to the precautionary principle.

While disposing off the appeal, Judge Stein made explicit mention of the various international instruments in which the precautionary principle in the Convention on Biological Diversity and its applicability in Australia’s legal system, he concluded thus;



*“.....In my opinion, the Precautionary Principle is a statement of common sense and has already been applied by decision-makers in appropriate circumstances prior to the principle being spelt out. It is directed towards the prevention of serious or irreversible harm to the environment in situations of scientific uncertainty. Its premise is that where uncertainty or ignorance exists concerning the nature or scope of environmental harm (whether this follows from policies, decisions or activities), decision-makers should be cautious.”*

The court also considered whether the precautionary principle would be applicable in situations where it is not expressly stated in the relevant legislation. He noted that:

*“Where a matter is not expressly referred to, consideration of it may be relevant if an examination of the subject matter, scope and purpose shows it not to be an extraneous matter.”<sup>58</sup>*

The case of *Ms Sheila Zia and Others Vs. WAPDA [Supreme Court of Pakistan]* is another example. This was a petition commenced by way of letter to the Supreme Court of Pakistan. In a letter addressed to the Chairman of the Court, citizens of Street No. 35, F-6/1, Islamabad, expressed apprehension about the construction of a grid station allegedly located in the green-belt of a residential locality. In their plaint, the petitioners pointed out that “electromagnetic field(EMF) by the presence of the high voltage transmission lines at the grid station would pose a serious hazard to the residents of the area” especially the children, the infirm and the *dhobi-ghat* families that live in the immediate vicinity. The plaint disclosed two issues; whether any Government agency had a right to endanger the life of citizens by its actions without the latter’s consent; and whether zoning laws vested rights in citizens which could not be withdrawn or altered without the citizens’ consent.

A number of scientific studies had been conducted on the effect of electromagnetic fields but uncertainty remained an issue. As a result, the court was confronted with the issue of scientific uncertainty on the subject and consequently the application of the precautionary principle. The court noted that the question of electromagnetic fields was a highly technical subject and the experts and evidence put before it in the course of the proceedings was inconclusive. It could therefore not make a definite finding on the matter. With respect to the precautionary principle, the court made the following observation:

*“...There is a state of uncertainty and in such a situation the authorities should observe the rules of the prudence and precaution. The rule of prudence is to adopt such measures which may avert the so-called danger, if it occurs. The rule of precautionary policy is to first consider the well-fare and safety of the human beings and the environment and then pick up a policy and execute the plan which is*

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<sup>58</sup>With reference to the legislation under consideration, Judge Stein had this to say; “When pt 7 of the Act is examined it is readily apparent that the precautionary principle, or what I have stated this may entail, cannot be said to be an extraneous matter. While there is no express provision requiring consideration of the “precautionary principle”, consideration of the state of knowledge or uncertainty regarding species, the potential for serious or irreversible harm to an endangered fauna and the adoption of a cautious approach in protection of endangered fauna is clearly consistent with the subject matter, scope and purpose of the Act.

*more suited to obviate the possible danger or make such alternate precautionary measures which may ensure safety.”*

The court concluded that:

*“to stick to a particular plan on the basis of old studies or inconclusive research cannot be said to be a policy of prudence and precaution.” Court further emphasized the fact that taking precaution did not necessarily entail scrapping the whole scheme but rather, making “such adjustments, alterations and additions which may ensure safety and security or at least minimise the possible hazards.”*

In the case *Green Peace Australia Ltd. Vs. Redbank Power Company Pty Ltd. and Singleton council* [Land and Environment Court of New South Wales], an appeal by Green Peace Australia Ltd. challenged a development consent granted to the first respondent, Redbank Power Company Pty Ltd. by the second respondent, Singleton Council. The first respondent application described the development as “generating works involving the construction of a 120 MWE nominal rated fluidised-bed combustion power plant” which involved the construction of a power station and ancillary facilities including overland pipes carrying slurry and water.” GreenPeace Australia Ltd. raised an objection pursuant to section 98 of the Environmental Planning and Assessment Act of 1979. They contended that the impact of air emissions from the project would unacceptably exacerbate the “greenhouse effect” in the earth’s atmosphere. They argued that the court should apply the precautionary principle and refuse development consent for the proposal.

Pearlman CJ approvingly quoted the judgement of Stein J in *Leatch Vs. National Parks & Wildlife Services*. He noted that the important thing about the application of the precautionary principle [in this case] is that

*“decision makers should be cautious; the application of the precautionary principle dictates that a cautious approach should be adopted in evaluating the various relevant factors in determining whether or not to grant consent; it does not require that the greenhouse issue should out weigh all other issues”, statement of political intent rather than a clearly articulated legal doctrine. Indeed, “while it may be framed appropriately for the purpose of a political aspiration, its implementation as a legal standard could have the potential to create interminable forensic argument” and “taken literally in practice it may prove to be unworkable.”<sup>59</sup>*

In the case of Electromagnetic Field (EMF), for example, there appears to be reluctance on the part of the courts themselves as to the nature of the problem. Consequently, both science and the law consider the determination of what is an acceptable level of risk to be a political responsibility.

It appears from some of the judicial decisions that the courts have not yet determined how to deal with the postulate that it is harmless. What seems clear is that there is judicial acknowledgement

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<sup>59</sup> Nicholls v. Director General of National parks and Wildlife Services and others, Land and Environment Court of New South Wales, August-September 1994.

of the inability of science to provide sufficient knowledge. Courts also seem to recognise that political decisions have to be made in margins of error- from determinism's ideal of all encompassing knowledge, to uncertainty and unpredictability. In that situation, the conclusion from the decision is that the courts are very likely to be unwilling to push the interpretive margins of the precautionary principle.

The debate on the proper meaning and application of the precautionary principle, however, continues unabated. It is likely that the courts will increasingly take a more proactive approach, once it is faced with uncertainty as to the likely impact of new products, processes or activities. In a 1999 case in Brazil, a Federal Court issued a definitive ruling against the commercial distribution for planting of genetically modified Roundup Ready soybeans unless the respondents provided an Environmental Impact Study (EIS). In this court running battle, the Brazilian Institute of Consumer's Defence (IDEC) challenged the decision by Brazil's National Technical Commission for Biological Safety in which it declared the soybeans harmless to public health and the environment. IDEC obtained additional orders requiring that all products containing the biotech soy be labeled as such, and further requiring the respondent to keep the altered seeds separate from the conventional ones, declare who it sold the modified seeds and the volumes of such sales.<sup>60</sup>

### **3.2 The Concept of Proportionality**

This is a notion that essentially means that every regulation must serve a definite purpose. The regulation must be necessitated by the need to achieve this purpose and it must not have a wider scope than necessary to achieve the purpose. Finally, the proportionality principle requires that regulatory interventions must provide as little disturbance as possible to those that the intervention is meant to regulate. The principle of proportionality therefore requires that the selected degree of restraint is not unduly costly.<sup>61</sup>

Consequently, although under the precautionary principle environmental regulatory agencies are released for demonstrating direct evidence of possible environmental harm, the concept of proportionality must involve a requirement on the degree of probability that must be shown for the probable environmental damage to form the basis for intervention. In a recent communication by the European Union on the principle, it is stated that where action is deemed necessary on the basis of the precautionary principle, such "measures should be proportionate to the chosen level of protection, non-discriminatory in their application and consistent with similar measures already taken. They should also be based on an examination of the potential benefits and costs of action or lack and subject to review in the light of new scientific data and should thus be maintained as long as the scientific data remains incomplete, imprecise or inconclusive and as long as the risk is considered to be too high to be imposed on society."<sup>62</sup>

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<sup>60</sup> [http://www.biotech-info.net/net/brazil\\_court.html](http://www.biotech-info.net/net/brazil_court.html) "brazil court reaffirms ban on biotech soybean planting." August 13, 1999. According to this report, since the National Technical Commission for biological Safety approved the roundup Ready seeds, its president and other members have resigned.

<sup>61</sup> Tim O' Riordan and James Cameron(Eds.), *Interpreting the Precautionary Principle*. Earthscan Publications, 1994.

<sup>62</sup> The Communication was presented and adopted by the European Commission in Brussels on February 2, 2000.

Consequently, for environmental law, the proportionality concept appears to be the point for determining the threshold of the scientific evidence that is required according to the precautionary principle. This is because at that point, environmental regulators have to balance the extent to which the available scientific evidence makes causality sufficiently likely to permit intervention by invoking the precautionary principle. In practice, the principle becomes rather a question of assessing uncertainty and consequences of making a mistake, something that may be entirely administrative than legal.

### **3.3 The Public Trust Doctrine**

The Public Trust Doctrine is one of the oldest but constantly evolving doctrines relating to the ownership and use of essential natural resources. The doctrine dates back to the Institutes of Justinian (530 A.D.), which restated Roman Law: “By the law of nature these things are common to mankind- the air, running water, the sea and consequently the shores of the sea.”<sup>84</sup> In the centuries since then, both civil law and common law countries have incorporated these principles, and remnants can be found in African constitutions. It governs the use of property where title is presumed to be held by a given authority in trust for citizens. While there was substantial debate on the nature and scope of this doctrine in the 1970s and early 80s, especially in the United States, its continuous implications for public interest litigation in East Africa in particular are yet to be ascertained. The doctrine has found its way in national legislation and practice and if interpreted creatively, it could play a very important role in environmental public interest litigation. It is argued that most of the conflicts over resources especially between the state and resource dependant communities are a result of the breach by the state, of the fiduciary relationship created by the trust. The flexible statutory and judicial interpretation of the responsibilities of the trustee and the resource rights of the beneficiary could lay the basis for a vibrant and thriving legal regime on public interest litigation under the public trust doctrine.

The Public Trust Doctrine requires the government to preserve and protect certain resources that the government holds in trust for the public<sup>63</sup>. Traditionally, courts applied the Public Trust Doctrine to waters and similar common resources, and generally limited the power of the government to significantly alter the nature of the public resource for the benefit of an individual party.

Courts have applied the public trust doctrine to invalidate conflicting legislation,<sup>64</sup> to limit alteration of public resources,<sup>65</sup> to require express legislative action,<sup>66</sup> and to identify public

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<sup>63</sup> For example, Part XIII of Uganda’s constitutional National Objective Principle of State Policy provides that: “the State shall protect important natural resources, including land, water, wetlands, minerals, oil fauna and flora on behalf of the people of Uganda.” And while the binding nature of these principles remains unclear, at the very least it suggests that there is a constitutional basis for the public trust doctrine in Uganda.”

<sup>64</sup> E.g., *Priewe v. Wisconsin State Land & Improvement Co.*, 93 Wis. 534, 67 N. W. 918 (1896) (invalidating legislation authorising the drainage of a lake for development purposes).

<sup>65</sup> E.g., *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387 (1892) (rescinding conveyance of the bed of Lake Michigan to a private party).

<sup>66</sup> E.g., *Gould v. Greylock Reservation Commission*, 350 Mass. 410, 215 N.E.2d 114 (1996) (requiring legislative action before a state park could be used for private and specific public uses).

rights of resource access and use. In addition to air, water, and shores, U.S. commentators have argued for the application of the public trust to wildlife and wildlife and public lands,<sup>67</sup> something courts have done in Kenya and India.

### 3.3.1 Evolution of the Public Trust Doctrine

The existing evolution of the Public Trust Doctrine can be traced from the Roman law.<sup>68</sup> It originated from the declaration of the Justinian Institute that there are three things common to mankind: air, running water, and the sea. The title to these essential resources was vested in the state, as the sovereign, in trust for the people. While not strictly the property of the Roman people, these resources especially the seashores were considered to be *res communes* and as such excluded from private control. The purpose of the trust then was to preserve these resources in a manner that makes them available to the public for certain public purposes. Indeed, Nanda and Ris have asserted that the protection and control of navigable waters and shorelines is the oldest and best developed of all evolutionary theories about the Public Trust Doctrine.<sup>69</sup>

The incorporation of the doctrine in the English common law may itself be traced in the Magna Carta. Paragraph 5 of the Magna Carta made explicit reference to the guardianship of land. It extended that guardianship “to houses, parks fishponds, tanks, mills and other things pertaining to land.”<sup>70</sup>

As early as 1865, the English House of Lords defined the concept of public trust more explicitly as is now known in the common law. In the case of *Gann Vs. Free Fishers of Whitestable*, it was held that

*“the bed of all navigable rivers where the tide flows, and all estuaries or arms of the sea, is by law vested in the crown. But this ownership of the crown is for the benefit of the subject, and cannot be used in any manner so as to derogate from, or interfere with the right of navigation, which belongs by law to the subject of the realm.”*<sup>71</sup>

Under common law, the Public Trust Doctrine imposed a high fiduciary duty of care and responsibility upon the state. This responsibility rested on the nature of the state and the beneficiary communities. While the existence of a fiduciary relationship has often been invoked in many areas of law including contract, it is one of those legal concepts that are less conceptually certain.

Professor Joseph L. Sax has asserted that fiduciary duty under a trustee-beneficiary relationship entails three major restrictions on the trustee; “first, the property subject to the trust must not only be used for a public purpose, but it must be held available for use by the general public. Second, the property may not be sold, even for a fair cash equivalent; and third, the property must be maintained for particular types of uses.” This duty includes the obligation not only to

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<sup>67</sup> E.g., Scott W. Reed, The Public Trust Doctrine: Is it Amphibious?, 1J. ENVTL.L. & LITIG.107 (1986);

<sup>68</sup> See for example Ved P. Nanda and William K. Ris, Jr. “The Public Trust Doctrine: A viable Approach to International Environmental Protection” in 5 *Ecology Law Quarterly*, No. 2, 1976.

<sup>69</sup> Ibid

<sup>70</sup> Avalon Home Page;<http://www.yale.edu/lawweb/avalon/magna.html>

<sup>71</sup> 11 English Reports( ER) 1305(1865)HL.

preserve the trust property, but also to seek an injunction against, and compensation for any diminution of the trust corpus. The fiduciary cannot unilaterally exercise that power or exercise so as to affect the beneficiary's legal or practical interests. Thus, under natural resources governance regimes, the doctrine could be used either against the state for a breach of its duties as a trustee, or by the state to protect the resources subject to the trust. The courts have emphasized the fact that the "notion underlying all the cases of fiduciary obligation that is inherent in the nature of the relationship itself is a position of disadvantage or vulnerability on the part of one of the parties which causes him to place reliance upon the other and requires the protection of equity acting upon the conscience of that other".<sup>72</sup>

In a later USA case, *Illinois Central Rail Road Co. V Illinois*<sup>73</sup> the United States Supreme Court reaffirmed the House of Lords position in *Gann Vs. Free Fishers of Whitestable* by holding that the government could not abandon its responsibility and authority over an area of the public trust. The court set very limited parameters within which the trustee could deal with the trust property. It considered using, managing, or disposing of the trust property in a matter that would infringe upon the *jus publicum* an abuse of the fiduciary relationship between the trustee and beneficiary. Therefore, an alienation of resources held in trust could only be proper where the conveyance either promotes the interests of the public or does not impair substantially the public interest in the remaining property.

The above and several other court decisions suggest that the courts could employ and uphold the Public Trust Doctrine to mitigate administrative abuses in natural resources management. Indeed, according to Prof. Sax, the court in *Illinois Central* "articulated a principle that has become the central substantive thought in public interest litigation. When a state holds a resource which is available for the free use of the general public, a court will look with considerable skepticism upon any government conduct which is calculated either to relocate that resource to more restricted uses or to subject public uses to the self-interest of private parties."<sup>74</sup> While reaffirming the Public Trust Doctrine as being part of the Indian law, the Indian supreme Court in *M.C. Mehta Vs. Kamal Nath and others*<sup>75</sup> emphasised the essence of the doctrine in the following terms;

*"The Public Trust Doctrine primarily rests on the principle that certain resources like air, sea, waters, and the forests have such a great importance to the people as a whole that it would be wholly unjustified to make them a subject of private ownership. The said resources being a gift of nature, they should be made freely available to everyone irrespective of the status in life. The doctrine enjoins upon government the duty to protect the resources subject to the trust for the enjoyment of the general public rather than to permit their use for private or commercial purposes"*

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<sup>72</sup> Hospital Products Ltd. V United States Surgical Corp. 91984, 55 A.L.R.417[per Dawson J. at pp.488]

<sup>73</sup> 146 US

<sup>74</sup> Ibid

<sup>75</sup> M.C.Mehta v Kamal Nath and others, Writ Petition [c] No. 182 of 1996(Supreme Court of India)-Decided on December 13, 1996

Despite the existing jurisprudence on the doctrine, there appears to be no consensus on the nature of the interest in the trust property. Bray contends that there are two co-existing interests to trust lands: the *jus publicum* which is the public's right to use and enjoy trust lands; and the *jus privatum* which is the private property rights that may exist in the use and possession of trust lands. The trustee may convey the *jus privatum* to private owners, but this private interest is subservient to the *jus publicum* which is the state's inalienable interest that it continues to hold in the trust land and water.<sup>76</sup>

In the *National Audubon Society Vs. Superior Court of Alpine County* (the Mono Lake case)<sup>77</sup> the California Supreme Court summed up the powers of the state as trustee in the following terms;

*"Thus, the Public Trust Doctrine is more than an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right only in rare cases when the abandonment of that right is consistent with the purposes of the trust...."*

Since the Justinian Institute Declaration, the doctrine has continued to evolve both in terms of scope and application. It has since then been extended from its traditional common law application to uses such as navigation, fishing and commerce to cover a broad range of natural resources. The USA Courts have in particular been very instructive in expanding the scope of the resources protected by public trust. American judicial decisions suggest growing judicial concern in protecting fragile and ecologically important lands such as fresh water, wetlands and riparian forests.

The observation by the Supreme Court of California in the *Mono Lake case* was to the effect that the argument that the ecology and environment protection is a relevant factor to determine which lands, waters, or air are protected by the Public Trust Doctrine. Indeed, the Indian Supreme Court in *Mehta Vs. Kamal Nath* and Others cited authoritatively the decision of the United States Supreme Court in *Phillips Petroleum Co. Vs. Mississippi*<sup>78</sup> to uphold Mississippi's extension of public trust doctrine to areas underlying non-navigable tidal areas. In that case, the Court expanded the public trust doctrine to identify the tide lands not on commercial consideration but on ecological concepts.

The Public Trust Doctrine has also influenced the debates over the management of resources that are considered to be of global significance. The debate about the global commons, common heritage etc, within the United Nations system is nothing other than an affirmation that certain resources are essential for the survival of humanity and should be protected to serve the common interest. This may be validated by the growing consensus among states that such areas like the Antarctica, the High seas or even outer space should be protected against expropriation by individual states. Public Trust Doctrine is, therefore, increasingly gaining acceptability as a legal and planning tool for managing natural resources both within and beyond the jurisdiction of states. In all cases, therefore, the Public Trust Doctrine represents a viable legal tool for

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<sup>76</sup> Paul M. Bray. <http://stella.als.edu/glc/ptd-home.html>

<sup>77</sup> 33 Cal 3d 419

<sup>78</sup> 108 SCt 791(1988)

establishing a system of governance that provides a dynamic and interconnected framework for intergenerational responsibility for the management of natural resources.



## **CHAPTER FOUR**

### **GUIDING PRINCIPLES IN THE DEVELOPMENT OF A LEGAL FRAMEWORK FOR ENVIRONMENTAL MANAGEMENT<sup>79</sup>**

#### **4.0 Introduction**

A framework for environmental legislation should be conceived within certain parameters. These parameters should guide the policy maker and stakeholders in policy development. They should be based, both on the concrete analysis of each particular country's history, and the comparative experiences of other countries. There is no claim that the following parameters are "all-inclusive" or as the final word but, instead, that they are tools which may be employed in assessing a situation at hand.

The following guiding principles, that have been used in the development of national environmental laws, are picked as a semblance for the development of model environmental legislation.

#### **4.1 The Social and Political Setting of Environmental Law**

Environmental law must be seen within the entire political, social, cultural and economic setting of the country. If the goal of environmental law is to achieve sustainable development, as we would all agree, then environmental laws must be geared towards each particular country's development vision. There are no universal models of legislation, which are appropriate to all countries. Each country must, therefore, formulate environmental laws, which reflect its own realities and for prosperity.

The Brundtland Commission report underscored this need for particularity in environmental management, by defining sustainable development as development that meets the needs of the present, without compromising the ability of future generations to meet their own needs.

It, therefore, follows that environmental legislation should be framed in such a manner that it acts as an aid to socio-economic development, rather than a hindrance. The principles, rules, standards and institutions established by legislation should be in harmony with each society's need to achieve better material standards and to defeat poverty (in the context of Africa).

The movement towards environmental legislation should be in harmony with the prevailing government's efforts and need to attract more foreign and local investment and to channel national energies into more productive endeavors in industry and the sustainable exploitation of natural resources.

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<sup>79</sup> John Ntambirweki. Mr. John Ntambirweki is a Senior Lecturer at the Faculty of Law, Makerere University, Kampala and also Director of the Grotius School of Law- Busoga University, Uganda.

## **4.2 Constitutional and Administrative Location of Environmental Law:**

Environmental legislation should also be seen in the context of the constitutional and administrative setting of each country. The definition of individual rights especially those relating to a clean and decent environment, to ownership and management of property play a crucial role in the efficacy of environmental laws. The system of administration that takes care of the enforcement of laws has an important role in the achievement of sustainable development. The laws framed must be made compatible with the entire legal system. A number of African countries have already adopted constitutions, which recognize and promote the right to a decent environment. In Uganda, Namibia and South Africa, for example, this right has been clearly set as an integral part of the Bill of Rights in their Constitutions.

The inclusion of a human right to a decent and healthy environment in the bill of rights has some major implications. Every right has a corollary duty. The right to a decent environment, therefore, imports the duty of each person to protect the environment and must create a complementary capacity, if it is to be meaningful. In this case, the individual should have the capacity to bring an action for breach of the right to a decent and healthy environment and for failure to observe the corollary duty. Such a capacity is general, notwithstanding that specific right in person or properties of the given individual have not been violated. In some countries (for example Uganda), the constitution which includes a right to a decent and healthy environment, provides that the violation of any human right entitles any person to sue for the redress of such violation, even if the violation did not affect the plaintiff personally.<sup>80</sup>

## **4.3 Environmental Law within the wider policy context**

Environmental legislation is not the only tool for environment management. Other factors such as general policy, education and awareness are equally important. A decision-maker must, therefore, be able to determine whether the making of a law relating to a certain subject matter is the best means of achieving given policy objectives. In many cases, it may be more desirable to use tools that are less authoritative than law to achieve given environmental objectives. This is especially favoured where law would interfere with settled human rights and accepted standards of behaviour, or would be difficult to implement, take for example in the area of population growth.

While it is accepted that high population growth rates inevitably lead to environmental degradation, most countries have favored policies that stress family-life education rather than compulsory limits to the number of children each person may have. Likewise, in the sphere of land use in rural areas, most countries have favored a combination of economic incentives and education through extension services to promote the growth of certain crops or economic activities, rather than compulsory zoning laws which would interfere and be incompatible with constitutional rights to property ownership and international conventions prohibiting forced labor. The determination of what is appropriate for legislation and for policy is, therefore, an essential process in the steps leading to development of environmental legislation.

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<sup>80</sup>See Article 50 of the 1995 Constitution.

#### **4.4 Determining the mission of legislation.**

The objectives of legislation have to be determined at the onset. These clear objectives should also be set out in the law itself. Does the legislation seek to promote certain standards of good environmental husbandry or to discontinue certain forms of misconduct? The following are some of the general objectives environmental legislation should seek to achieve:

- to provide a system for obtaining environmental intelligence for use by governments and individuals in making decisions affecting the environment and the exploitation of natural resources;
- to anticipate environmental damage (e.g. through long term planning and environmental impact assessments);
- to prevent environmental damage (e.g. through monitoring and environmental audits);
- to manage the sustainable utilization of the natural resources (through the establishment of viable environmental standards); and
- to control the by-products of utilizing the environment (e.g. pollution).

Where damage has already occurred environmental legislation may also seek to achieve, discontinuation of the harm, compensation to the harmed and restoration of the environment.

#### **4.5 Prospective Approaches to Environmental Management**

Modern environmental legislation concentrates more on the prospective approach (anticipation, management and prevention rather than the retrospective approach (punishment, compensation restoration). The adage that prevention is better than cure is best applicable here. The principal reason behind this approach is that it is more expensive to repair than to prevent damage to the environment.

The importance of pursuing precautionary approaches to the management of the environment has been emphasized by principle 15 of the Rio Declaration. It provides:

*"In order to protect the environment, the precautionary approach shall be widely applied by states to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific. Certainty shall not be used as a reason for postponing cost effective measures to prevent environmental degradation."*

Within national jurisdictions, this principle may be active in planning for environment management at the local, regional and national levels. At the lower levels, planning helps take into account, the particulars of locality and local circumstance. At national level, the larger picture is taken into account. Planning involves periodic exercises, which enable revision to take into account lessons learned, and concretize the gains realized.

#### 4.6 Environmental Impact Assessments (EIA)

This is a study conducted to determine the possible negative and positive impacts a project can have on the environment. It is a study conducted before the commencement of the actual project. By studying the possible impacts, it is possible to avoid the adverse impacts by either redesigning the project or by taking other mitigation measures. It also identifies the positive impacts on the environment and the likely socio-economic benefits. In some cases, it is possible to stop a project all together. It helps industries avoid possible litigation by ensuring that they do not undertake obviously environmentally harmful projects. Since EIA involves the public participation in deciding whether or not a project is desirable, the investor may know before hand, the public perception, which when positive is a good indicator for gainful investment.

#### 4.7 Environmental Audits:

EIA determines whether a project should or should not be undertaken, and therefore, precedes the project. Environmental audit is the tool for ensuring that the project continues to perform in accordance with the set standards. Like the EIA, the environmental audit is also a comprehensive study. It has been defined as-

*"A management tool comprising a systematic, documented, periodic and objective evaluation of how well environmental organization, management, and equipment are performing with the aim of helping to safeguard the environment by:*

- (i) *facilitating control of environmental practices,*
- (ii) *assessing compliance with company policies, including meeting regulatory requirements."*<sup>81</sup>

Originally, the environmental audit was a company tool used by each company to evaluate its own performance. Today, various national legislation in Africa, while acknowledging that a company may carry out its own audit, voluntarily, the scope of the tool has extended to include: activities which may be carried out by public agencies, through inspections to determine;

- (a) in the case of projects where an EIA has been carried out, whether the performance of the project in practice complies and compares with the prediction made at the time of EIA and in relation to set standards and what requires to be done to correct a degrading situation;
- (b) in the case where a project was not subject to EIA, how the project performs in relation to the set standards and what should be done to foster compliance with the laws;
- (c) in both cases set out, (a) and (b) illustrate how the entire system is operating and whether there exists any stress, which may lead to an environmental emergency.

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<sup>81</sup> See UNEP.IEO Environmental Auditing, UNEP, Paris, 1990 of page 1.

#### **4.8 The Institutional Arrangement for Environmental Administration**

Having determined the style of legislation to be adopted, and the objectives to be achieved, it is necessary to put in place the institutional arrangement to achieve those objectives. The size, nature and functions of the institutions depend upon the functions to be carried out and the capacity to afford the institution sought. The typical nature of institutional arrangements in any environmental legislation determines how successful such legislation can be. It is certainly contradictory in logic to seek to achieve sustainable development using an institution, which is inherently not sustainable in the social and economic circumstances. The participation of local people in the management of environmental resources here is a question pertinent to the institutional arrangement that should be addressed. Clear answers are required as to how, at what level and in what context they are required to participate. It should be noted, however, that the requirement for public participation is taken as a given necessity.

#### **4.9 The relevance of sectoral legislation**

While these general principles and tools are appropriate for inclusion in framework legislation on the environment, the place of these principles in the various sectors needs to be given due attention. This place is determined by the relationship between the institutional arrangement for environmental conservation and the sectoral agencies that policy-makers would like to promote. It may not be unnecessary to include these tools and principles in the sectoral laws and agencies where the intention is to concentrate and centralize all functions in the institutional arrangement. On the other hand, the provision for these tools and principles in sectoral legislation and agencies is necessary, where the institutional framework for environment management is conceived as a co-ordination centre for all the sectoral agencies.

#### **4.10 Framework Legislation**

While the framework legislation should not seek to codify existing legal provisions on all sectors affecting the environment, it should nevertheless lay down some basic guiding principles in the conservation of those resources. These principles have a dual purpose; they enhance the co-ordination function of the institutional arrangement established under the law. Secondly, they act as residual general principles which can be applied to ensure the conservation of environmental resources where the sectoral laws are found wanting. Most framework legislation in various countries, therefore, have laid down general principles regarding air quality, water quality, disposal of effluent and solid wastes and conservation of energy resources. The elaborate definition and regulation of these specific sectors, however, should be left to specific sectoral laws. Subsidiary legislation under the framework legislation could also be used to fill in some of the gaps.

It is necessary to lay down the basic principles regarding the various sectors affecting the environment in the framework legislation, it is also essential to include in such an instrument the basic tools of environmental management as general standards to be observed in all cases. These basic tools include the requirement for environmental impact assessments, environmental monitoring and environmental audits for all activities, plants and establishments that may significantly affect the environment. Other principles, which are relevant here, include

compensation for those affected by environmental damage and the restoration of the affected environment. These principles are retrospective in character but are nonetheless important.

#### **4.11 The Environment not being a free good must be paid for:**

Environmental conservation must be paid for. As a basic public good, the environment should at best be taken care of from public funds obtained from the public purse. This situation does not always hold because in developing countries, where meeting of basic budgetary needs out of national revenues is not easily attainable, the idea that conservation needs be met out of the usual public coffers would only be an aspiration rather than a realizable goal. Meeting conservation needs, therefore, requires the creation of novel techniques of raising finances. There are a number of existing devices in various countries employed in the raising of finances, which include:

- (a) charges for services rendered by the institutional organs in charge of the environment;
- (b) pollution charges;
- (c) licenses and permits for various activities;
- (d) fines for infraction of environmental law;
- (e) environmental bonds; and
- (f) funds from external sources including both bilateral and multilateral financial arrangements.

These techniques should be seen across the entire spectrum of the system of environmental law. Each device should be employed in the appropriate sectors and studied closely.

An important factor in the area of financing environmental concerns is the issue of whether the institutional arrangement chosen has access to the funds realized. The ordinary financial arrangements tend to require that all public revenue accrue to the national treasury. In some cases, bureaucratic problems and different government priorities may lead to revenue generating agencies such as those dealing with industry, natural resources and environmental conservation getting none or little of the revenue generated. The creation of environmental funds and other financial mechanisms may be appropriate to ensure that the finances generated by environmental conservation agencies are ploughed back into conservation. The creation of such financial mechanisms, however, must take into account the fact that not all sectors that take care of the public good can raise their own revenue (e.g. police, Defense etc). Appropriate arrangements have to be made, therefore, to ensure sharing of revenues to take care of these other public goods is made.

#### 4.12 Polluter or User Pays Principle

The polluter should repair the damage he has caused either by making actual reparation or paying the necessary monetary compensation to society. Such compensation can be paid either before or after the event. Payments before the event can be in the form of deposit bonds, which are tied to environmental performance, to be forfeited if performance falls below, expected standards. Care must be taken to ensure that the payments are not too high to impose an unnecessary burden to the taxpayer or discourage investment. In some countries, systems for *apriori* payments have also been put in place for pollution or use licenses. Pollution licenses are envisaged to be applicable where activities will or likely to cause pollution or degradation beyond the established standards. A sum equivalent to the likely cost of the repair of the pollution is required to be paid. The expectation is that such money will be applied by the public authorities to redress the effects of the pollution or degradation.

Payments after the event (*or ex post facto*) may be made after the determination by court where set standards have been infringed. These payments should again be commensurate with the harm caused and be capable of redressing such harm through restoration and compensation.

#### 4.13 Novel Approaches for Enforcement<sup>82</sup> of and Compliance<sup>83</sup> to Environmental Laws

The enforcement of and compliance to environmental law, is an important issue, which has to be taken care of by all legislation. The traditional forms of enforcement by means of fines and terms of imprisonment may not be sufficient to ensure compliance. What has been urged and followed in many countries, is the movement away from the command theory of criminal law to the use of economic devices such as incentives and disincentives in the form of taxes and charges for behavior deleterious to the environment on the side of disincentives and tax credits, tax exemptions, rewards for good environmental performance, soft loans and subsidies on the side of incentives. In any case, it is the poor who are usually criminally punished and yet they may not be the major polluters or environment degraders. The rich normally pay their way through criminal punishment.

The primary motive behind this approach is to modify behavior by using economic factors rather than legal Compulsion. Economic factors are preferred because they have within them, an auto-enforcement inner logic. This is preferable to the reliance on law enforcement officials and litigation in courts, which requires tremendous expense, and does not necessarily promote a conservation ethic among the people. This approach is important for industry. Industry must see how to benefit from these benevolent approaches.

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<sup>82</sup> "Enforcement" means the range of procedures and actions employed by a State, its competent authorities and agencies to ensure that organizations or persons, potentially failing to comply with environmental laws or regulations that can be brought or returned into compliance and/or punished through civil, administrative or criminal action.

<sup>83</sup> "Compliance" means the state of conformity with obligations, imposed by a State, its competent authorities and agencies on the regulated community, whether directly or through conditions and requirements in permits, licences and authorizations, in implementing multilateral environmental agreements (UNEP, 2001).

Beyond the traditional form of sanctions (punishment for infraction) and the emerging concern with economic incentives and disincentives, another trend to ensure enforcement may be discerned. Environmental considerations have been key factors in the development of legal requirements for the registration, labeling, control on advertising, and classification of dangerous processes, products and by-products such as hazardous chemicals and waste. To ensure that these requirements are met, the law should go further to require reports on potentially dangerous inputs, products, processes, and by-products and to provide for inspection and analysis of inputs, products and by-products.

These techniques have been particularly used in specific legislation relating to hazardous substances and wastes and they are pertinent to sustainable industrial development. Examples of these approaches are the recent laws enacted in Uganda, Malawi, Zambia, Ghana and Gambia.

#### **4.14 Monitoring**

While EIA and Environmental Audits emphasize specific projects and how to manage their impacts, monitoring looks towards the whole system. It looks at the wider aspects of the effect of systems on the entire ecosystem, which have to be studied in order to safeguard the environment against damage. In this regard, both public organizations and industry must co-operate to ensure successful monitoring.

These measures being predictive instruments, enable to avoid liability caused by damage from activities resulting from interaction with the environment. While these predictive instruments cost money at the onset, they act as an insurance against future risks. In addition, these instruments also help the investor not to invest in unviable ventures but also in operating in an efficient and cost effective manner. In the event that the risk exists, the investor is equipped with foreknowledge and hence the ability to safeguard. The benefits go to all; a better environment- a win-win situation.

#### **4.15 The Style of Legislation**

The subject matter of legislation is of essence to the style of instrument chosen. Where there is need to create clarity in the existing legal norms and to bring them into one comprehensive text, a code is appropriate. Where the aim is to maintain sectoral competencies and yet ensure co-ordination, framework legislation has been found appropriate. A framework type of legislation has been defined as "legislation, which lays down basic legal principles without attempting to codify all relevant statutory provisions".

While codification is appropriate to certain sectoral concerns (for example, water, wildlife and energy), the framework legislation is appropriate as a basic law on the environment with a mission to co-ordinate existing sectoral concerns. Since the mission of the framework legislation is standard-setting and co-ordination, it follows that the sectoral laws have to be strengthened in order to create a strong system of environmental law.



#### **4.16 Implementing International Obligations**

While it is important that legislation should cover important aspects of the regulation of conduct within the municipal sphere, the external dimension cannot be forgotten. In a world characterized by expanding multilateral co-operation and an emerging transnational order, (globalization) external factors become crucial in decision making in the internal or municipal sphere. International standards have quickly become pacesetters for municipal law making in the field of the environment and are assuming the standard criteria for legitimacy in the area of environmental concern.

Principally, legislation should address the transformation and implementation of international obligations into municipal law. While taking into account the sovereignty of state and the local socio-economic vision and conditions.

International obligations are imposed either by operation of customary law, treaties and the general principles of dualist conception of the relationship between national and international laws, especially in most commonwealth countries where international treaties do not become part of municipal law until the legislature passes a law to that effect. Customary international law is considered part of the municipal law. These treaties have to be taken into account by translating them into municipal law. Even where treaties automatically become part of the municipal law, only those treaties, which are self-executing, will create immediate obligations for individuals and corporations. It will be necessary to create and implement those non-self executing obligations in municipal law.

An appropriate legal framework for environment management should take into account, the problems associated with transboundary resources such as shared waters and aquatic biodiversity and the issues of migratory species of wild animals. The standards set for their conservation is of key concern. The translation of transnational concern into municipal environmental policy, is recognition of the unity of the global environment. Law enables transnational environmental risks to be avoided and their consequences mitigated. Transnational efforts create a uniformity of philosophy and operations to sustain the environment, thereby serving as a harmonizing factor, over and above parochial -occupations with sovereignty.

#### **4.15 Application of International Law**

International law sometimes addresses issues of environmental concern, that extend beyond national and regional boundaries. Some sources of international law, as described in Article 38 of the Act of the International Court of Justice, are as follows:

“...international conventions, general or particular, establishing rules expressly recognized by the contesting states; international custom, as evidence of general practice accepted as law; general principles of law recognized by most countries; and judicial decisions and teachings of the most highly respected and visible representatives of individual countries”.

To some of the readers of this Handbook, it is necessary to bring some of the terminologies that are used in international law but also useful in the development of national legislation. The following are therefore selected.

**Soft law** – Statement of principles, guidelines, convention decisions, and other non-enforceable texts play a significant role as persuasive authority. It is usually flexible for individual states, and can serve as a springboard for domestic action and legislation. Soft law measures are frequently non-binding, and thus can be easier to pass initially. Once in practice however, they often serve as a transition from no law to “hard” law, paving the way for the passage of future binding agreements.

**Convention:** Generic term as defined in Art. 38(i)(a) of the statute of the International Court of Justice meaning source of law, apart from international customary rules and general principles of international Law. Specific term used for formal multilateral treaties with a broad number of parties. Normally open for formal multilateral treaties with a broad number of parties. Normally open for participation of the international community as a whole or a broad number of states negotiated under the auspices of an international organization.

**Treaty:** “An international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.”<sup>84</sup>

**Protocol:** Used for agreements, less formal than those labeled “conventions.” Could refer to an Optional Protocol to a treaty that establishes additional rights and obligations; a protocol based on a framework treaty that implements the general objectives of an earlier framework; a protocol to amend former treaties; a protocol as a supplementary treaty that supplements a previous treaty; or a process-verbal that contains a record of understanding between the contracting parties.

**Declaration:** Not always legally binding, a term often chosen to indicate a notion that the parties do not intend to create binding obligations but want to declare aspirations. Can also be binding treaties, so the intention of the declaration must be stated. Can form part of soft law. Declarations can form part of soft law.

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<sup>84</sup> Vienna Convention Article 2.1 (a)

## CHAPTER FIVE

### INTERNATIONAL LEGAL PROTECTION OF THE ENVIRONMENT<sup>85</sup>

#### 5.0 Introduction

The first treaties concerning the protection of the natural environment had already appeared at the turn of the 18th Century. They were primarily concerned with protecting and regulating the commercial hunting of certain species of animals (for example, the 1897 agreement on the protection of seals). It is only in recent decades that there has been a qualitative shift in the international legal regulation of environmental protection and that States have begun to adopt active measures in this field.

The attention being given today to problems of the environment is not surprising. The revolution in science and technology and the rapid development of the productive forces of society have intensified the impact of humankind's economic activities on the natural environment, and have considerably widened the sphere of intervention in natural processes. The intensive utilization of natural resources and the pollution of the planet's biosphere have brought the human race to the brink of a serious ecological crisis. Consequently, the protection of the environment and the rational utilization of natural resources have become urgent global problems of the modern age.

Naturally, these problems cannot be solved by the efforts of individual States alone. National measures to protect the environment must be combined with the wider international cooperation at the global and regional levels. International law is called upon to play a leading role in establishing and developing such cooperation and regulating the measures undertaken by various States to protect the environment.

The international legal protection of the environment is, relatively new but rapidly developing part of modern international law. At the present time, there are a number of international treaties governing various aspects of international protection of the environment and the rational utilization of natural resources. These agreements primarily concern the following, among others –

- (a) the prevention of the pollution of maritime waters, the protection and rational utilization of the sea's living resources;
- (b) the protection of the waters and resources of international (multinational) rivers;
- (c) the protection of the Earth's atmosphere and circum-terrestrial outer space from pollution and other unfavourable influences;
- (d) the protection and rational utilization of terrestrial animals and their ecosystems and plant world on land;

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- (e) the protection of unique natural objects and complexes and of individual ecological systems;
- (f) the protection of the Earth's environment from radioactive contamination.

The international legal protection of the environment emerged and is continuing to expand within the general framework of the progressive development of international law. Thus, the international legal regulation of the environment protection measures undertaken by different States has unquestionably been influenced by the many universal international treaties which either contain important provisions relating to the protection of the environment, or else are directly or indirectly contributing to the improvement of the planetary environment.

The efforts made by States, to limit and fully prohibit nuclear weapons and other weapons of mass destruction and to reduce international tension, are particularly important for the protection of the environment. It is known that the arms race, the testing of nuclear weapons, the development of new types of weapons of mass destruction, neutron bombs, not only absorb enormous material and human resources, but are also one of the basic factors in the degradation of the environment. In addition to international treaties, international custom also plays an important role in the protection of the environment (in particular, the protection of certain major components of the environment, such as international rivers, has developed largely on the basis of customs).

An important role in the development of the international legal protection of the environment is played by resolutions adopted by international organizations, and above all by the United Nations and its specialized agencies. One of the most important measures undertaken by the United Nations was the 1972 Stockholm Conference on the Human Environment, the Rio Conference on Environment and Development of 1992 and the World Conference on Sustainable Development held in 2002 in Johannesburg. These Conferences adopted plans of action containing recommendations to governments and international organizations, and declarations on the Environment that formulated the basic principles of the international protection of the environment and sustainable development.

## **5.1 Principles of International Legal Protection of the Environment**

The basic principles of international law also apply to cooperation among States in the conservation and utilization of the natural environment and its resources. The international legal protection of the environment, however, possesses its own specific principles and, moreover, many of them are still in the process of development. The following are some of the major principles for international legal protection of the environment.

(i) *The Principle of cooperation in protecting the environment.* International law sees the gradual development of the principle according to which States should take measures, either unilateral or joint, to preserve the environment and secure the rational utilization of natural resources for the well-being of the present and future generations. States have the duty to cooperate with one another in environmental conservation and in balanced utilization of natural resources. Such cooperation is effected in accordance with treaties on the basis of equality and

mutual advantage.

(ii) *The principle of inalienable sovereignty over natural resources.* This principle is reflected in a number of resolutions adopted by the United Nations General Assembly, including the resolution entitled "Permanent Sovereignty Over Natural Resources" of December 14, 1962. This principle means that each State has the sovereign right to dispose freely of its own resources in accordance with its policy and obligates other States to respect that right.

(iii) *The principle of not inflicting damage on the environment beyond national state jurisdiction.* This principle, which emerged as a customary norm of international law, has met with virtually universal recognition. It was formulated as follows in the Stockholm Declaration:

“States have, in accordance with the UN Charter and principle of international law, the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.”

This principle also extends to those activities by States which are not prohibited under international law.

The following special principles are beginning to emerge:

- (i) the *principle of ecological evaluation*, according to which States may be obliged to carry out a preliminary evaluation of the ecological consequences of activities that may exert a harmful influence on the environment beyond their national jurisdiction;
- (ii) the *principle of exchanging information*, according to which States whose activities may cause serious damage to the environment and to the interests of other States may be obliged to provide those other States with the relevant information;
- (iii) the *principle of mutual consultations*, according to which the States concerned may be obliged to consult one another with regard to activities that are potentially dangerous for the environment; and
- (iv) the Stockholm Declaration has proclaimed the *principle of a right to a healthy living environment* to be a basic human right. At the same time the individual is under the *obligation to protect and improve the environment* in the name of the well being of the present and future generations.

## **5.2 Objects of International Legal Protection of the Environment**

The Earth's environment constitutes the unified object of the international legal protection of the environment in the most general sense. Above all, this refers to those of its elements on which the existence of the human race depends, and whose condition, in turn, depends on the behaviour

of States. This includes the world's oceans and its natural resources, the atmospheric air and the atmosphere, circum-terrestrial outer space, the animal and plant world, unique natural complexes, and also fresh water resources.

From the point of view of international law, the world's natural resources are divided into two categories, namely, national and international.

*National natural resources* are under the jurisdiction of the State. The norms of internal law play a major role in defining their legal regime. At the same time, the number of international treaties relating to the protection of these resources is growing and has influence on the municipal law governing these resources.

*International natural resources* are located beyond the boundaries of national jurisdiction, or else, in the process of a natural cycle, find themselves on the territory of various States. Depending on this, they are usually divided into *universal*, which are in the general use of all States (the high seas, outer space, Antarctica, the sea bed beyond national jurisdiction) and *multinational*, that is shared resources belonging to two or several States or utilized by them (for example, the water resources of international rivers, the populations of migrating animals, natural complexes located in border areas). The legal regime for protecting and utilizing international natural resources is defined by norms of international law,

### **5.3 International Legal Protection of the Environment of the World Oceans and its Resources**

Intensive shipping, the extraction of mineral resources from the sea-bed, the utilization of the seas as a place for discharging and burying industrial and household waste products have led to the serious pollution of the marine environment in many areas of the world's oceans. States have had to take urgent measures, in order to counteract the damage that is being caused to the marine environment and to prevent such damage in the future. International law serves as an effective instrument for carrying out this task.

Joint actions by states to protect the marine environment are generally carried out at the global level (with the participation of practically all interested states) or the regional level (with the participation of the coastal states in specific seas - the Baltic, Mediterranean, Indian Ocean among others). In such a context, international cooperation is developing primarily along the following lines: the prevention of the pollution of the seas as a result of shipping; a result of the discharge of waste products from ships, and land based resources; and as a result of research into and the exploitation of the resources of the sea-bed and of its subsoil.

Among the numerous international legal acts directed at protecting the marine environment, a central role is played by such international multilateral agreements as the 1954 London Convention for the Prevention of Pollution of the Sea by Oil (as amended in 1962, 1969 and 1971), the 1973 International Convention for the Prevention of Pollution from Ships, and the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matters.

*The London Convention of 1954* (entered into force in 1958) was the first international

agreement to impose on States specific obligations as regards the pollution of the marine environment, The Convention prohibits the discharge of petroleum and petroleum-water mixtures from ships. Initially, special zones were established within which, discharges were prohibited, but subsequently (as a result of the amendments of 1969) such discharges were prohibited, with few exceptions, throughout the territory of the World's Oceans. The Convention also imposes on the signatory states the obligation to take measures to equip ports with facilities enabling them to receive from ships and tankers residual amounts of petroleum and petroleum mixtures.

*The 1973 International Convention for the Prevention of Pollution from Ships*, which was amended by the 1978 Protocol, and entered into force in 1983 is based on the need to prevent all kinds of pollution of the marine environment by any substances, including petroleum, liquid poisonous substances, waste waters and garbage discharged, into the sea from ships. Its term extend to virtually all types of sea-going ships, including hovercraft, submarines and stationary and mobile platforms. Exceptions are made only for warships, and naval auxiliary vessels and also ships that are utilized exclusively in governmental, non-commercial service. According to the Convention, all tankers and other ships employed to carry petroleum or liquid poisonous substances must be subjected to periodical certification and possess international certificates.

The discharge of petroleum or petroleum mixtures is prohibited (with certain exceptions in the case of oil tankers). A similar prohibition extends to the discharge of liquid poisonous substances (in the process of cleansing, de-ballasting tankers) which constitute a danger to marine resources or human health, damage leisure facilities, or impede forms of the legitimate use of the sea. Coastal States are given the right to inspect foreign ships (in port or if there is reason to suspect that the terms of the Convention prohibiting discharges are being violated) and to prosecute those who violate the given Convention. The annexes to the Convention contain unified international standards relating to the prevention of pollution by all types of pollutants associated with maritime transportation.

*The 1972 Convention for the Prevention of Marine Pollution by the Dumping of Wastes and Other Matter* (entered into force in 1975), regulates the deliberate burial in the oceans of practically all known dangerous substances and materials. Under the terms of the Convention, the most dangerous substances may not be buried at all; for the burial of others special permission is needed, while for less dangerous substances general permission is sufficient. A list of such substances and materials is contained in the annexes to the Convention. In particular, a full prohibition extends to the discharge of raw and fuel petroleum, heavy diesel fuel and oil, highly radioactive waste products, mercury and mercury compounds, stable plastics, and also materials produced for biological and chemical warfare.

The implementation of the terms of the Convention provides grounds for hoping that in the future there will be no repetition of such notorious cases as the burial by the United States in the Atlantic Ocean in 1970 of a ship carrying chemical missiles with neuro-paralitical effect, or the burial by a number of West European countries in the Atlantic in 1967 of 34,790 containers with highly radioactive waste.

In particular, accident involving the super-tankers *Torrey Canyon* in 1967 and *Amoco Cadiz* in 1978, resulted in the discharge of enormous quantities of petroleum and the serious pollution of

large coastal areas in Britain and France. In order to prevent a repetition of such events, the *Brussels Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties* was adopted in 1969 (it entered into force in 1975). Under the Convention, the coastal states have the right to adopt the measures necessary to reduce or avoid serious and real threats of coastal pollution by petroleum.

In addition to protecting the waters of the World Ocean against pollution, it is equally important to prevent the depletion of living marine resources and to ensure their rational utilization. This constitutes the basic idea underlying the international legal regulation of sea fishing. The 1958 Geneva Convention on Fishing and Conservation of the Living Resources of the High Seas (came into force in 1966) proclaimed the principle of the freedom to fish in the high seas. At the same time, States were obliged to take measures to preserve the living resources of the high seas, and, to this end, to participate in collective measures. Generally recognized standards of international law are being developed and concretized in numerous multilateral agreements:

The Third United Nations Conference on the Law of the Sea further stimulated the development of international legal protection of the environment and of the resources of the World Ocean. It is important that the United Nations Convention on the Law of the Sea, enshrines many international principles and norms relating to environmental protection.

#### **5.4 International Legal Protection of Multinational Rivers**

In the past, the legal regime of this type of river was associated exclusively with the problem of navigation. At the present time, multinational rivers and other bodies of water are utilized by States basically for the needs of industry and agriculture, as a result of which there has been a substantial demand on the water resources of these rivers, and their pollution and depletion have intensified. A specific feature of the legal regime governing the utilization of resources of such rivers is that they represent an integral natural complex, and at the same time are components of the territories of different States.

All questions relating to the utilization of waters of multinational rivers call for a coordinated approach, cooperation among all interested riparian States. The practice of treaties points precisely in that direction. Norms governing any type of such uses (or some of them) are contained in special international agreements concluded by riparian States, with due consideration for specific factors relating to hydrological, climatic, economic and other condition that are specific for various river basins. These agreements are based on the principle of equal and equitable water utilization.

It provides for each riparian State to have an equitable share in the utilization of international water resources and require it to refrain from damaging other States through pollution of the water, or in any other way. There are numerous international agreements governing particular aspects of the utilization and protection of the waters and living resources of multinational rivers. These may be categorized as follows:

- (a) international agreements on the utilisation of international waters (such as the Convention on the Protection and Use of Transboundary Watercourses and International Lakes, 1996, meant to strengthen national and international actions aimed at the protection and ecologically sound management of transboundary waters;



- (b) special agreements relating to a particular water course or a water system (for example, the Convention Relating to the Development of the Chad Basin 1964 entered into by Cameroon, Chad, Niger and Nigeria, the Convention Creating the Niger Basin Authority and Protocol relating to the development Fund of the Niger Basin, 1980;
- (c) treaties on the regime of state borders, whose terms also cover certain questions of water utilization on border rivers (for example, treaties concerning the Nile waters off 1929 and 1959 between the Nile Basin Countries); and
- (d) agreements concerning fishing in international (multinational) rivers (for example, the Convention for the Establishment of Lake Victoria Fisheries Organisation, 1994 between Uganda, Kenya and Tanzania ).

## 5.5 International Legal Protection of the Earth's Atmosphere

The atmospheric air constitutes an exceptionally mobile element of the environment that does not recognize state borders. Pollutants entering into the atmosphere over the territory of one State are often carried over very large distances and cause damage to the natural environment and the health and well-being of the population of other States. Such, for example, is the origin of acid rains. Sulphur dioxide, which is discharged into the air over major industrial regions of Western Europe, precipitates together with rain in the form of a solution of sulphuric acid over the territory of Scandinavian countries. "Acid rains" cause great damage to the natural environment and to man, pollute water bodies, cause a deterioration in the soil, and contribute to the erosion of architectural monuments.

The All-European Conference on Cooperation in the Protection of the Environment, 1979, resulted in the adoption of the *Convention on Long-Range Trans-boundary Air Pollution*, which entered into force in 1983. Countries who are parties to the Convention agreed to limit air pollution as much as possible, to exchange information, to hold consultations, undertake scientific research and monitor air quality.

Uncontrolled artificial influences on the environment and the climate, which have become possible as a result of recent scientific and technical achievements, constitute a serious danger for the Earth's atmosphere. In particular, it is already possible to cause or prevent precipitation (rain or hail). Experiments are being carried out to change the force and direction of hurricanes and typhoons. The ability to influence the weather and the climate may bring to the human race both vast advantages and enormous harm. In the future there may appear truly "apocalyptic" measures for waging war, including the destruction of the ozone layer, which protects life on Earth against the deadly action of ultra-violet radiation from the sun, and the creation of artificial floods and droughts over large areas.

The awareness of this serious danger led to the adoption in 1977 of the *Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques* (it came into force in 1978). States that are parties to the Convention undertook not to use means of influencing the natural environment which have wide-ranging, long-lasting or serious

consequences in order to destroy, damage or cause harm to another member-state. By means of influencing the natural environment is meant any method of changing through the deliberate regulation of natural processes the dynamics, the composition or the structure of the Earth including its biota, lithosphere, hydrosphere, atmosphere, or outer space. At the same time the Convention does not prohibit the use of means of influencing the environment for peaceful purposes.

*The United Nations Framework Convention on Climate Change* has the objective of stabilizing concentrations of greenhouse gases in the atmosphere at a level that does not affect food production, allow adapting naturally to climate change and enables economic development to proceed sustainably.

## **5.6 International Legal Protection of Circum-Terrestrial Space**

The intensive exploration of outer space, the moon and other celestial bodies has led to a situation in which it has become necessary to protect the environment of outer space from the harmful consequences of such activities. In the nearest part of outer space, the number of used satellite components; parts of rockets and other space garbage, are continually increasing, and at the present time exceed 10,000 objects. The pollution of the space environment may be the result of the experiments such as the American "West-Ford" project to put in a near-Earth orbit a belt of copper needles (dipoles) for research in the field of long distance communication. The space environment may be subjected to radioactive contamination in the course of nuclear weapon tests, or the use of cosmic devices equipped with nuclear sources of energy. Nor can one exclude the danger of the biological contamination of the, Earth's environment through the return of space objects to the Earth, and also as a result of the delivery of substances and materials of an extra-terrestrial origin from outer space.

A reliable safeguard against the radioactive contamination of outer space and of its transformation into a nuclear proving ground has been provided by the *Moscow Treaty of 1963*, which prohibited the testing of nuclear weapons in outer space. The *1967 Space Treaty* and the *1979 Agreement Governing the Activities of States on the Moon and other Celestial Bodies* contain important terms relating to the protection of the environment. In particular, under Article 1 of the 1967 Treaty, and Article VI of the Agreement on the Moon, 1979. States are obliged to avoid the harmful pollution of outer space, the moon and other celestial bodies, and also adverse changes in the Earth's environment resulting from the delivery of extra-terrestrial substances, and, to this end, to undertake appropriate measures. The prohibition on launching into near Earth orbits or deploying on the moon and other celestial bodies nuclear weapons, as provided for by the Space Treaty and the Agreement on the Moon, is also of considerable importance in avoiding the pollution and contamination of outer space.

## **5.7 International Legal Protection of the Animal and Plant World**

The increasing scale of human interference in natural processes is leading to a deterioration of the environment, the disappearance of many species of fauna and flora, a reduction in the population of wild animals, and the destruction of their habitats. Already, several hundreds of

species of birds, fish, mammals and plants have vanished forever from the Earth. Today, animals threatened with extinction include such rare animals as the blue whale, the Asian rhinoceros, and the mountain gorilla. It is not surprising that a number of agreements adopted in the early 20<sup>th</sup> Century and concerned with protecting representatives of the animal world marked, in effect, the beginning of the international legal protection of the environment.

The agreements that exist in this field relate primarily to questions of protecting:

- migratory birds and animals (the 1950 International Convention for the Protection of Birds)
- individual animal species (the 1978 Agreement on the Conservation of Polar Bears) ;
- habitats of migrating animals (the 1972 Convention of Wetlands of International Importance Especially as Waterfowl Habitat)

Convention on Biological Diversity (CBD) meant to conserve biological diversity and promote their sustainable use including animals and plants

The protection of those species of wild animals that, in the course of their natural cycle, constantly cross the borders of States, is covered by the *1979 Convention on the Conservation of Migratory Species of Wild Animals* signed in Bonn. This Convention establishes general norms for the behaviour of States in relation to wild animals migrating through their territories. Annexes to the Convention contain lists of migrating species that are threatened by extinction, and also of those species that will be the object of special agreements by interested States.

The *1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora*, (came into force in 1975), imposes limitations on and introduces control over international trade in animals and plants threatened by extinction through a system of import and export licenses. The aim of the Convention is to avoid the excessive exploitation of vanishing species of fauna and flora.

The *1972 Convention Concerning the Protection of the World Cultural and Natural Heritage*, is designed, in particular, to create an effective system insuring the collective protection of natural rarities (unique natural complexes, the habitats of vanishing animals and plants, etc.).

## **5.8 The Protection of the Environment from Radioactive Contamination**

The threat to living nature and especially to man posed by the radioactive contamination of the environment resulting from the utilization of nuclear energy both for military and peaceful purposes is widely known and appreciated.

Nuclear radiation threatens the very foundations of human existence. External irradiation and the penetration of radioactive substances into the human organism produce irreversible changes, genetic illnesses. The adoption in 1963 of the Moscow Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and under Water, has contributed to a significant reduction in environmental radioactivity. The overwhelming majority of the countries of the world are signatories to the Moscow Treaty.

The conclusion in 1959 of the Treaty on the Antarctic has prevented the transformation of the little-known and ecologically vulnerable region into a site used to carry out nuclear tests and discharge radioactive waste and material. The 1968 Treaty on the Non-Proliferation of Nuclear Weapons and the 1971 Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and Ocean Floor and in the Subsoil thereof have made a substantial contribution to the protection of the environment.

The utilization of nuclear energy for peaceful purposes, and above all for the production of electric power, has a high level of reliability and safety. For the time being, however, it is not possible to fully exclude the possibility of a repetition of cases such as the accidents at the American nuclear power station on *Three Mile Island* and at the Soviet nuclear power station in *Chernobyl*, where, as a result of defects in the equipment, there occurred dangerous leakages of radioactive materials.

States are now revealing a manifest wish to resolve these questions through international agreements and other collective arrangements. The 1972 Convention for the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, for example, totally prohibits the dumping in the sea of radioactive waste and provides for rigorous control. The 1960 and 1974 Conventions for the Safety of Life at Sea regulate the transport of radioactive materials by sea. Several international agreements deal with liability for damage caused by a nuclear incident: the *1960 Paris Convention Concerning Liability for Damage to a Third Party in the Field of Nuclear Energy*, the 1963 Vienna Convention on Civil Liability for Nuclear Damage, the 1971 Convention Relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material, are among such international agreements.

## **5.9 Activities of International Organizations in the Protection of the Environment**

There exist a large number of international (inter-governmental and non-governmental) organizations that are concerned with the most diverse aspects of the problem of environmental protection.

The United Nations plays a leading role in coordinating environmental conservation activities of States and international organizations, and devotes considerable attention to questions relating to the protection of the environment. The organs of the United Nations that are directly relevant in protection of the environment are: the General Assembly, the Economic and Social Council, and also its regional Economic Commissions, as well as United Nations Conference on Trade and Development (UNCTAD), the United Nations Industrial Development Organisation (UNIDO), and the United Nations Development Programme (UNDP), the United Nations Food and Agricultural Organisation (FAO), United Nations Education, Scientific and Cultural Organisation (UNESCO) and above all the United Nations Environment Programme (UNEP). In accordance with its decisions and the General Assembly Resolution, a special body, namely, the *United Nations Environment Programme*, was established. UNEP enjoys very substantial autonomy and possesses a number of the attributes of an international organization.

UNEP pays considerable attention to the development of international law concerning environmental protection. The Programme promotes the development of universal and regional

conventions and agreements. On its initiative, a programme is being implemented to protect the marine environment of regional seas - the Mediterranean, the Red Sea, and also the Persian Gulf, including the formulation of corresponding international agreements. The UNEP mobilises financial support for and coordinates with other environmental related programmes of the specialized United Nations agencies, such as UNESCO, WHO, FAO, IMO, ILO, WMO, ICAO and the International Atomic Energy Agency. Within the limits of their competence they all engage in various aspects of environmental protection.

Among non-governmental organizations, a central role is played by the *International Union for the Conservation of Nature and Natural Resources* (IUCN), established in 1948, whose members are States, national and international organizations and associations. The Union was created in order to promote cooperation among governments, national and international organizations, and also among individual persons involved in matters relating to the protection of the environment and the preservation of natural resources. With that objective, the IUCN organizes national and international measures, disseminates the latest scientific and technical achievements in this field, and expands education and awareness campaigns on nature conservation.

## CHAPTER SIX

### CONSTITUTIONAL ENVIRONMENTAL LAW: GIVING FORCE TO FUNDAMENTAL PRINCIPLES IN AFRICA<sup>86</sup>

*“The Constitution is above everything. It is the fundamental law which guarantees individual and collective rights and liberties, protects the principle of people’s free choice and confers legitimacy to the exercise of powers. It allows the assurance of legal protection and control of the actions of the public authorities in a society wherein prevails the law and man’s progress in all its dimensions.....”* -Preamble, Constitution of Algeria (1996)

#### 6.0 Introduction

Although most African nations have constitutional environmental provisions, there is a marked dearth of cases interpreting and applying them. This may be due to the novelty of the subject matter of these provisions, a lack of public interest environmental litigation, a lack of judicial familiarity with public interest litigation, and the failure of governments to set up the machinery to implement their constitutional duties. To illustrate possible ways to give force to these constitutional protections, this chapter surveys various ways that judiciaries around the world have interpreted and applied the right to a healthy environment and the duty to protect it.

In addition to providing the legal basis for cases enforcing environmental protection, constitutional provisions can expressly enable legislatures to enact environmental laws to implement the protection (e.g., Central African Republic Constitution, art.58.1). In Mozambique, for example, the government relied on its constitutional environmental provision to provide the authority for a new framework environmental law. In *Laguna Lake Development Authority vs. Court of Appeals*, the Philippines Supreme Court upheld the authority of a government agency attached to the Department of Environment to issue cease and desist orders against a city that was illegally dumping garbage.<sup>87</sup> In dismissing the challenge to the authority’s police and regulatory powers to regulate the dumping, the court relied on the constitutional right to a “balanced and healthful environment” and the right to health to uphold the authority’s charter and mandatory laws.

#### 6.1 Right to a Healthy Environment

In *Minister of Health and Welfare Vs. Woodcarb (Pty) Ltd.*, a South African court upheld the standing of the Minister of Health and Welfare to seek an order requiring a saw mill to cease emission of noxious gases. In granting standing, the court recognised the Minister’s administrative responsibilities, as well as the right to seek redress for actions that infringed

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<sup>86</sup> \* Carl Bruch is a Staff Attorney and Director of the Africa Programme at Environmental Law Institute (ELI), Washington USA., Wole Coker is a visiting scholar at ELI, Chris Van Arsdale is an Attorney with Greenberg Traurig, USA. This chapter also relies in part on a research conducted by Anne Angwenyi, Hank Kessler, Maggie Kolb and Christine Nanyonjo, visiting scholars at ELI. This chapter is a Copyright of the Environmental Law Institute, 2000.

<sup>87</sup> *Laguna Lake Development Authority v. Court of Appeals*, G.R. No. 110120 (Supreme Court of the Philippines, 3<sup>rd</sup> Div., Mar., 16, 1994).

citizens' right to "an environment which is not detrimental to health and well-being" under the interim South African Constitution. The court held that the defendant's unlicensed emission illegally interfered with the neighbours' constitutional right to a healthy environment.

Of the many countries that have interpreted constitutional environmental provisions, India has the most experience.<sup>88</sup> The environmental provisions of the Indian Constitution- Article 48A (protection of the environment) and 51A (fundamental duties)-are both principles of state policy. Though the application of these principles have been interwoven with the separate right to life provision, the scope of these environmental rights and duties have been interpreted and applied in different circumstances. One application of this right, illustrated by *L.K. Koolwal Vs. Rajasthan*, is that the constitutional rights to health, sanitation and environmental preservation could be violated by poor sanitation resulting in a "slow poisoning" of the residents, without any more specific allegations of the injury.<sup>89</sup> Furthermore, in *Rural Litigation and Entitlement Kendra Vs. Uttar Pradesh*, the right to a "healthy environment" was invoked even though no direct link with human health had been demonstrated in the case at hand.<sup>90</sup> The petitioner alleged that unauthorised mining in the Dehra Dun area adversely affected the ecology and resulted in environmental damage. Without establishing harm to human health, the Supreme Court upheld the right to live in a healthy environment and issued an order to cease mining operations, notwithstanding the significant investments of the money and time by the mining company. According to this thread of interpretation, protection of this right arises when ongoing behaviour is damaging or is likely to damage the environment, regardless of the effect on human health.

A third view in India views the right as an entitlement to "ecological balance." Issuing the Order in *Rural Litigation and Entitlement Kendra*, the Supreme Court stated:

"The consequence of this Order made by us would be that the lessees of time stone quarries which have been directed to be closed down permanently under this Order... would be thrown out of business in which they have invested large sums of money and expended considerable time and effort. This would undoubtedly cause hardship to them, but it is a price that has to be paid for protecting and safeguarding the right of the people to live in healthy environment with minimal disturbance of ecological balance."<sup>91</sup>

Courts in other countries also have applied the constitutional right to a healthy environment. In a watershed decision delivered in Eurogold case, Turkey's High Court ruled that Eurogold's mine violated the provisions of Articles 17 and 56 of Turkey's amended constitution, which protect the fundamental rights to life and a "healthy, intact environment."<sup>92</sup>

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<sup>88</sup> See generally Martin Lau, *The Scope and the Limits of Environmental Law in India*, 4 REV.EUR. COMMUNITY & INT'L L.15(1995)

<sup>89</sup> *L.K. Koolwal v. Rajasthan*, 1988 A.I.R.(Raj) 2 (High Court of Rajasthan), 1988).

<sup>90</sup> *Rural Litigation and Entitlement Kendra v. Uttar Pradesh*, 1985 A.I.R. (S.C) 652, 656 (1985); 1988 A>I.R. (S.C.) 2187 (1988).

<sup>91</sup> *Rural Litigation and Entitlement Kendra v. Uttar Pradesh*, 1985 A.I.R. (S.C.) 652, 656(1985); 1988 A.I.R.(S.C.) 2187 (1988).

<sup>92</sup> The Eurogold decision was delivered in Ankara on May 22,1997.see <http://www.sierraclub.org/sierra/199711/humanrights.html> (visited Nov.1, 1999).

Similarly, a number of civil law countries in Latin America also have given life to their constitutional right to “a healthy environment.”<sup>93</sup> In the Ecuadorian case of *Fundacion Natura Vs. Petro Ecuador*, the constitutional court upheld a civil verdict that the defendant’s trade in leaded fuel violated a ban on leaded fuel placed by Congress, and thus violated the plaintiff’s constitutionally guaranteed right to a healthy environment.<sup>94</sup> Similarly, in *Arco Iris Vs. Instituto Ecuatoriano de Minería*, Ecuador’s constitutional court held that “environmental degradation in Podocarpus National Park is a threat to the environmental human right of the inhabitants of the provinces of Loja and Zamora Chincipe to have an area which ensures the natural continuous provision of water, air, humidity, oxygenation and recreation.”<sup>95</sup>

In the Trillium case, Chile’s Supreme Court voided a timber licence where the government approved an environmental impact assessment without sufficient evidence to support the conclusion that the project was environmentally viable without incorporating the conditions proposed by different specialised agencies.<sup>96</sup> The court held that by acting in such an arbitrary and illegal way, the government violated the rights of all Chileans- and not just those who would be affected locally- to live in an environment free of contamination.

In *Fundacion Fauna Marina Vs. Ministerio de la Produccion de la Provincia de la Buenos Aires*, an Argentine court voided a permit to capture a number of dolphins and killer whales, stating that it was first necessary to conduct an environmental impact assessment.<sup>97</sup>

The judge relied on Article 41 of Argentina’s national constitution (recognising the right to a clean environment and establishing a correlative duty to protect the environment), and Article 28 of the Buenos Aires provincial constitution, which requires authorities to control the environmental impacts of any activity that could damage the environment. The court held that the way to ensure the general constitutional environmental rights and duties found in these constitutions was by imposing an obligation to execute an environmental impact assessment before issuing a permit. And in Peru, the citizens’ constitutional right to a healthy environment was in issue when a barge was dumping petroleum residues into a lake that served as a source of drinking water, causing severe environmental damage and rendering the water unpalatable. Finding for the plaintiffs, the judge ordered the barge owner to halt the pollution by using a filter

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<sup>93</sup> See Adriana F. Aguilar, *Enforcing the Right to a Healthy Environment in Latin America*, 3 REV. EUR. COMMUNITY & INT’L L. 215 (1994).

<sup>94</sup> Provincia de Buenos Aires, case No. 221-98-RA (constitutional court, 1998), upholding *Fundacion Natura v. Petro Ecuador*, case No. 1314 (11<sup>th</sup> civil court, Pichincha, Apr. 15, 1998). *Fundacion Natura v. Petro Ecuador de la*

<sup>95</sup> *Arco Iris v. Instituto Ecuatoriano de minería*, case No. 224/90, Judgement No. 054-93-CP (Constitutional Court of Ecuador).

<sup>96</sup> “Judicial Power,” Supreme Court Decision No. 2.732-96 (Supreme Court of Chile, March 19, 1997), unofficial English translation available at <http://www.elaw.org/cases/Chile/trilliumenglish.htm> (the case is popularly referred to as “Trillium,” the defendant logging company).

<sup>97</sup> *Fundacion Fauna Marina v. Ministerio de la Produccion de la Provincia de la Buenos Aires* (Federal Court No. 11, Ma del Plata, Civil and Commercial Secretariat, May 8, 1996).



or other technology, or else to leave the lake. The judge also ordered the government to conduct an environmental impact assessment of the effects on the lake.<sup>98</sup>

In *Pedro Flores Vs. Corporacion del Cobre, Codelco, Division Salvador*, the Supreme Court of Chile applied Articles 19(right to live in an unpolluted environment) and 20(legal action to enforce art.19) of Chile's constitution to enjoin a mining company from further depositing Copper tailing wastes onto Chilean beaches, a practice that had destroyed all traces of marine life in the area.<sup>99</sup> In *Proterra Vs. Ferroaleaciones San Ramon S.A.*, the Peruvian Supreme Court held that the constitutional right to a healthy environment belongs to the whole community, and allowed an *accion de amparo* to protect the citizens' constitutional rights even though the plaintiffs had suffered no direct damages themselves.<sup>100</sup>

### 6.1.1 Cases Interpreting the Right to Life

#### (a) Tanzania

Tanzania is among the first African nation in which courts have addressed the scope of constitutional right –to – life provisions in the context of environmental protection. Article 14 of Tanzania's constitution provides that:

*“Every one has the right to exist and to receive from the society protection for his life, in accordance with the law”. In Joseph D. Kessy Vs. Dar es Salaam City Council and Festo Balegele Vs. Dar es Salaam City Council, the High Court of Tanzania at Dar-es-Salaam interpreted Article 14 expansively.<sup>101</sup>*

In *Kessy*, citizens of Tabata, a suburb of Dar-es-Salaam, brought a suit against the city Council of Dar-es-Salaam, seeking to enjoin the city from operating a garbage dump that created severe air pollution in the nearby neighbourhood.

The foul smell and air pollution had caused respiratory problems in area residents, particularly in children, pregnant women, and the elderly. The citizens won a Judgment in 1988 in which the court ordered the City Council to cease using the Tabata area for dumping garbage and to construct a dumping ground where it would pose no threat to the health of nearby residents. The City Council subsequently sought several extensions to comply with the court's order, effectively extending the time for compliance until August 1991. In this action, the City Council sought another extension of time to comply with the 1988 order. The court noted that the air pollution created by the garbage dump endangered the health and lives of nearby residents, and

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<sup>98</sup> See judge Orders Barge to stop Polluting, E-LAW UPDATE (Spring, 1995), available at [http://www.igc.apc.org/elaw/update\\_spring\\_1995.html](http://www.igc.apc.org/elaw/update_spring_1995.html) (visited Nov. 1, 1999).

<sup>99</sup> Pedro Flores v. Corporacion del Cobre, Codelco, Division Salvador, ROL. 12.753. FS. 641(Supreme Court of Chile, 1988).

<sup>100</sup> Proterra v. Ferroaleaciones San Ramon S.A., Judgement No. 1156-90 (Supreme Court of Peru, Nov. 19,1992).

<sup>101</sup> Joseph D. Kessy v. Dar es Salaam City Council , Civil Case No. 29 of (High Court of Tanzania of Dar es Salaam, Sept. 9 1991); Festo Balegele v. Dar es Salaam City Council, Misc. Civil Case No. 90 ( High Court of Tanzania Dar es Salaam, 1991). The cases are quite similar, with Kessy, brought by the residents of Tabata and Balegele brought by the residents of Kunduchi, two suburbs of Dar es Salaam who were suing the city to cease illegal dumping in the regions.

consequently that the operation dump violated Article 14. Thus, the High Court denied the City Council's petition for an extension.

**(b) India**

Outside of Africa, India has generated by far, the largest body of jurisprudence regarding the environment aspects of the constitutional right-to-life. India's Constitution contains provisions protecting both human health (art.47) and the natural environment ( art. 48 and 51), in addition to extending a fundamental right to life (art. 21). Notwithstanding these other provisions relating to health and environment, India's Article 21 is often invoked to personal environmental resources. Article 21 states: "No person shall be deprived of his life or personal liberty except according to procedural issues establish by law." Procedurally, most of the Article 21 cases protecting the environment are brought in the Supreme Court pursuant to Article 32, which grants citizens standing to sue directly in the Indian Supreme Court for violations of constitutional rights.<sup>102</sup>

Indian courts have interpreted the scope of the constitutional right to life expansively to forbid all actions of both state and citizen that disturb "the environmental balance."<sup>103</sup> The courts have found violations of the right to life in a variety of factual contexts. In ***T. Damodhar Rao Vs. Municipal Corp. Hyderabad***, for example, the court found that a city's failure to protect an area designated as "recreational" space from residential development violated the right to life.<sup>104</sup> The court held that the Hyderabad development plan prohibited respondents from using the land for any other purpose except recreational uses. As an addition, the independent ground for the holdings, the court held that the attempt of the Life Insurance Corporation of India and the Income Tax Department to build houses in the designated recreational area was contrary to the Indian Constitution's Article 21 right to life. The court stated that Article 21:

Embraces the protection and preservation of nature's gifts without which life cannot be enjoyed. There can be no reason why practice of violent extinguishment of life alone should be regarded as violative of Art.21 of the Constitution. The slow poisoning by the polluted atmosphere caused by environmental pollution and spoilation should also be regarded as amounting to violation of Art. 21 of the Constitution..... It therefore becomes the legitimate duty of the courts as enforcing organs of constitutional objectives to forbid all action of the state and the citizen from upsetting the environmental balance. In this case, the very purpose of preparing and publishing the developmental plan is to maintain such an environmental balance.

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<sup>102</sup> Barriers to standing in public interest cases are generally few in Indian courts. Under Article 32 of the Indian constitution a petition to vindicate a constitutional right "is maintainable at the instance of affected persons or even by a group of social workers or journalists." See Subhash Kumar v. State of Bihar, 1991 A.I.R.(S.C) 420 (1988). Thus, a petitioner need not even be directly affected, but may sue on behalf of the community. Public interest litigation cannot be invoked by a person or body of persons to satisfy his or its personal grudge or enmity." Id. Indian courts are also competent to initiate, sua sponte, a proceeding to vindicate citizens rights. In M.C. Mehta v. Kamal Nath(1997) for example, the Supreme Court itself initiated a proceeding against developers who sought to build in an ecologically sensitive area.

<sup>103</sup> T. Damodhar Rao v. Municipal Corp of Hyderabad, 11987 A.I.R.(A.P) 171 (Andhar Pradesh High Court, 1987).

<sup>104</sup> Id.

In *Vellore Citizens Welfare Reform Vs. Union of India*, the Indian Supreme Court found that tanneries in the state of Tamil Nadu had violated citizens' right to life by discharging untreated effluents into agricultural land, making it unfit for cultivation and had severely polluted the local drinking water. In granting the petitioners' requested relief, the Court invoked the "Precautionary Principle, "the Polluter –Pays Principle," and Sustainable Development as components of Article 21 environmental protections.

The court defined the Precautionary Principle to mean that:

- (1) the state must anticipate, prevent, and attack the causes of environmental degradation;
- (2) lack of scientific certainty should not be used as a reason for postponing measures to prevent pollution;
- (3) the onus of proof is on the polluter to show that his or her actions are environmentally benign.

The polluter pays principle was defined to mean that:

Polluting industries are "absolutely liable to compensate for the harm caused by them to villagers in the affected area, to the soil and to the underground water..... , liability for harm.... Extends not only to compensate victims of pollution but also the cost of restoring the environmental degradation.

Applying these principles to the facts of the case, the court ordered more than 900 tanneries operating in Tamil Nadu to "compensate the affected persons and also pay the cost of restoring the damaged ecology."

In *Indian Council for Enviro-Legal Action Vs. Union of India*, the Supreme Court found that the national government's failure to control an industry's release of toxic chemicals violated citizens' right to life.<sup>105</sup> The plaintiff-petitioner brought this action to stop and remedy pollution caused by several chemical industrial plants in the village of Bichri in Rajasthan. The defendant-respondents operated chemical plants producing highly toxic chemicals, such as sulfuric acid, without permits and discharged pollutants into aquifers and into the soil. The defendants had failed to obey several previous court orders directing them to control the discharge of toxic materials. Using the constitutional right to life, the court ordered the appropriate governmental regulatory agency to impose controls on the industry, carry out remedial measures, and charge the industry for the cost of clean up.

### ***(c) Pakistan, Bangladesh, and Nepal***

In the case *In re: Human Rights Case (Environmental Pollution in Balochistan)*, the Pakistani Supreme Court itself initiated a proceeding against industries seeking to dump radioactive waste

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<sup>105</sup> Indian Council for Welfare Reform v. Union of India, 3 S.C.C. 212 (1996). Other Indian right –to –life cases implicating environmental protection include: Francis Corralie v. Union Territory of Delhi, 1981 A.I.R (S.C) 746 (1981); Bandhua Mukti Moreha v. Union of India, 1984 A.I.R (S.C) 802 (1984); Olga Tellis v. Bombay Municipal Corp., 1986 A.I.R. (S.C.)1782 (1988); Virendra Gaur v. State of Haryana, 1995 A.I.R. (S.C.) 577 (1995); F.B. Taraporawala v. Bayer India Ltd., 6 S.C.C. 58 (1996); Chetriya Pardushan Mukdi Sangharsh Samiti v. State of Uttar Pradesh, 1996 A.I.R. (S.C.) 2060 (1996).

in a coastal area.<sup>106</sup> The court found that the dumping could “create environmental hazards and pollution” in violation of the constitutional right to life. The court ordered the Chief Secretary of Balochistan to investigate the matter and report to the court. After receiving a report detailing the identity of entities to which land allotments were made in the coastal area in question, the court ordered that with respect to any allotment of land, the full identity of the applicant and other information shall be supplied to the court, and any lease or allotment contract must specify that the land may not be used for dumping waste.

In this case, the Pakistani Supreme Court found that the constitutional right to life is broad enough to include “protection from being exposed to the hazards of electromagnetic field or any other such hazards which may be due to installation and construction of any grid station, any factory, power station or such like installations.”<sup>101</sup> *Shehla Zia v. WAPDA*, Human Rights Case No. 15-K of 1992 P.L.D. 1994 SUPREME COURT 693 (1992).

The petitioners, - citizens opposing the construction of a power grid station near the residential area in which they lived (in Islamabad), wrote a letter to the Supreme Court seeking to enjoin construction of the grid station on grounds that it violated the constitutional right to life. The citizens argued that the presence of high voltage transmission lines would pose a serious health hazard to the residents of the area.

While noting that the right to life could encompass protection from the hazards of electromagnetic fields, it did not enjoin construction of the power grid station. Rather, the court ordered further investigation into whether the potential harms of the project could be mitigated. The court found that the United Nations Rio Declaration on Environment and Development, though not ratified by Pakistan, has persuasive value, noting that “if there are threats of serious damage, effective measures should be taken to control it and it should not be postponed merely on the ground that scientific research and studies are uncertain and not conclusive.” The court further noted, however, that “a method should be devised to strike balance between economic progress and prosperity and to minimize possible hazards. In fact, a policy of sustainable development should be adopted.” The court ordered that the commissions study the construction plan and report whether the grid station has “any likelihood of any hazard or adverse effect on the health of the residents,” and whether there are ways to minimize any potential harm. The court also ordered that the government authority responsible for constructing the grid stations or power lines and afford an opportunity for public to comment or make objections.

In *Mohiuddin Farooque Vs. Bangladesh*, the court found that the right to life includes a right to be free from “man-made hazards of life,” including contaminated food. The petitioner, the Secretary- General of the Bangladesh Environmental Lawyers Association, filed suit seeking to halt the importation of certain imported milk powder that was found to contain radiation levels above the acceptable limit. The petitioner argued that the failure of government officials to send back the powdered milk powder in question was injurious to human health and violated the fundamental right to life. The court found that citizens have a natural right to the enjoyment of a healthy life and longevity up to normal expectation of life of an ordinary human being. Enjoyment of a healthy life and normal expectation of longevity is threatened by disease, natural

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<sup>106</sup> In re: Human Rights Case (Environmental Pollution in Balochistan), Human Rights Case No. 31-K/92(Q), P.L.D. 1994 Supreme Court 102(1992); see also Martin Lau, Case study: Public Interest Litigation in Pakistan, 3 REV.

calamities and human actions..... Natural right of man to live free from all the man-made hazards of life has been guaranteed under constitutional right- to-life provisions. We are, therefore, of the view that right to life not only means protection of life and limbs necessary for full enjoyment of life but also includes, amongst others, protection of health and normal longevity or an ordinary human being.

Because the contaminated food “is a potential danger to the health of the people ultimately affecting their life and longevity,” the court ordered the respondent government agencies to develop better testing and sampling techniques to prevent the importation of contaminated food.

In *LEADERS, Inc. Vs. Godawari Marble Industries*, Nepal’s Supreme Court held that a marble mining operation contaminating the water supplies and the soil violated nearby residents’ constitutional right to life.<sup>107</sup> The petitioners alleged that Godawari Marble Industries had caused serious environmental degradation to the Godawari forest and to its surroundings. The Industries’ activities also had contaminated nearby water bodies, soil and air to the detriment of local inhabitants, members of petitioner’s organisation, and labourers in the mining industry. The court noted that “life is threatened in a polluted environment.” The court reasoned that “since a clean and healthy environment is an indispensable part of human life, the right to a clean and healthy environment is undoubtedly embedded within the Right to life.” The court ordered the government ministries to “enact necessary legislation for protection of air, water, sound and environment and to take action for protection of the environment of the Godawari area.”

#### ***(d) Colombia, Ecuador and Costa Rica***

The civil law jurisdictions of Colombia, Ecuador and Costa Rica all have applied a constitutional right to life in the context of environmental protection. In many cases, Latin American litigants use an “amparo,” which is a form of legal action or proceeding the purpose of the writ of habeas corpus.

Colombian courts have applied their constitutional right to life<sup>108</sup> in a variety of factual contexts, expansively interpreting it and holding that environmental protection must be understood as an extension of the rights of physical security. In *Victor Ramon Castrillon Vega Vs. Federacion Nacional de Algoderos y Corporation Autonoma regional del Cesar (COPROCESAR)*, the Supreme Court of Colombia found an industry ‘s release of toxic fumes from an open pit endangered the health and life of nearby residents and therefore violated their constitutional right to health and life.<sup>109</sup> The court ordered the respondent industry to remove the waste and safely dispose of it, to pay for the costs of safely moving and disposing of the waste, and to pay past and future medical expenses of those who fell ill as a result of the illegal waste.

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<sup>107</sup> *LEADERS, Inc., v. Godawari Marble Industries* (Supreme Court Nepal, Oct., 31, 1995).

<sup>108</sup> Article 11 of the Colombian Constitution states: “The right to life cannot be denied.”

<sup>109</sup> *Victor Ramon Castrillon Vega v. Federacion Nacional de Algodoneros y Corporacion Autonoma Regional del Cesar (COPROCESAR)*, Case No. 4577 (Supreme Court, Chamber of Civil and Agrarian Cassation, Nov. 19, 1997).

In the Ecuadorian case, *Fundacion Natura Vs. Petro Ecuador*, an Ecuadorian environmental law NGO brought suit against a corporation for illegally cutting trees on indigenous lands and against the government agency for its failure to take care of the lands and protect the indigenous community.<sup>110</sup> The court ordered the agency to assess the damage and to compensate the community, and held that the community could sue the corporation once the assessment was completed. The court also passed a general prohibition making “illegal”, any activity that diminishes or harms the area that was the subject of this litigation.

In the Costa Rican case *Carlos Roberto Mejia Chacon Vs. Municipalidad de Santa Ana*, the Supreme Court held that a waste disposal site in a small canyon threatened the constitutional right to life of the petitioner, ordered the municipality to stop disposing of waste at the site, and closed the illegal dump.<sup>111</sup> While Costa Rica has an independent constitutional right to a healthy environment (see discussion of the JPN-Geest case, in Section II), it is interesting to note that *Chacon* instead relied on the right to life.

## 6.2 Environmental Duties

Constitutional environmental provisions also impose duties to protect the environment, sometimes through explicitly imposing a duty on the state and other parties and sometimes through implicitly granting a right to a healthy environment. Although the legal effect of such constitutionally provided duties is unclear, courts occasionally have relied upon the fundamental duties to interpret ambiguous statutes.<sup>112</sup>

The constitutional duty to protect (or not to harm) the environment can be borne by the government and its organs, individuals, legal persons, or some combination of these parties. In some cases, constitutional environmental duties explicitly addressed to citizens have been expanded to apply also to the state. In *L.K. Koolwal Vs. Rajasthan*, for example, an Indian court ruled that the fundamental duty to protect the environment in Article 51 A(g) extended not only to citizens but also to instrumentalities of the state.<sup>113</sup> As a result, the court held that by virtue of Article 51 A(g)’s duty, citizens have the right to petition the court to enforce the constitutional duty of the state. The application of constitutional of India’s constitution provides that “it shall be the duty of every citizen.... to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures.”

Environmental rights and duties to the state is fairly straight forward. The more difficult question is whether constitutional environmental rights and duties operate only between governmental bodies and private legal persons (“vertical” operation), or whether it also operates

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<sup>110</sup> *Fundacion Natura v. Petro Ecuador de la Provincia de Buenos Aires*, Case No. 221-98-RA (Constitutional court, 1998), upholding *Fundacion Natura v. PETRO Ecuador*, Case NO. 1314 (11<sup>th</sup> Civil court, Pichinca, apr. 15, 1998).

<sup>111</sup> *Carlos Roberto Mejia Chacon v. Municipalidad de Santa Ana*, Judgement No. 3705-93 (Supreme Constitutional chamber, July 30, 1993).

<sup>112</sup> *Mumbai Kamgar Sabha v. Abdulbhai*, 1976 A.I.R.(S.C.) 1455 (1976).

<sup>113</sup> *L.K. Koolwal v. Rajasthan*, 1988 A.I.R.(Raj) 2 (High Court of Rajasthan, 1988). Article 51 A(g) of India’s constitution provides that “it shall be the duty of every citizen.... to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures.”

between private legal persons, so that one citizen could invoke the provision against another legal or natural person (“horizontal” operation).<sup>114</sup>

In developing economies, the public sector is often relatively large, and high courts have interpreted the term “state” broadly to extend to local authorities, bodies created by statute, government-owned industrial enterprises, and any entity acting as an instrumentality or agency of the government.<sup>115</sup> Where ownership of most natural resource is vested in the state and most major industries are owned and controlled by the government, breaches of constitutional environmental rights and duties are usually by the state, and “vertical” operation of constitutional rights and duties enables citizens to address many environmental problems. In recent years, however, the erosion of government control and the subsequent or imminent privatisation of the vast public sector has led to the adoption of the more progressive “horizontal” operation of constitutional rights clauses, whereby private citizens, corporations, and other legal persons are legally liable for their actions that breach these rights.<sup>116</sup>

### 6.3 Procedural Rights

In addition to providing a variety of substantive rights to life and a healthy environment, virtually all African constitutions provide procedural rights that can be indispensable in implementing and enforcing those substantive rights. These procedural rights provide civil society with the mechanisms for learning about actions that may affect them, participating in governmental decision making processes, and holding the government accountable for its actions, as well as enabling civil society to bind together to protect environment through the exercise of these procedural rights.

The rights discussed in this section fall generally into four categories:

- freedom of association;
- access to information ;
- public participation in decision making; and
- access to justice (including recognition of *locus standi* and explicit recognition of public interest litigation).

The freedom to access to information, because of its importance, is discussed in a separate chapter of this Handbook.

#### (a) Freedom of Association

The freedom of association is fundamental for environmental advocacy. By forming and participating in non- governmental organisation, people can be more effectively advocate for

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<sup>114</sup> See generally Jan Glazewski, *Environmental Rights and the New South African Constitution*, in ALAN E. BOYLE & MICHAEL R. & ANDERSON Eds. *HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION* 188(1996).

<sup>115</sup> E.g., *Raman Dayaram Shetty v. International Airport authority of India*, 1979 A.I.R.(S.C.) 1628 (1979).

<sup>116</sup> See e.g., *M.C. Mehta v. Shriram Food and Fertiliser Industries*, 1987 A.I.R. (S.C) 1628 (1979). From a gas leak, the supreme court held that Article 32, which provides for writs against the state for any breach of fundamental rights, also applies to private parties).

environmental protection.<sup>117</sup> With the support of an organisation and strength in numbers, any fears of retaliation can be allayed and people are more likely to take an active role in matters that affect them, including natural resources and environmental management. By joining with others in an association, citizens can have a stronger say in these matters, as many people speaking with a single, clear voice can be more effective. Similarly, an association allows for economies of scale, as financial, technical and labour costs are shared among the members, enabling them to participate collectively where it would be prohibitively expensive to participate individually.

Finally, associations can focus an issue, drawing upon their members as needed, enabling the members' interests to be advanced in ways that would be impossible for an individual to do on their own. In fact, all of the African nations ensure the right of their citizens to associate to promote their business, personal, or their interests. The provisions of a few countries' constitutions, such as Angola's (art. 33), suggest this might be limited to professional or trade unions, but this is the distinct minority position.

The breadth and strength of a constitutional right of association may depend upon national laws that prescribe the terms for its exercise. Approximately half of the constitutional provisions grant the right subject to "conditions fixed by law," or a similar "claw-back" clause (so-named because it claws back some of the rights just granted in the provision), with the overwhelming number of claw-back clauses found in civil law constitutions. While a claw-back clause may diminish the strength of the freedom of association because it explicitly enables legislation to set limits on the right, in practice those limits may not be much more than the reasonable limitations in other kinds of provisions.<sup>118</sup>

#### **(b) Access to Information**

In order for the public to effectively advocate for environmental protection, access to relevant information is important: the public needs to know of environmental threats and the origins of those threats. Although access to information is a relatively new norm, already twenty one(21) African countries have constitutional provisions, with fifteen(15) explicitly granting citizens the right of access to information generally or specifically held by the state. At least another five countries incorporate access to information through reference to the Universal Declaration of Human Rights or the African Charter on Human and People's Rights ("Every individual shall have the right to receive information.") and some countries such as Kenya basically repeat or elaborate on the provisions of these conventions.<sup>119</sup>

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<sup>117</sup> See, e.g., *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958) ("effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association...").

<sup>118</sup> Cf. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 n. 17 (1982) suggesting that reasonable "limitations on the right of access to information that resemble permitted 'time, place, and manner' restrictions on protected speech" might be constitutional).

<sup>119</sup> UDHR, art., 9, African Charter on Human and Peoples' Rights, (done at Banjul, June 26, 1981; entered into force, (Oct. 21, 1986), O.A.U. Doc. CAB/LEG/67/3 Rev. 5, reproduced in 21 I.L.M. 59(1982), art.,9, see also CONNIE NGONDI-HOUGHTON ET AL., *THE STATE OF FREEDOM OF INFORMATION IN KENYA* 12-14(1999).



Congo, South Africa and Uganda have some of the strongest constitutional provisions on access to information. Section 32(1) of South Africa's 1996 Constitution (within its Bill of Rights) guarantees to all "the right of access to any information held by the state; and held by another person and that is required for the exercise or protection of any rights." When read in conjunction with the constitutional rights to a healthy environment (sec24) and life(sec.11), this ensures the right to information necessary for environmental advocacy. Although there is not yet any South African jurisprudence on this provision, it has been utilised. When Legal Resources Centre (LRC), a South African NGO, sought technical information from the South African Ministry of Environmental Affairs regarding oil refinery processes and releases, the Ministry refused on the grounds that the information was a protected trade secret. LRC prepared to sue the Ministry under Section 32, and the Ministry and refineries produced the requested information before the case could be filed. In *Van Huyssteen Vs. Minister of Environmental Affairs & Tourism*, a case interpreting a similar right of access to information in section 23 of South Africa's 1993 Constitution, the court held that trustees to a tract of land adjacent to a lagoon that would be polluted by a proposed steel mill had a right to government-held documents relating to the proposed mill.<sup>120</sup> Although the right of access is not absolute, the court held that access to the documents were necessary for the plaintiffs "in order to exercise their rights."

Like South Africa, Article 27 of the Constitution of Congo provides access to information held by the government and by private parties:

Freedom of the press and freedom of information shall be guaranteed.....Access to sources of information shall be free. Every citizen shall have the right to information and communication. Activities relative to these domains shall be exercised in total independence, in respect of the law.

Uganda similarly provides for wide access to state-held information, except where "the release of the information is likely to prejudice the security of or sovereignty of the state or interfere with the right to the privacy of any other person"(art.41).

In five countries (Kenya, Nigeria, Sierra Leone, Zambia Zimbabwe) citizens have the constitutional freedom to receive information free from government interference. A typical provision would guarantee citizens the right to "receive and impart ideas and information without interference." Additionally, article 8 of Senegal's constitution provides that "everyone has the right to be informed without hinderance from the sources accessible to all." Innovative advocacy may be able to draw out a right to receive information from this freedom, but until this theory is tested in court, it remains unclear to what extent these provisions grant citizens a right to demand state-held information.

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<sup>120</sup> Van Huyssteen v. Minister of Environmental Affairs & Tourism, 1996(1)S.A. © 283 ( Cape Provincial Div., June 28, 1995).

The Indian Supreme Court has held that there is a constitutional right of access to information implicit in the constitutional rights to free speech and expression, and also in the right to life.<sup>121</sup> In the 1982 landmark case of *S. P. Gupta Vs. President of India*, the Supreme Court asserted:

This is the new democratic culture of an open society towards which every liberal democracy is moving and our country should be no exception. The concept of an open government is the direct emanation from the right to know which seems to be implicit in the right of free speech and expression guaranteed under article 19(1)(a). Therefore, disclosures of information in regard to functioning of government must be the rule, and secrecy an exception justified only where the strictest requirement of the public interest so demands. The approach of the court must be to attenuate the area of secrecy as much as possible consistent with the requirement of public interests, bearing in mind all the time that disclosure also serve an important aspect of public interest.<sup>122</sup>

Subsequently, in 1988, the Supreme Court held that access to information (or “right-to-know”) was a basic public right and essential to developing public participation and democracy.<sup>123</sup> The same year, the High Court of Rajasthan held that the privilege of secrecy only exists in matters of national integrity and defence.<sup>124</sup>

In addition to national precedents, the international community has increasingly recognised a right of access to environmental information. Access to environmental information- broad and affordable access for any party requesting it – has been enshrined in the 1992 Rio Declaration, the 1998 United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision making and Access to Justice in Environmental Matters (also known as the Aarhus Convention), and the draft Inter-American strategy for the Promotion of Public Participation in Decision making for Sustainable Development (ISP).<sup>125</sup> In dicta, the Inter-American Court of Human Rights also promoted the “collective right

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<sup>121</sup> See generally Robert Martin & Estelle Feldman, Access to Information in Developing Countries, Transparency International working paper, ch. 8 (relating to India), available at <http://www.transparency.de/documents/workpapers/martin-feldman/> (visited October 8, 1999).

<sup>122</sup> *S.P. Gupta v. President of India*, 1982 A.I.R. (S.C.) 149 (1982); also *Bombay Environmental Action Group v. Pune Cantonment Board*, W.P.2733 of 1986 and Supreme Court order re Special Leave Petition No. 1191 of 1986 (*Bombay High Court*, Oct.7,1986) (emphasising access to information for bona-fide activists).

<sup>123</sup> *Reliance Petrochemicals v. Indian Express*, S.C.C. 592(1988).

<sup>124</sup> *L.L. Koolwal v. Rajasthan*, 1988 A.I.R. (Raj.) 2(High Court of Rajasthan, 1988).

<sup>125</sup> Rio Declaration on Environment and Development, done at Rio de Janeiro, Brazil, June 13, 1992, U. N. Doc. A/CONF. 15/26 (vol. I) (1992) reprinted in 31 I.L.M. 874(1992); United Nations Economic Commission for Europe Convention on Access to information, Public Participation in Decision making and Access to Justice in Environmental Matters, done at Aarhus, Denmark, June 25 1998; Inter-American Strategy for the Promotion of Public Participation in Decision making for Sustainable Development (draft Policy Framework and Recommendations for further action, distributed Sept. 8, 1999 in Mexico city). Rio Principle 10 guarantees to “each individual shall have appropriate access to information concerning the environment that is held by public authorities...” Article 4 of the Aarhus Convention ensures broad, affordable access to environmental information with a few limited, explicit exceptions, and no reason needs to be stated in requesting the information. Policy Recommendations 1 and 2 of the draft ISP address public access to information and the legal framework

to receive any information whatsoever.”<sup>126</sup> This increased international recognition of a right to environmental information argues in favor of a liberal interpretation of constitutional right to information.

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<sup>126</sup> Inter-American Court of Human Rights, Advisory Opinion OCC-5/85, Series A, No. 5 para. 30 (Nov. 13, 1985); see also Francisco Martorell v. Chile, case 11.230, Report No. 11/96, Inter-American C.H.R., OEA/Ser.L/V/II.95 Doc. 7 rev., at 234 (1997); see also Martin & Feldman, Access to Information, ch.3 (describing the 1995 Johannesburg Principles on access to environmental information).

## CHAPTER SEVEN

### ENVIRONMENTAL ISSUES AND THE EVOLUTION OF ENVIRONMENTAL POLICY AND LAW IN UGANDA<sup>127</sup>

#### 7.0 Introduction

Uganda is endowed with rich natural resource diversity. Despite the country's high natural resource potential, the country is undergoing rapid loss of this diversity, the quality, stability and productivity of the various constituents of the environment, namely air, animals, plants (including wild plants and cultivated crops), soil and the man-made elements.

The political and economic turmoil of Uganda between 1970 -1985 had serious impact on the management of natural resources and the environment. Since these resources were squarely in the hands of the state; they declined with the decline of state power and responsibility. In other areas the population moved in forests and game reserves such as Mabira, Kibaale, Lake Mburo, Kyambura and settled there and turned them into farmlands, because they were perceived as wasted resources.

The growth of industries, expansion of urban areas due to population increase and rural urban immigration was not matched with corresponding policies and legislation to protect the environment. The implementation and enforcement was weak because of inadequate and ill trained personnel, lack of equipment, and scarcity of financial resources, poor governance and poor public attitude or apathy.

#### 7.1 A Synopsis of Environmental Issues in Uganda

##### 7.1.1 Underlying Causes of Environmental Degradation.

The following are the underlying factors that have caused environment degradation in Uganda.

##### *Population growth*

In 1991 the population of Uganda was 16,671,700 million, having risen from a population 2,463,900 million in 1911, an increase of 576.7%. By 2002, the population had risen to 25 million people. There has therefore been a sudden high increase in the demand for basic needs of food, fuel and land for cultivation as well as settlement in the country. Indeed some parts of Uganda are said to have exceeded their human carrying capacity. This high level of demand has led to high pressure on the natural resources base, due to the direct reliance on natural resources. This has been exacerbated by poor technological development and access in the country, which have made it difficult for efficient and alternative means for livelihood.

##### *The Inadequacy of Existing Policies and inter-sectoral synergies*

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<sup>127</sup> By Charles Michael Akol and Cornelia Kakooza Sabiiti. Charles Michael Akol is Director, District Support Coordination and Public Education, and Cornelia Kakooza-Sabiiti is a Legal Counsel at NEMA, Uganda.

While some policies on natural resource management exist, for the most part they are outdated, sectoral and rarely implemented. The sectoral nature has led into misuse of resources, which are deemed not to be under the management of the given policy host institution, such as agriculture on the forestry. The situation has been worse for resources, which were not under the jurisdiction of any specific institution and therefore lacked a management policy, such as wetlands. The lack of policies in this case led to massive degradation of wetland resources. The lack of a land-use policy is having deleterious impacts on natural resources. Land is being allocated to non-compatible uses.

### ***The Inadequacy of Legislation and intersectoral Management***

Like the policies, the legislation has been sectoral, ineffective and lacked the participation of the local people. The result was that the laws couldn't be enforced, which has negative impacts on the very resources that they are meant to protect. Institutional conflicts, rivalry and the lack of effective cooperation and coordination both; within and outside government have resulted in ineffective implementation of programmes geared towards sustainable resource management and reversing environmental degradation.

Poverty, low levels of environmental awareness, low levels of technology development and access, and lack of managerial and technical expertise in resource management are the other underlying factors in environmental degradation. A sizeable population of Uganda is illiterate and natural resource use and management is based on indigenous knowledge, which does not take into consideration scientific and technological developments.

There is, therefore, inadequate understanding of the implications of the various activities on the environment, and little consideration is given to the environment as a result. These factors have resulted into strain, and causing a number of environmental problems.

### **7.1.2 Major Environment Problems of Uganda**

Uganda today experiences the following environment problems, which can be attributed to certain direct human activities as follows.

#### ***Soil Degradation***

Soil degradation is becoming more pronounced particularly in the highland areas. This is manifested through soil erosion and leaching leading to loss of soil nutrients and hence low agricultural productivity. This is as a result of the following:

- (i) poor farming methods and practices such as cultivating up and down hill continuous cultivation of the same piece of land, lack of crop rotation and mono – cropping;
- (ii) land fragmentation, which causes limited availability of land and therefore over utilization/continuous cultivation of a given piece of land;

- (iii) deforestation that leaves the soil without any protective covers. This exposes them to erosion especially given the increased water runoff and wind speed;
- (iv) overstocking of livestock, this leads into overgrazing. This results in destruction of the natural vegetation cover, loosening and compaction of soil through trampling;
- (v) uncontrolled bush burning which also has the effect of clearing the vegetation cover leaving the soil bare and susceptible to the forces of erosion, to be washed and blown away by water and wind respectively;
- (vi) improper use of agro-chemicals which can lead to demobilization and Mobilization of certain soil nutrients which can then be easily lost or become unavailable to crops.

### ***Deforestation;***

Deforestation is widespread in the country. By 1890 Uganda was estimated to have forest and woodland cover of 45% of its land. Uganda today has 21% of its land covered by forest including woodlands. Of this, 7.7% is gazetted forestry out of which 3% of tropical high forests.

This rapid loss of Uganda's forest cover is a result of -

- (i) high wood fuel demand for cooking, brick making and the mining industry (lime production). Approximately 96% of the total quantity of energy consumed in the country is provided by woody biomass (mostly fuel wood). The end-use technologies used in the extraction of this wood energy are rudimentary and thus, are wasteful in terms of energy loss;
- (ii) encroachment into forests for agriculture. Because of the high population growth and the fact Uganda's farmers cannot afford external inputs, the required increase in agricultural production has overwhelmingly been met by expansion of agricultural land. This has meant loss of vegetation cover with its attendant effects; and
- (iii) uncontrolled pit-sawing' coupled with poor logging, and inefficient wood use methods have also lead to high rates of deforestation. It is important to note that the preference for some selected wood types such as Mahogany and *Muvule* have lead to the extinction of these species in certain areas.

### ***Loss of Wildlife***

This is due to the following-

- (i) poaching of animals for hides, skins ivory and meat. This has contributed to population reduction especially of Elephants, Buffaloes, Hippopotamus, Crocodiles and the extinction of the White Rhino; and
- (ii) encroachment into the protected areas for ranching and crop production, as well as for settlement (e.g., fishing villages), leading to the loss of wildlife habitats.

### ***Loss of Biodiversity.***

Biodiversity is the variety and variability of all living things; which can be measured at the genetic, species and ecosystem level. Uganda is therefore increasingly undergoing genetic erosion and loss of species (such as the White Rhino). This loss of diversity occurs with the loss of forests and other wildlife as shown above. It is important, however, to know that loss of Biodiversity has also occurred through the introduction of exotic animal and plant types which have tended to replace the native species.

### ***Wetland Degradation***

Wetlands are commonly known as swamps in Uganda. Otherwise they have ecosystem where the vegetation therein has adapted to temporal or permanent flooding. Wetland ecosystems in Uganda have been degraded by -

- (i) extensive drainage for dairy farming;
- (ii) extensive burning especially to renew pasture and for hunting;
- (iii) brick-laying (extraction of clay);
- (iv) excessive harvesting of vegetation (Papyrus, trees);
- (v) hunting of wild animals especially the *Sitatunga*;
- (vi) rice growing especially in Eastern Uganda;
- (vii) conversion Pollution from sewage, industries, garbage dumping especially in and around Kampala;
- (viii) conversion for industrial developments;

### ***Pollution***

Pollution of land, air and water is widespread in the country due to the following factors-

- (i) soil erosion, which increases the sediment load of rivers and lakes some, leading to the siltation of these water bodies, e.g. Lake Wamala;
- (ii) discharge of industrial effluent from breweries, textile, sugar, leather tanning, and mining and other industries;
- (iii) improper sewage and other waste disposal (Municipal, Industrial, medical and agricultural waste);
- (iv) mismanagement of agro-chemicals (fertilizers, herbicides, acaricides and insecticides);
- (v) gaseous emissions and dust from Industries;
- (vi) bush burning leading to carbon dioxide and other gas emissions;
- (vii) exhaust fumes from motor vehicles.

### **7.1.3 Implications of Environment Degradation.**

The degradation of the environment as demonstrated above has direct deleterious effects on the well-being of the people. The following will suffice to illustrate the potential dangers of environmental degradation.

- (j) Reduction in agricultural production leading to food shortages, and in extreme cases, famine, and loss of income. This eventually results into poverty, which leads to further environment degradation. Its through such factors that environmental refugees have been realized.
- (ii) Shortage of building poles and firewood. Parts of Uganda especially in the north and northeast are reported to be facing acute shortage of firewood and building poles. In these areas there is congestion in houses, fewer meals are cooked, more meals are eaten raw and women walk longer distances to look for firewood.
- (ii) Poor health arising out of drinking polluted water, living in a polluted environment, and failure to meet basic nutritional requirements.
- (iii) Loss of foreign exchange earnings due to the reduced tourist attraction with the loss of wildlife and other natural resources.
- (iv) Reduced availability of water with the accompanying impacts of poor hygiene etc.
- (v) Loss of water bodies, associated with the disappearance of fish resources, which are a major source of protein.
- (vi) Floods and associated impacts, leading to displacement of settlements, loss of property and life, and poor health.

## **7.2 Evolution of Environmental Policy and Law in Uganda**

Environmental concerns in Uganda had been relegated to the background until the advent of the National Resistance Movement (NRM) Government to power in 1986. In 1986, the Government, in recognition of the growing level of environmental degradation, created the Ministry of Environment Protection (MEP). This Ministry was charged with the responsibility of coordinating and enhancing natural resources management, and harmonizing the interests of the resource users, monitoring pollution levels and advising government on policy and legislative reforms for ensuring sound environmental management.

In 1991, the Government of Uganda launched the National Environment Action Plan (NEAP). It intended among other things, to provide a frame work for integrating environmental considerations broadly defined to include natural and man made environments, into the country's



overall economic and social development.<sup>128</sup> In 1994, the Government of Uganda approved the National Environment Management Policy (NEMP). The first of its kind in Uganda's history it was one of the landmarks of the NEAP process.

The overall policy goal of the NEMP is sustainable social and economic development, which maintains and enhances environmental quality and resource productivity on a long term basis, which meets the needs of the present generation without compromising the ability of future generations to meet their own needs.<sup>129</sup> The policy set out the objectives and key principles of environmental management and provided a broad framework for harmonization of sector and cross-sectoral policy objective. It was on this policy, that a comprehensive legal and institutional framework was designed. The policy, through legislation has created new capacity building needs in environmental planning, information generation and dissemination and the use of environmental tools in managing the environment and natural resources.

In order to achieve this overall policy goal of sustainable development, the NEMP recommended four initial actions. These actions included, the creation and establishment of an appropriate institutional and legal framework, transformation of existing environmental management systems, evolution of a new sustainable conservation culture, revising and modernization of sectoral policies, laws and regulations and establishing an effective monitoring and evaluation system to assess the impact of policies and actions on the environment, the population and economy.

In 1990, Uganda started formulating the National Policy for Conservation and Management of Wetland Resources, becoming the second country after Canada to adopt such a policy<sup>130</sup>. These were later followed by the National Water Policy, the Water Action Plan and the Water Act 1995, whose overall objective is "to manage and develop the water resources in Uganda, in an integrated and sustainable manner, so as to secure and provide water of adequate quantity and quality for all social and economic needs, with the full participation of all stake holders so as not to leave the future generations any worse off than ourselves".<sup>131</sup>

The Wildlife Act of 1996 and the establishment of the Uganda Wildlife Authority. By 1995, as a result of the above government policies, Parliament had enacted a law to provide for sustainable management of the environment. The National Environment Act (No. 4 of 1995) was enacted in May, 1995. The Act set up the National Environment Management Authority (NEMA,) whose functions among others are to co-ordinate, manages, monitor and supervise all activities in the field of environment, making NEMA the principal agency of government, for the management of the environment.

The NEMP also led to the formulation of sectoral policies concerning environment and natural resource management. Some of the policies that have been formulated in conformity with the NEMP include: the Water Policy 1995, the draft National Soil Policy, draft Fisheries Policy

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<sup>128</sup>State of Environmental report 1994, Preface P.V

<sup>129</sup> State of Environmental report 1998 Pg. 242

<sup>130</sup>Supra 4

<sup>131</sup>Supra 4

2000, the draft Wildlife Policy 2000, the National Wetlands Management Policy 1995, Forestry Policy 2001 and several district Environment Management Policies from 2000 onwards.

In October 1995, a new national Constitution came into force in Uganda, the 1995 Constitution. The Constitution sets out in its National Objectives and Directive principles of state policy, among others, the promotion of sustainable development and public awareness of the need to manage our environment. Chapter 4 of the Constitution of Uganda sets out a detailed Bill of rights. For the first time in Uganda's history, the Bill contained the right to a healthy and clean environment, as a human right. Under Article 39, enjoyable and enforceable as any other form of human rights. The Constitution also contains a mechanism for enforcement of this right. This means that the Constitution recognized the importance of the environment and health as inseparable from all forms of human rights and that the government would put forward policies to ensure the observance of this right, set a mechanism for its protection and provide money for it in its budget, to ensure its observance, otherwise it would just remain on paper. Better still, it empowers the population to whom it is granted, a right to enforce it against government or any other person or body. This right is not just provided by the Constitution, but the Constitution recognizes that it is inherent and God given, and as such it is the duty of government to ensure that it is granted and enjoyed.

## CHAPTER EIGHT

### “WHAT IS GOOD SCIENCE?”<sup>132</sup>

By Allison Watkins<sup>133</sup>

#### 8.0 What is Good science?

**Samuel J McNaughton<sup>134</sup>.**

We are bombarded by science news. Science has become a media favorite from DNA testing in the OJ Simpson trial to threats of global warming. Most American newspapers have a weekly feature page on science, many of the presentations revolving around medicine, space, and the environment. This inundating torrent threatens to overwhelm itself as many of us begin to tune out pro and con arguments that pepper the news. Is global warming taking place right now? Or is the fact that the 1990's encompass three of the ten hottest years since weather record-keeping began merely a reflection of normal climatic variation? In an obsession with 'fairness' any harebrained viewpoint conflicting with general scientific consensus can be given equal weight in the press. Are there UFOs? After the scientists say no, lets have a UFO aficionado tell us they do exist and recount personal testimony of 'evidence'. How are we to make sense of the cacophony of clashing attitudes and beliefs? I believe that the answer lies in critically evaluating the evidence presented based on four central criteria of good science. Science depends upon evidence that is not special to one individual or small coterie but that is a shared experience. When the Hubble Telescope takes photographs, you can see them as the astronomers can. The courts should weigh conflicting opinions based on explicit criteria, and accept only conclusions that meet them fully.

In its 1993 decision, *Dauber v. Merrell Dow Pharmaceuticals*, 509 U.S 579 the United States Supreme Court charged trial judges with acting as independent evaluators of scientific testimony, using the criteria of empirical testability of assertion, peer review and publication of results, error inherent in a methodology, and degree of acceptance of that Methodology by the scientific community. The Court got it right, and here I suggest four closely related, but somewhat discrete criteria that courts can use to determine whether testimony is dependable on scientific evidence.

Good science can be identified readily by applying four tests, each of which can be unequivocally answered by a single yes or no. Those tests deal with procedure, performance, duplication, and peer scrutiny. Science consists of both a body of knowledge and a way of viewing the world. In evaluating the quality of science, I concentrate on its practice, because that is the measure of quality. In my experience, the fact that science is a process, as well as a body

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of knowledge, seems obscure to most non scientists, but the process itself is science's most arresting and powerful property to many scientists: *Science is the most reliable and powerful method humans have discovered for determining the nature of objective reality.*

There are other types of reality that are not accessible to scientific investigation (e.g., aesthetic reality or endeavor reality or which painting is the more satisfying? Which NFL team is the best?). These are elements of subjective reality and as such, will never be amendable to scientific resolution. In a pair of paintings, one may be more satisfying to one observer, the other to another observer. A football game, even the Super Bowl, only demonstrates which team was 'best' on the day and under the circumstances that it was played. Judging whether information is scientific and if it is good science, on the other hand, clearly depends on affirmative answers to four lucid understandable questions.

These questions encompass (1) procedure, (2) performance, (3) repeatability, and (4) peer review. Specifically, does the process follow the scientific method? Was the process performed in an objective manner? Are the results repeatable? Have the results been published in a peer-reviewed publication?

## **8.1 Scientific Method**

First, did collection of the data on which a conclusion is based conform to the following procedure?

Question--> hypothesis--> prediction--> test by--> collecting data--> analyze--> determine if prediction is supported.

These steps comprise the scientific method.

Support for hypothesis through the prediction it makes depends on the statistical probability that such a result could have occurred by chance.

Although the scientific method diagrammed above appears unidirectional, in practice it is cyclic. If predictions are supported, that commonly suggests to the scientist additional predictions leading to additional data collection, refining and expanding the conclusion. If predictions are not supported, this nevertheless leads to modification of the original hypothesis or formulation of a completely new hypothesis. Accordingly, science is a means, not an end.

First, it begins with a question. A scientist's observations (data) about a phenomenon or, perhaps data published by another scientist prompt the scientist to pose question about the phenomenon. In this refining process, the second step is for the scientist to reformulate the question as a hypothesis. A hypothesis is merely a tentative explanation. Third, hypothesis makes predictions and, fourth, data are collected to test the prediction. Fifth, data are analysed to test the prediction and sixth, a determination is made about the likelihood that the result was due to chance and whether the result is scientifically important.

As an example of how the scientific method works, suppose you notice that drivers of bright red cars seem to be pulled over by traffic officers more often than cars of other colors. This causes you to pose the question: Do drivers of red cars exceed the speed limit more often than those

driving cars of other colors? From this question you pose a hypothesis that red cars are more likely to speed than drivers of non-red cars. You predict that drivers of red cars are more likely to pass you on the expressway than the other cars if you are driving at the legal speed limit. Now you test this with a null hypothesis: Drivers of red cars will pass you no more often than red cars are represented as a proportion of total cars on the road. If you reject the null hypothesis, you conclude that an alternative hypothesis is true. You obtain data from local automobile registrations on the proportion of cars that are red and test your hypothesis by recording the color of all cars passing you when you are driving at the legal limit. You repeat this experiment on different days at different times. There are three possible results. First, red cars may pass you no more often than the proportion they represent of all cars. With that result, you accept the null hypothesis. Second, red cars may pass you less often than their proportion, suggesting a new hypothesis, for example, that patrol officers preferentially stop drivers of red cars. Or, finally, red cars may pass you more frequently than their representation in the general car population. This leads you to reject the null hypothesis and accept the original hypothesis as an explanation of your casual observation.

Measuring a difference in data that is gathered does not necessarily mean that a hypothesis is correct or incorrect. The scientist must first determine whether a difference in results is due to chance. This is done by comparing the variation within the samples with the difference between samples. If the difference between averages of samples is large relative to the variation within each sample, there is a high probability of a difference between samples, commonly expressed as  $p < 0.001$  means that the result is likely to occur by chance only one time out of one thousand:  $1/1000 = 0.001$ .

Once statistical significance has been established, the scientist must decide whether the results are of scientific significance. Statistical significance is influenced most strongly by the sample size. Increasing the number of units sampled (individual humans, tumors, automobiles, livestock) can make the most trivial result ‘highly significant’ statistically. However, we then must decide if it is important. The answer lies in the proportion of the total variation (statistically, variance) explained by the phenomenon. Suppose a result is statistically significant at a probability of  $< 0.00001$  (less likely to happen by chance than once in 100,000 trials) but explains only one-tenth of one percent of the variation in the variable measured. It is of high statistical significance but may be of no practical importance whatever. The probability that someone will be struck by lightning today may be relatively high.... The probability that you will be the victim is vanishingly tiny. In addition, a phenomenon that has devastating effects on individuals or society may be important, even if it is unlikely. Thus we contract for insurance policies to cover low probability events of major consequence to us. The probability of a hurricane striking Southern Florida over any five-year period is relatively high, the probability that a hurricane will strike any give hose in South Florida is much, much smaller. People in South Florida insure their houses because once any house is hit, the damage can be devastating.

One problem with advocacy in science, for example, medicine, is that an event of small probability, when multiplied by the entire human population of a city, state, or the nation, will result in a seemingly large number if we are not cognisant of how the number is obtained. Are you likely to engage in an activity that has detrimental effects on one participant out of every ten thousand per year? In fact, you are likely do so with some regularity. We drive cars because of

the convenience, not because they are the safest available vehicles for travel. If, however, you read that over twenty-seven thousand people in the United States are detrimentally affected by this activity every year, it seems like an enormous concern. But the large number is only a much larger number, the population of the United States, divided by the probability,  $2-1,000,000/10,000-27,100$ . Liability of asbestos manufacturers was influenced by the statistics of lung damage in shipyard workers who were exposed to very high levels of asbestos for long periods. This risk was extrapolated to the general population, most of whom are never exposed to “significant” that is “important” levels of asbestos for any “meaningful” that is, again, “important” length of time. Similarly, the most recent scientific studies of medical disorders in women with silicone breast implants has revised downward to a chance association not a cause and effect, the probability of a connection between the implants and the disorders.

## **8.2 Is the Procedure Objective in its Execution?**

Objectivity in execution is the standard of good science. Although scientists proceed by testing hypothesis, there is no reason to believe that scientists are wholly impartial about those hypotheses. Scientists tend to affect a role of studied objectivity, as if they could care less about whether the hypothesis they are testing is confirmed or rejected. Realistically, practicing scientists typically are motivated by a favored hypothesis, and the goal of the scientific method is to purge the process of biased manipulation, however unconscious. That is, the procedure of science must be executed in a way that does not influence the results. Methods such as ‘double blind randomization, variable matching, and analysis of variance,’ are aimed at eliminating bias and are particularly important when dealing with phenomena that directly impinge upon human beings. A double blind test in medicine, for example, conceals the treatment from both the patient and the physician. Randomization assures that comparisons are made between initially similar groups and not made between two groups that are different to begin with.

The third standard of good science asks: Is the result repeatable? This is of utmost importance. For a scientific conclusion to be acceptable, other scientists must be able to repeat it in other locations at other times employing the same methods. A one-time result that cannot be repeated by others is no more than an anecdote, and should be treated as such in the courts. Similarly, an effect that only one scientist or group of associated scientists can repeat should be viewed with considerable suspicion.

The fourth standard of good science asks; Have the results been published in a scientific journal or other publication that is peer reviewed? Science unpublished is not science at all. It is simply an unfinished undertaking of no merit, with one exception: the result is so new that it has not been accepted for publication in a peer-reviewed journal. Nevertheless, we should withhold judgment until it has gone through the peer review process where other scientists familiar with the field of inquiry can judge the merit of the idea, clarity of the hypothesis, design and execution of the test, and analysis and interpretation of the results in a broader conceptual framework.

Peer review is usually an anonymous endeavor. Reviewers do not reveal their identities, and are not paid or even recognized for their time and effort. It is done solely as a service to other scientists in an attempt to make the science as good as present practice allows. Several times,

articles I submitted to journals were rejected by reviewers and editors. In most cases, I was pleased afterward because those rejections forced me to rethink and clarify my approach to the problem. On the other hand, some reviewers may be hypercritical to the point of unwarranted faultfinding. They usually are weeded out of the pool by editors. Most journal editors are, in fact, scientists who practice in the field of the journal they edit. And many scientific journals are published not for profit but by nonprofit scientific societies. Passing the huddle of peer-reviewed publication is an assurance that quality control has been exercised in communicating the results to other scientists and, therefore, meets a type of reliability norm that decision-makers can rely on.

Pseudoscience (i.e. false or junk science) will fail any one or all of the four criteria: it cannot pass them all—only good science can do that. Any “science” that does not meet all four of the standards (procedure, performance, duplication, and peer scrutiny) is not good science. Whether it is what has come to be known as junk science depends principally on whether it violates any of the first three criteria. If only the fourth standard is not met, it is still not good science. There is a huge body of published information that has not met the rigors of peer reviews but which appears as limited circulation publication, or “gray literature”. Government and corporate reports are usually, though not always, in this category. Because the gray literature has been subject to much lower, if any, standard of review, it should never be used as conclusive evidence.

Much of the evidence I have cited in news reports of court cases does not conform to the standards of good science. Some of it is retrospective analysis of data collected for one reason and then used as a means of testing a hypothesis that was not formulated prior to the original data. For example, many conclusions about connections between health and nutrition, such as those about fiber or oat bran in the diet, often arise at first out of studies designed for quite different purposes. This practice, referred to by scientists as “data dredging” should be avoided because many confounding factors may lead to rejection of the null hypothesis, when it is true.

There are two types of mistakes that scientists can make when testing a hypothesis. Each of these can have important consequences that courts must evaluate.

“**Type 1 error**” is rejection of a null hypothesis that is true. For example, a rare plant species is said to be declining rapidly and a private landowner is prohibited from developing his land because it is the principal habitat of that species. But, the truth is that the rare species is not declining and is distributed in many other localities, but those localities have not been searched for the species. That is Type 1 error.

“**Type 2 error**” is acceptance of a null hypothesis that is false. An example of a Type 2 Error would be to conclude that salmon are not declining in rivers of the Pacific Northwest and allow fishing to proceed when the fact is that they are declining drastically.

Ideally, the testing step of the scientific method involves an intervention: the scientist changes conditions herself (e.g. her driving speed) to provide a standard or control. An experimental result is an outcome that is particularly powerful because manipulations can be used to isolate the effect of one factor from all other factors. It is very simple to determine whether a scientific procedure is experimental. Did the scientist manipulate something? If the answer is yes, we are dealing with an experiment; if the answer is no, then we are dealing with an observation, but not an experiment. Simply, an experiment leads to a controlled observation and therefore can determine cause and effect.

### 8.3 Scientific Practice

Science is not an arcane activity accessible only to acolytes trained by a sage. Although the results of a given science may be difficult for a layperson or a scientist from a different discipline to understand, comprehension of the scientific process which is essential to evaluating reliability of conclusions is accessible to everyone and practiced by everyone.

Scientific discipline at the level of investigatory or discovery science is best attained in a mentor apprentice relationship. In this way the mentor conveys the reasoning and technological tools to the apprentice. This is how university training and apprenticeships develop competent practicing scientists.

But all of us in fact engage in scientific learning continuously. Therefore, it is not science that is opaque but our understanding of it on a day-to-day basis. We do it, but we do not know that we do it. However, neither is the practice of science to be equated with “common sense” or “folk wisdom”. Instead, science is a very powerful and calculated way of solving problems. It is not intuition, prejudice, aspiration or whim.

Consider the following set of observations and actions. You are reading at night by lamp light. The lamp goes out. That is an observation and you ask yourself, why has the lamp gone out? From that question, you formulate a hypothesis based on the past experience with the reading lamp; the switch is faulty and has spontaneously slipped from the “on” to the “off” position. You test that hypothesis by fiddling with the switch, rotating it backward and forward. You observe that the light does not come on. Therefore you conclude that the switch is not functioning properly. What you have just done is test hypothesis. The switch is not the cause of the lamp going out. You have accepted this null hypothesis based on your experiment. So you move on to another hypothesis; the bulb is burned out and its converse, the null hypothesis that you can test the bulb. You go to the storage closet and get a new bulb, remove the old bulb and screw the new one into the fixture. The lamp lights, now you have falsified the null hypothesis. You have disproved the idea that the bulb is burnt out. In my experience as a professor teaching science, this double negative is among the most elusive aspects of science to non scientists.

Even scientists do not often consciously test null hypotheses. However, scientists do have a general consensus about what constitutes good experimental design. It is that consensus about good experimental design that inherently tests a null hypothesis. The single most important aspect of good experimental design that tests a null hypothesis is the requirement that the experimenter’s hypothesis be capable of being disproved by the experiment. To allow a hypothesis of causation to be disproved, the scientist must allow an equal opportunity for the truly opposite or null hypothesis to be proven.

For example, in the bright red car study, you can test whether red cars pass you more often than expected by chance, but you have no preknowledge of what that passing number is by 10%,20%, 50%, 100%, or any other margin. Therefore, you assume that the numbers passing will be equal to the representation in the mobile population as a whole, and test for departed from that proportion.



The approach also gives you the power to determine the unexpected. You might find that bright red cars passed you less frequently than their presentation in the total car pool. Although the double negative concept of disproving null hypothesis is difficult to grasp initially, it is essential to good science. If you hear a scientist preface a statement about the research by saying, what I wanted to prove was....beware.

## **8.4 Rejecting Null Hypotheses**

So science progresses by rejecting hypotheses of no effect or no relationship: If I do this, that will not happen. If I put my hand over a burning candle, I will not get burned. The statement is an experimental null hypothesis of no effect. It involves your intervention as a scientist, by placing your hand above the candle. "There is no relationship between the number of cigarettes a person smokes and the likelihood that the person will develop lung cancer." That statement is an associational null hypothesis of no relationship between two variables, number of cigarettes smoked and the probability of contracting lung cancer.

Science progresses by disproving null hypotheses. However, science can never prove a nothing. For example assertions that the UFOs, or ghosts, or auras exist cannot be disproved. However, science can demonstrate that the probability that they exist is vanishingly small.

In general, experimental results are more reliable, more trustworthy, and more reputable than associational results. In addition, associational results cannot equivocally demonstrate cause and effect. For example, the number of cigarettes smoked and probability of suffering lung cancer might both be caused by other, unidentified variables, such as stress, or poor office or home air quality.

In fact, the confusion about smoking and lung cancer that lasted for decades after the Surgeons General's warning of the health dangers of smoking was directly due to the associational nature of the evidence. Although there was experimental evidence from animal "models", such as laboratory rats, rats are not humans and everyone knows it. Also experimental rats are commonly exposed to levels of smoke that were far out of proportion to the amount a human would smoke. For years, the conflicting assertions about health consequences of smoking supplied persons who didn't want to quit smoking with excuses: The experiments were done on rats and I'm not a rat". Or, I'd have to smoke 10 cartons a day to be exposed to the same level of smoke."

I think the most difficult facet of good science for non practitioners to master is that good science proceeds by disproving ideas. In fact, I know many proficient, practicing scientists who do not grasp this fundamental concept. But because we disprove null hypothesis, every prevailing idea is based on tentative acceptance. As facts pile up and theory organizes those facts, that becomes less and less tentative, but it can never be absolute. It can never be absolute because new ideas, new technologies, new perspectives may modify the available facts and theories. That is how science progresses, and why it is such a revolutionary and robust process among human activities. It is never completed, but is perpetually ongoing. It is a collective activity involving many participants, which guards against both the legitimate mistaken and the deliberate charlatan.

Three quotes from turn of the twentieth century scientists demonstrate the tentative nature of scientific “fact” and the ability of new facts and theories to expand our awareness of reality.

- Charles H. Duell, director of the U.S. Patent Office said in 1899, ‘Everything that can be invented has been invented.’
- Robert Milliken, Nobel Prize winner in physics said in 1923: “There is no likelihood that man can ever tap power of the atom”.
- Lord Kelvin, President of the Royal Society, said in 1895; “Heavier than air flying machines are impossible.”

The future isn’t what it used to be and it never will be. You will notice that assertions are in fact null hypotheses. They assert what will not happen.

## **8.5 Society and Science**

Society views science in three ways;

First, science is traditionally considered, taught, as a body of ‘facts’ that is, observations about existence that are certainly true. That is the way science commonly enters the courts, leading to the phenomenon of “dueling experts”, one asserting one set of declarations and another asserting an opposite, or at least contradictory, set of contentions.

Second, science is viewed as a “theory”, which is more insubstantial than facts but is, somehow, associated with facts. Scientific facts and theory are related in the following fashion; facts confirm theory, and theory organizes facts. Facts are confirmed repeatable, and therefore shared observations that need to be explained and therefore organizes the facts into a coherent, explanatory concept. However, neither theory nor fact stands in invulnerable autonomy; theory must be confirmed by the facts that are observed. Similarly, facts that have been supported by theory are more substantial than anecdotal evidence unsupported by theory.

Third, science in our society has come to have a quality of infallibility attached to it. This arises, I think from the fact that science has set the stage for all the technology that surrounds us, from cell phones to refrigerated food. However, just as not all adults who would like to play professional baseball are capable of doing so scientists also vary in the proficiency with which they practice their craft. Those who do it best combine adherence to the four standards with imagination, leading to new insight into how objective reality is organized. It is a common lapse in the press and the popular mind to refer to a scientific idea as a theory. Such ideas are theories only if they organize a spectrum of facts into a coherent whole. Otherwise, they are step by step hypotheses that scientists test through disproving null hypotheses. A theory is an organized totality of hypotheses about some test of natural phenomena.

The essence of good science is repeatability. Different scientists, in different places, at different times, can repeat good science if they follow the same methods and protocols. The core of good science is thoughtful design of the test of a hypothesis, careful execution of that design, and rigorous analysis of the data to test the null hypothesis.

Science, I allege is a process that anyone can understand and judge. It is a human enterprise that is not in the less hidden, obscure, or dependent upon “expert” interpretation. If a scientist is

incapable of explaining what he knows to anyone of average education and mental faculties, I insist that the scientist himself really does not understand what he is attempting to explain.

Healthcare is a social activity in which there is a good deal of shoddy science and pseudo-science, which act to confuse the public as well as experts. Are homeopathy and acupuncture effective beyond a placebo effect? Can psychoanalysis improve mental health? Is it better to eat butter or margarine? Do naturopathic treatments improve health? Does consumption of shark cartilage control prostate cancer?

Does reduction of dietary salt intake reduce blood pressure? An affirmative answer to this question is a “fact” so well established in our culture, both medical and general, as to be a certain truth. However, a recent review of evidence on the role of salt consumption in hypertension. The (Political) science of salt, 281 SCIENCE 898(1998), by Gary Taubes, indicates that support for dietary salt restriction to control blood pressure is shaky, at best. Experiments that have manipulated salt consumption commonly show no effect on blood pressure, according to Taubes. Therefore, we know much less than we think we do about standard medical treatment of patients suffering from hypertension. If the assertions that reduction of dietary salt does not combat hypertension are true, prescriptions to do so are socially meaningful examples of Type I error, rejecting the null hypothesis that is true: salt in the diet does not affect hypertension. In tracing the history of this medical certainty, Taubes highlights the role of powerful personalities promoting views in which they deeply believe. In spite of less than firm evidence. That is scientists can be wrong not because they are fraudulent, but because they wish to do good and they hold certain views so strongly that competing evidence is overwhelmed by the weight of their convictions.

By diverting medical concerns from a serious health problem, hypertension to pseudo solution, reducing salt intake, ill-advised conclusions can damage individuals and society as a whole. Science is practiced by humans, after all, and is, finally, subject to all frailties of human behaviors, including ego, stubbornness, fraud, theft, lying, and plain stupidity. Perhaps most common is exaggeration inflating the importance of a result. This need not be done maliciously or even in bad faith. It is merely human to look at an accomplishment, which is what a scientific result is, in most favorable light. However, as a collective enterprise with clear criteria of evaluation, science is less subject to those frailties than any other human activity. When I make a mistake, I can be confident that other scientists, sooner or later, will correct it.

The standards that the courts should bring to evaluating testimony by scientific experts are the standards of good science. Did procedures follow the scientific method? Does testimony indicate that execution of tests was unbiased? Has the result been repeated by different scientists? And, finally have the fundamental results underlying the testimony been published in a scientific journal and therefore, met the standards of peer review?

We should be aware; however, the most “expert” testimony in litigation is not scientists. In a 1991 study, Joe Cecil of the Federal Judicial Center in Washington, D.C. found that only 10% of the expert testimony in federal civil cases was from scientists and 40% was from practitioners in medical and mental health fields. The United States Supreme Court is expected to decide this term, by ruling on *Kumho Tires Co. v. Carmichael*, 131 F.3d 1433(11<sup>th</sup> Cir. 1997), cert

granted, 118 S. Cr. 2339 (1998), whether experts other than scientists should be held to the same standards as those promulgated in Daubert. It is my opinion that they should.

Legal determination should always be mindful of the fundamental fact that is at the heart of good science; it is repeatable. On issues from toxic waste to the hazards of buildings or silicone breast implants, conflicting opinions must be judged by the standards of the scientific method, lack of bias, repeatability, and publication. Courts should admit into evidence any assertion that fails to pass those hurdles. Science is a powerful tool in the search for truth and it is not beyond the talents of most citizens to evaluate.

## CHAPTER 9

### ENVIRONMENTAL LAW AS A TOOL FOR SUSTAINABLE DEVELOPMENT IN THE CONTEXT OF UGANDA<sup>135</sup>

#### 9.0 Introduction

Sustainable development is defined as development that meets the needs of the present without compromising the ability of future generations to meet their own needs. Sustainable development, which conserves land, water, fish, plant and animal resources, is considered environmentally sound and non-degrading, technically appropriate, economically viable and socially acceptable.

Sustainable development dictates that whatever man or woman does on this planet should not put the life of future generations into jeopardy. The protection of the environment has been perceived as being of paramount importance to the future of humankind. It contains the concept of needs whereby development serves human needs especially the needs of the world's poor, the concept of limitations to development imposed by the state of technology and social organization to ensure that the environment meets future human needs.<sup>136</sup>

Uganda, like her counterparts in Africa, has not been passive in promoting and advocating for sustainable development. There is still, however, need to achieve sustainable development in both the economic and social spheres. Faced with poverty due to low income per capita, threats to the environment and the need to promote industrialization in the new wake of modernization, the need to use law to protect the environment and ensure sustainable development becomes crucial. Uganda, in the 1990s enacted laws that uphold the concept of sustainable development.

#### 9.1 Historical Development of Environmental Law and Sustainable Development in Uganda

##### *9.1.1 Outmoded Legislation and its Concern with Exploitation of Natural Resources*

Legislation on the management of natural resources in Uganda mainly originated from the colonial period. In the 1960's and the 1970's, a number of amendments were made to the basic legislation inherited from colonialism. Most of the amendments were mainly directed at changing institutional structures to make them fit into the new reality of an independent Uganda. Where sweeping reforms were attempted, (e.g. the Land Reform Decree, 1975), the necessary political climate and will to implement the reforms was lacking. The law remained on the Statute books and yet old undesirable practice targets of the reform continued.

A notable feature of the existing laws on natural resource management before 1995 was the lack of provisions aimed at conserving the natural resource base. The driving force behind these laws

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<sup>136</sup> WCED; Over Common Future Report of the World Commission on Environment and Development, chapter 2 paragraph 4.

was enhancement of purposes of socio-economic exploitation of natural resources. This omission is not surprisingly a feature of that time. The grounding philosophy of the times posited nature as man's enemy, which had to be conquered for development. This philosophy has now been discredited in favor of a view that advances the compatibility of man and nature, the concept of sustainable development.

A number of critics who reviewed the laws before 1995 noted the following in relation to environmental law in Uganda-

- legislation was sectoral in nature and addressed sectoral concerns;
- legislation mainly addressed natural resource utilization and not the conservation of the natural resource base;
- legislation lacked effective sanctions to deter infraction;
- legislation did not provide a sufficient mechanism for co-ordination; and
- legislation was not comprehensive enough;

The need for "basic" or "framework" legislation on the environment as the remedy to the malaise affecting Uganda's environmental law was reiterated.

In addition to these popular criticisms of the then legislation on natural resources management and the environment, the following issues were raised -

- (i) the place of environmental and natural resources legislation, *vis-a vis*, other elements in the legal system; and
- (ii) the internalization of the conservation ethic in the legal system.

### **9.1.2 Review of Legislation**

One issue that cut across all reviews of legislation in Uganda prior to 1995 revealed that there was the misunderstanding of the nature and role of customary law and practices and their importance in the conservation of the environment. Customary law and practices are regarded as negative factors in environmental conservation. The most important area where this view comes out is on the question of land law, tenure and property rights.

Underlying this view, is the conception that customary law is based on the belief that it is a system of land tenure originating from the pre-colonial days. This conception positions customary law as an unchanging system with no capacity for growth or adaptation. This view is contrary to the law as it exists in Uganda. A number of cases decided by the colonial courts and the courts of independent Uganda, have asserted the view that customary law changes and is adaptable to new circumstances. These cases assert further, that new economic, political and social forces generate new norms of customary law.<sup>137</sup>

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<sup>137</sup> See the cases of (1) *The Kabaka's Government v. Musa*.

Customary law is conceived as a dynamic, adaptable, and progressive force, but what should be of essence, is how to integrate the conservation ethic in customary law, and force the abandonment of customs and practices that are deleterious to the environment. Customary law is itself created by the existence of a general practice in a given community, where the members of the community accept the practice as law. Since the colonial times, an additional criterion has been imposed on the legal quality of custom: custom must not be repugnant to natural justice and morality. This repugnancy test should be used, to eradicate practices that infringe current environmental standards. To achieve such a change, there is need to sensitize the judges and magistrates on the need to include environmental standards in their conceptions of justice and morality.

A question may arise: why improvement of custom should be given consideration, when the objective should be to put in place workable laws, an objective easily accomplished by legislation? The answer lies in the present consciousness that environmental conservation can best be achieved through community participation and awareness. There is no better vehicle for integration of awareness into communities, than through accepted beliefs and practices - custom.

The achievement of the integration of the conservation ethic into local customary laws and practices can only be achieved through dissemination of knowledge about the environment and of measures to conserve the natural resource base, also avoiding pollution. This effort must be society-wide from the policy makers to the policy consumers. Under the current system in Uganda, such dissemination should not be difficult. Public education and sensitization campaigns can be mounted through the grass root committees.

### ***9.1.3 Application of the Common Law and Equity in Natural Resources Management***

Common law and the principles of equity, have several norms that have been consistently applied in the protection of the environment. The principles of the law of torts regarding nuisance, negligence, trespass and the rule in the case of *Rylands vs Fletcher* have been used to control interferences in the environment that prejudice individual rights. The rules relating to nuisance have been used against pollution by noise, smell or intrusion by effluent. The rules relating to negligence have been used to create a standard of care, the infraction of which leads to liability. The rules against trespass ensure enjoyment of private property against unlawful intrusions. The rule in the case of *Rylands vs Fletcher* asserts the principle that any person who controls dangerous forces on his land is liable for the consequences, if those forces should escape and cause damage to the property and rights of others.

The doctrines of equity, likewise, contain a number of prescriptions for the management of the environment and natural resources. The well-known principle of equity (an age-old Roman maxim) - *sic utere tuo ut alienum laedas* - requires that a property owner must use his property in a manner that does not cause injury to others. It is the foundation of the now very well accepted principle on utilization of water resources, i.e., the principle that an upper riparian cannot use a river or an aquifer contrary to the interests of a lower riparian. This is a principle that mitigated the common law rigors, respecting the near-totality of property rights.

Common law and equity have the advantage of being flexible and adaptable to changing circumstances. This means, therefore, that new norms can evolve and old ones can adapt. Common law and equity, however, have the disadvantage that the rules are not easily discernible. A person searching for law cannot easily say this is the law, an advantage that statutory law enjoys.

Common law and equity are, therefore, intricate branches of the environmental law. The importance, nature and role of the rules of equity and the common law have to be taken into account in ensuring sustainable development. To ignore them completely, is to create a lop-sided legal system.

The laws that existed in Uganda before 1995 excluded the participation of local populations in the benefits from the resources of the wild including those communities, whose socio-cultural life was inextricably bound with those resources. This is against the law of equity in natural resource management. In Uganda, the Forests Act, 1947, the Game, (Preservation and Control) Act 1959 (as amended by Decree 13 of 1975) and the National Parks Act, 1952 took the preservationist mode and excluded the local population.

The preservationist movement in natural resource conservation ensured the preservation of wildlife in Africa, but created two negative results; The State paid little attention to those natural resources, especially biological diversity outside the protected areas. These were left to the vagaries of land law, with minimum control over individual rights to exploit the resources. This minimum control approach, was based on the common law doctrines against waste.

Secondly, the local communities regarded the protected areas as an imposition and a deprivation of local resources, and as areas to be taken advantage of, if conditions permitted, through poaching and encroachment.

#### ***9.1.4 The Sectoral Nature of Legislation***

Another characteristic of all reviews of legislation in Uganda and of environmental and natural resource law in other countries is that legislation is sectoral (sector specific). Although the observation about the sectoral nature of legislation is correct, what should be emphasized is that such legislation does not make adequate provision for environmental management and especially for those environmental concerns that are inter-sectoral and cross-sectoral in nature.

It should be noted from the outset, however, that codification of environmental legislation is near to impossible, especially when just positioned in the institutional and administrative setup of the state. Such a trend would be incompatible with the real organization of the Ugandan government, where sectoral, specialized and technical departments form the base of the government functional structure. Legislation has more of a mission, than the conservation of environmental resources alone. It is also the defining factor in the competence of various governmental institutions in relation to its subject matter. Legislation also has the mission to create ample provisions for the exploitation and utilization of natural resources.



In the common law system, which Uganda also follows, there can never be a comprehensive legislation on a subject because all the other interactive branches of the law must be seen in totality.

#### ***9.1.5 Coordination in the Existing Legal Framework for Natural Resources Management and Conservation of the Environment.***

As the law stood by 1995, each Act seemed to stand on its own, administered by a commissioner, a board, or Commission usually under the general direction of a Minister. This state of affairs gave the impression of lack of a coordinating mechanism in the area of natural resource and environment management. In reality, it may be true that there was no active co-ordination between the various departments, boards, commissions and ministries in charge of various aspects of natural resources and the environment.

The need to introduce any subsidiary agencies for the coordination of any government activities was to be harmonized with the existing system of Cabinet government. It had to be determined whether the addition of another layer to the bureaucracy was in the interest of the government to downsize the bureaucracy through retrenchment and decentralization.

#### ***9.1.6 Abuse of, and the Wide Discretionary Powers***

There are two situations in the problem of abuse of powers. In the first case, public officers, e.g. forest officers, game wardens, 'fisheries officers were accused of abusing their powers. Often instead of using the powers given to them to enhance the protection of natural resources under their jurisdiction, they used the same powers to authorize the destruction and waste of those resources. According to press reports, Forest officers, in particular, authorized the logging of vital virgin forests instead of protecting them. Secondly, that public officers, magistrates and judges who possess wide discretionary powers in relation to environmental issues often use those discretionary powers to deny the public access to environmental justice and information.. This laxity acts an incentive for further infraction of the law rather than as a deterrent.

The solution to abuse of power by public officers lies in strengthening of the general law relating to administration, especially on matters of conduct and ethics. It is not only the laws that need to be strengthened but also the general knowledge of public servants on environmental and natural resources issues. Administrative law requires that discretion can only be exercised according to law and only for proper purposes. The need to include in the law the right of a citizen to require public officials to do their duties by Court petition is one of the best solutions to abate abuse of power and neglect of responsibility.

#### ***9.1.7 The Place of Natural Resources and Environmental Law in the Legal System of Uganda before 1995***

In the effort to create an adequate system of environmental management based on law, the emphasis has been on the enactment of legislation. The supposition here is that apart from legislation, there is no other means for developing environmental law.

The Constitution of the Republic of Uganda, 1995, the Judicature Act, 1967 and the Magistrates Courts Act, 1970 as amended, define law applicable in Ugandan Courts. According to these statutes, the sources of law applicable by the courts are the Constitution, statutory law, customary law, equity, common law, and statutes of general application in force in England before 1902. What should be noted is that most of the reviews on environmental law concentrated on legislation and did not review other sources of law such as customary law and equity. These other sources of law are the basis of the principles of sustainable development.

## **9.2 Milestones in the Development of Environmental Legislation in Uganda since 1995**

Uganda's laws have several checks and balances, which could have been used to manage the environment. The problem, however, is whether the necessary inter-connections between environment management and existing legal devices have been established.

### **9.2.1 *The Constitution of Uganda, 1995***

The Constitution, being the supreme law in Uganda, provides for environmental protection and conservation. It provides, in the National Objectives and Directive Principles of State Policy,<sup>138</sup> that 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.

The Constitution further provides that the utilization of natural resources of Uganda is to be managed in such a way as to meet the development and environment needs of present and future generations of Ugandans. In particular, the State is required to take all possible measures to prevent or minimize damage and destruction to land, air, and water resources due to pollution or other causes. The Constitution also imposes a duty on the state to protect important natural resources, including land, water, minerals, oil, fauna and flora on behalf of the people of Uganda. In article 245, the Constitution provides that Parliament shall, by law, provide for measures intended: to protect and preserve the environment from abuse, pollution and degradation; to manage the environment for sustainable development; and to promote environmental awareness. This has already been implemented through the National Environment Act, the Water Act, the Forest and Tree Planting Act, the Local Governments Act, and the Wildlife Act, among others.

The provisions of the Constitution protect property rights and other individual rights. Furthermore, the State is to promote and implement energy policies that will ensure that the people's basic needs and those of the environment are met. Above all, Article 39 of the Constitution provides for an individual right to a clean and healthy environment. This provision is complemented by Article 50, which gives any person the right to take judicial action to redress the breach of a fundamental right, irrespective of whether the breach affects him or another person. The above provisions are important in broadening the *locus standi* of citizens to redress environmental wrongs.

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<sup>138</sup> Principle xxvii

The State, including local governments, are required to create and develop parks, reserves and recreation areas and ensure conservation of natural resources and to promote the rational use of natural resources so as to safeguard and protect the biodiversity of Uganda.<sup>139</sup> The public trusteeship of rivers, lakes, wetlands, national parks, game reserves and forest reserves is vested in the State.

### ***9.2.2 The Local Governments Act***

The Local Governments Act provides for the system of local governments, which is based on the district. Below the District there are lower local government and administrative units.<sup>140</sup> This system provides for elected Councils. The Executive Committee of each Council is nominated by the Chairman. The functions of this Executive Committee include:

- initiation and formulation of policies for approval of Local Council;
- overseeing the implementation of government and council policies, monitoring and coordinating activities of non-governmental organization in a district; and
- receiving and solving disputes forwarded to it from lower local government units.

#### ***The District Local Councils.***

The District Council is the highest political authority in the district. It has both legislative and executive powers in accordance with the Constitution and Local Government's Act, 1997. The composition of the District Council is in the Act.

The Act also prescribes the functions of the Government that the District council is responsible for. The following are the functions relevant to natural resource management for district councils:

- (i) land surveying;
- (ii) land administration;
- (iii) physical planning;
- (iv) forests and wetlands.
- (v) environment and Sanitation; and
- (vi) protection of streams, lakeshores, wetlands and forests.

Below the district there are lower local government councils which consist of<sup>141</sup>-

A Sub-county Council;  
City Division Council;  
A Municipal Council;  
A Municipal Division; and  
Town Council.

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<sup>139</sup> ARTICLE 237(2)

<sup>140</sup> See section 3 of the Local Governments Act.

<sup>141</sup> (Section 23(1) of Local Governments Act).

These Councils have powers to make laws. The District Councils have power to enact district laws (Ordinances)<sup>142</sup> while urban, sub-county, division or village councils may in relation to their specified powers and functions make bye-laws not inconsistent with national laws or the Constitution. Through this method, it is hoped that the district and other lower local councils can effectively control and manage their natural resources and environment.

The Act establishes Administrative Units and these are divided into two categories: rural and urban. In rural areas these divisions are referred to as- county level; parish level; and village level.

In urban areas they are referred to as parish or ward and village level. At each level of the Administrative Unit, there is established an executive committee including the Secretary for Production and Environment Protection. These committees have the responsibility of monitoring projects and other activities.<sup>143</sup>

The Local Governments Act also prescribes the functions for which the Urban Councils are responsible. The functions relevant to natural resource management are:

- botanical and zoological gardens;
- camping and grazing grounds; and
- burning of rubbish and grassland.

The District Councils can devolve the following services and functions to the Lower Local Councils:

- the control of soil erosion and protection of local wetlands;
- the control of vermin in consultation with the ministry responsible for tourism and Wildlife and any other relevant ministry;
- the taking of measures for the prohibition, restriction, prevention, regulation, or abatement of grass, forest or bush fires including the requisition of able bodied persons to extinguish such fires and' cut fire breaks and general local environment protection;
- the control of local hunting and fishing; and
- the protection and maintenance of local water resources.

### **9.2.3 *The Agricultural Seeds and Plants Act*<sup>144</sup>**

This Act provides for the promotion, regulation and control of plant breeding and variety release, multiplication, conditioning marketing, importing and quality assurance of seeds and other planting materials. It establishes the National Seed Authority and a Variety Release Committee. The Act also establishes the National Seed Certification Service which is responsible for the design, establishment and enforcement of certification standards, methods and procedures, registration and licensing of all seed producers, auctioneers and dealers, advising the Authority

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<sup>142</sup> See Sec 2a (1)

<sup>143</sup> See section 49 of the Local Governments Act.

<sup>144</sup> No. 10/94

on seed standards and providing the Authority with technical information on any technical aspects affecting seed quality.<sup>145</sup>

The Act imposes stringent requirements for variety testing. All imported and domestic varieties of seeds or breeding materials are required be tested for a minimum of three generations before their releases<sup>146</sup> and imposes licensing requirements for the importation and dealing in varieties of seeds and plants.

In view of the increasing importance of genetic resource conservation, the Act is a key element in natural resource management by protecting the country against unwanted alien species of plants and conserving endemic species.

#### **9.2.4 The Uganda Wildlife Act**

The Act was enacted in 1996, to provide for sustainable management of wildlife, to consolidate the law relating to wildlife management, establish a coordinating, monitoring and supervisory body for that purpose. It fundamentally changes the way wildlife is managed. It repealed the National Parks Act and the Game (Preservation and Control) Act.<sup>147</sup>

The Uganda Wildlife Authority was created under the Act with the following functions-

- (a) ensuring the sustainable management of wildlife conservation areas;
- (b) identifying and recommending areas for declaration as wildlife conservation areas and the revocation of such declaration;
- (c) establishing the management plans for wildlife conservation areas and for wildlife population outside wildlife conservation areas;
- (d) proposing policies and procedures for the sustainable utilization of wildlife by and for the benefit of the communities living in proximity to wildlife;
- (e) controlling internal and external trade in specimens of wildlife.
- (f) promoting conservation of biological diversity ex-situ and to contribute to the establishment of standards and regulations for that purpose, and;
- (g) promoting public participation in the management of wildlife.

From the perspective of this Handbook, the relevant functions of UWA for the purposes of wildlife protected areas and wildlife management areas are, among others, to preserve selected examples of biotic communities in Uganda and their physical environment, and preserve populations of rare, endemic and endangered species of wild plants and animals and to generate economic benefits from wildlife conservation for the benefit of the people of Uganda.

The protection of wildlife under the Act is seen from two perspectives, conservation within conservation areas and conservation outside protected areas. Conservation areas are declared by

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<sup>145</sup> (See s.6(2))

<sup>146</sup> (See s.7(1))

<sup>147</sup> (See s. 93 of Wildlife Act)

the Minister, in consultation with the District Council in whose jurisdiction the proposed area is located. Parliament is empowered to approve such establishment by its positive resolution.<sup>148</sup>

Conservation areas are divided into two categories; wildlife protected areas and wildlife management areas. The wildlife management areas include wildlife sanctuaries, community wildlife areas, and such other areas as the Minister may declare. Wildlife protected areas include national parks, wildlife reserves and such other areas as the Minister may declare to be wildlife protected areas.

The Act preserves community property rights.<sup>149</sup> Local communities and individuals who have property rights in land within the protected areas are permitted to carry on activities compatible with conservation principles and practices of wildlife resources. The Act also recognizes and guarantees the historic rights of individuals and communities which were recognized in previous laws, such as the National Parks Act, the Forests Act, and the Game (Preservation and Control Act).<sup>150</sup>

The Act restricts entry into wildlife protected areas without authority. Any person who enters contrary to the provisions of the Act commits an offence. This is one way of controlling access to species in protected areas.

A novel feature of the Act is the provision of wildlife use rights which are tradable 'rights to hunt, farm, ranch, trade in or use wildlife for educational purposes.'<sup>151</sup> The Act provides for their management and transfer. For the purpose of proper management, the wildlife use rights are classified into various classes as - A-Hunting, B-Farming, C-Ranching, D-Trading in wildlife products, E-Educational Scientific or medical uses. These wildlife use rights are transferable and in some cases, a transfer permit is needed especially for class A and class E. This kind of transfer is known as a permitted transfer.<sup>152</sup>

The Minister, upon the advice of the Board, may by *Statutory Instrument*, vary, revoke or create additional wildlife use rights. For one to utilize wildlife or wildlife products, one must first obtain a grant of wildlife use rights.

Wildlife use rights are not enjoyed in perpetuity, and are not absolute. If there is non-compliance by a right holder, with the terms of grant or any other sufficient reason to which, the grant of wildlife use rights was made or that it is expedient that a grant of a wildlife use right be revoked, it may be revoked subject to the conditions of the Act.<sup>153</sup> Such a holder of a wildlife use right may, however, be entitled to compensation.

The Act provides measures for regulating and licensing professional trappers and hunters, and penalties for their noncompliance. It prohibits the taking of protected species, so as to maintain

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<sup>148</sup> (See s.17(1)).

<sup>149</sup> See s.18(8).

<sup>150</sup> (See section 25)

<sup>151</sup> (See section 29)

<sup>152</sup> (See s. 41 of the Wildlife Act, 1996.)

<sup>153</sup> (See s.39 of the Wildlife Act 1996)

their abundance.<sup>154</sup> The Act provides for the management of vermin and other problem animals. The Act also contains the usual limitations on the methods of hunting and taking of wildlife. It makes provisions regulating international trade in species and specimens, thereby implementing the CITES. It is an offence for any person to import, export or re-export or to attempt to import or re-export any specimen, except through a customs officer or port and without producing a valid permit to a customs officer.<sup>155</sup>

The Act establishes a wildlife appeal tribunal, which consists of seven persons appointed by the Chief Justice. This tribunal hears and determines appeals from the decisions of Uganda Wildlife Authority. It is hoped that this tribunal will expedite cases involving wildlife resources.

All the foregoing is intended to conserve wildlife throughout Uganda, so as to maintain the abundance of diversity of species and to support sustainable utilization of wildlife for the benefit of the people of Uganda. The Act, from the above synopsis, changes the philosophy of wildlife conservation in Uganda. It moves away from a state centered management system, to a system that encourages public participation and private sector involvement. It establishes local government wildlife committees, so as to involve local communities in wildlife management issues. It further updates and modernizes the law and goes a long way to implement the conservation philosophy of the Convention on Biological Diversity. By opening up the wildlife sector to popular participation, it is hoped that this new law will promote the conservation ethic and eradicate the view that wildlife is a property of nobody, which is available for taking and misuse.

### **9.2.5 *The National Environment Act*<sup>156</sup>**

This Act establishes the National Environment Management Authority (NEMA) as the over all body and principal agency responsible for coordinating, supervising and monitoring all aspects of environmental management in Uganda.<sup>157</sup>

NEMA is empowered, in consultation with the lead agencies, to issue guidelines and prescribe measures and standards for the management and conservation of natural resources and the environment. NEMA is mandated to –

- integrate environmental considerations into socio-economic development policies and programmes;
- develop standards, guidelines, laws and other measures in environmental management; and
- coordinate government policies, liaise with lead agencies and international organizations in environmental management

At the apex of NEMA is the Policy Committee on the Environment, composed of 10 ministers charged with various sectors of environment. The Policy Committee is responsible for the

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<sup>154</sup>(See s. 49 of the Wildlife Act 1996)

<sup>155</sup>(See s.66 of the Wildlife Act).

<sup>156</sup> Cap 153

<sup>157</sup>(see s.4 of the Environment Act(1995).

formulation and implementation of policy guidelines, and coordinating environmental policies of various government<sup>158</sup> agencies.

The Act establishes the Board of Directors, who are appointed by the Minister, with approval of the Policy Committee on the Environment. The members of the Board are appointed by virtue of their knowledge and experience in environment management. The principal role of the Board is to oversee the operation, policy and to review the performance of Management of NEMA and to establish procedures for the management of staff. They have basically an administrative function.

The Board is given the mandate to appoint technical advisory committees, including those on-

- soil Conservation;
- licensing of Pollution;
- biodiversity, and
- environmental Impact Assessment.

The Act also enables local administrations to be involved in the management of the environment. The Act creates District Environment Committees, charged with the management of environmental issues at the District level. Environment Committees are created at the lowest levels of the local government structures to enable public participation in environmental decision-making at those levels.<sup>159</sup>

This kind of institutional framework ensures that natural resources are controlled and managed by communities for their own benefit on sustainable basis.

### ***Sustainable Development Measures under the Act***

#### ***(a) Environmental Impact Assessment***

One of the key management tools provided by the Act is the requirement of environmental impact assessment (EIA) for projects likely to have a negative effect on the environment.<sup>160</sup> Regulations have been making detailing the measures and processes that can be taken in conducting an EIA and environmental audits.<sup>161</sup>

#### ***(b) Collaboration with local authorities***

The Act requires that the Government to collaborate with the local governments in the management of the following areas:<sup>162</sup>

- lakes and rivers;
- lakeshores and riverbanks;

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<sup>158</sup>(see s.7(2) of the Environment Act (1995)

<sup>159</sup>(See sections 14, 15 and 16)

<sup>160</sup>Sections 19-21 of the Act

<sup>161</sup>See Environmental Impact Assessment Regulations, no.13 of 1998.

<sup>162</sup>see part vii of the Act.



- wetlands;
- hilltops, hill-sides, and mountainous areas;
- conservation of biological resources;
- forests;
- planting of woodlots; and
- range lands, land use planning.

These environment management areas are specifically selected because of their immediate relevance to community use and hence, the need to involve local communities. The key emphasis is to permit the use of resources within their capacity to regenerate.

**(c) *Control of Pollution***

The Act contains, in addition to these provisions relating to management of natural resources, important provisions on the control of pollution. Since pollution is a relative state of affairs, the Act provides for mechanisms to establish environmental standards and criteria for what is considered environmentally acceptable behavior and phenomena.<sup>163</sup> Where a person wishes to exceed the standards, which have been set, such a person must apply for a pollution license under Part VIII of the Act.<sup>164</sup> Standards for the control of pollution are now in the process of formulation.

**(d) *Enforcement of the Law***

The Act provides for a variety of mechanisms to ensure that the law will be enforced, that go beyond the traditional command and sanction approach of criminal law. The following are some of the mechanisms:

***Environmental easements***

Under the Act, a person may apply for an easement to protect the environment. In view of the Constitutional provision relating to rights to a clean and healthy environment and the capacity of any person to enforce that right notwithstanding that his specific rights have been affected, this easement differs from the common law easement.

It may be enforced by anybody who finds it necessary to protect a segment of the environment, or view even where a person may not own property in the proximity of the property subject to the easement.<sup>165</sup>

***Environment restoration orders and improvement notices***

The Authority or a court may issue a restoration order requiring the person to cease the activities or to restore the environment as much as possible to its original state if the person's activities are likely to affect the environment. The order may be given pursuant to an action brought by an

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<sup>163</sup> see sections 24-31.

<sup>164</sup> see sections 57-65

<sup>165</sup> See sections 72-76.

individual or upon the initiative of the Authority.<sup>166</sup> Restoration orders can be enforced by the Authority even without a court order and at the cost of the person violating the law.

### ***Raising awareness***

The need for popular awareness is a key requirement for enforcement of environmental legislation. NEMA is given the mandate to carry out education and awareness campaigns, to ensure that the public participates in environmental decision-making and enforcement.<sup>167</sup>

### ***Licensing and registration of activities and substances***

The licensing of pollution has already been discussed above. There are other activities, which require specific permits. These include the import, manufacture, and disposal of hazardous chemicals, wastes and substances. In order to control the environmental effects of these substances, the law requires their classification and labeling.

### ***The use of economic and social incentives***

The Act clearly provides that management measures should be carried out in conjunction with the application of social and economic incentives including taxation measures and environmental performance bonds.<sup>168</sup>

### ***Use of Criminal law***

Criminal law remains a veritable instrument for the control of behavior, because of the natural tendency of human beings to fear the infliction of pain, isolation or economic loss. Therefore, the Act provides for serious penalties against infraction of its provisions. Criminal law, however, cannot be the mainstay for the enforcement of environmental law, but is a necessary supplementary measure to the approaches outlined above.<sup>169</sup>

## **9.2.6 The Land Act**

The Land Act provides for the tenure, ownership and management of land. Subject to Article 237 of the constitution, all land in Uganda is vested in the citizens of Uganda and is owned in accordance with customary, freehold, *mailo* and leasehold land tenure systems.<sup>170</sup> The customary mode of land ownership is recognized as a form of tenure and the occupants enjoy security of tenure on former public lands, for which, a certificate of title known as "a certificate of customary ownership" is granted to the owner of such land.

The colonial land settlement, which was made in the Buganda, Ankole, and Toro Agreements at the turn of the 19<sup>th</sup> Century, had dispossessed many people who occupied the land before the

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<sup>166</sup>See sections 67-71

<sup>167</sup> See sections 85-87.

<sup>168</sup> see part vii

<sup>169</sup> see part xiii

<sup>170</sup>section 2

agreements. The land was allocated to chiefs and other collaborators of the colonial regime in the form of freeholds or modified freeholds locally known as “*mailo*”. This left the former occupants as squatters on these lands. Under the 1995 Constitution, these occupants are protected and their protection has now been detailed by the Land Act. A *bona fide* occupant is defined as a person who, before the coming into force of the Constitution had occupied and utilized or developed any land, unchallenged by the registered owner or his agent for twelve years or more, or a person who had been settled on land by the government or its agent which may include a local authority.

A *bona fide* occupant is issued with a certificate of occupancy. The security of tenure of a lawful or *bona fide* occupant is, however, not prejudiced by the fact that he or she does not possess a certificate of occupancy.<sup>171</sup> Under the Land Act, a person who acquires land is required to manage and utilize it in accordance with the existing environmental laws,<sup>172</sup> and any use of land must conform to the law relating to town and country planning.<sup>173</sup> The implication of this is that even customary tenants, occupants are required to observe the environmental laws. This provision obviously curtails the right of exclusive ownership of land as it makes it subject to the environmental laws.

The Act, like the Constitution provides, that the government holds in trust for the people, and protects environmentally sensitive areas such as natural lakes, rivers, ground water, natural ponds, natural streams, wetlands, forest reserves, national parks and any other land reserved for ecological and tourist purposes for a common good of the citizens of Uganda.<sup>174</sup> Government has no powers to lease or otherwise alienate any natural resource mentioned above, but may only grant concessions, licenses or permits in respect to those natural resources

The new land laws are in line with the emerging environment management regime. By providing security of tenure to persons who till the land, the law has created and strengthened their interest in conserving the land as a resource. It is, therefore, expected that these new laws will spur public interest in natural resource conservation. It has been urged that this provision curtails investors as they cannot have exclusive ownership of these protected natural resources.

### **9.2.7 The Water Act**

The Water Act is one piece of Uganda's environmental legislation with key provisions to enhance sustainable development of water resources. It provides for the use, protection and management of water use and supply.

Most of its provisions have the key objective of protecting the environment and in turn ensuring all water resource-based development is sustainable. Important aspects in the Act include the following-

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<sup>171</sup>See sections 29-33.

<sup>172</sup>see section 43

<sup>173</sup>See section 45

<sup>174</sup> See section 44

### ***Rights in water are vested in government;***

All rights to investigate, control, protect and manage water are vested in the government of Uganda.<sup>175</sup> Government is accordingly better placed to ensure that water resources are utilized sustainably.

### ***Planning for water use;***

The Act establishes the water policy committee, an inter-sectoral body, charged with coordinating the preparation, revising and keeping up to date the comprehensive action plan for the investigation, controlling protection, management and administration of water resources for the nation. Such planning may specify types of activities, development of works, which may not be done without the prior approval of the policy committee.<sup>176</sup>

### ***Control on the use of water resources;***

The Act provides for the use of permits to use and supply water. A person who needs to construct or operate any water works or for waste discharge,<sup>177</sup> needs permission.<sup>178</sup> The permit system ensures that use of water resources is environmentally friendly and promotes sustainable development. These controls also ensure that water is not treated as a free good, but as a good with a value to be paid for. This economic valuation of water is an important incentive for its conservation. The Water Act, however, excludes abstraction of small quantities of water from the operation of the water permits.

### ***Water easements;***

An easement is the right of a person over the land of another person. Under Water Act, an easement may enable a holder of a water abstraction permit to bring water to or drain water from his land over land owned or occupied by another person. In the same way, an easement may enable a holder of a waste discharge permit to drain waste from his land over the land owned or occupied by another person. The works for which an easement is granted has to be maintained and repaired so as to comply with development that is sustainable.

### ***Control over water works and water use;***

An authorized person may enter land for the purposes of inspecting works for the use of water. He may take samples and make tests to find out whether water is being wasted, misused or polluted, or whether the terms of any permit are being met.<sup>179</sup> Non-compliance is an offence under the Act.

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<sup>175</sup> See section 4

<sup>176</sup> See section 15 and 16.

<sup>177</sup> see section 27

<sup>178</sup> See section 17

<sup>179</sup> See section 36.

All these aspects of the Water Act have the object of sustainable use of water resources, which runs through the entire Act. Waste, misuse and pollution, which may lead to unsustainable use of water, are prohibited.

### **9.2.8 *The Fisheries Act***

This Act regulated fishing, conservation of fish, the catching of crocodiles and the sale and movement of their skins through issue of licences. It was amended by *Section 92(3)* of the Wildlife Statute by deleting from all its provisions any reference to crocodiles. The management of crocodiles was thus brought under the Wildlife Statute.

The Act provides for the protection of fish by regulating the size of nets, prohibited fishing methods, and makes provisions for conservation through the prohibition of fishing immature fish, declaring closed seasons and regulating vessels of non-citizens from fishing in Uganda without a valid licence. The Act also attempts to conserve fish by prohibiting the introduction of some species of fish or eggs that were not indigenous to Uganda, or the transfer of fish or fish eggs from one water body to another without the consent of the Chief Game Warden. It does not make express provisions for regulating international trade in fish species and should, therefore, be amended to match the present day conservation and management trends in fisheries resources.

## **Conclusion**

In the 1990s to present, the Government of Uganda has strenuously attempted to implement the principle of sustainable development through the enactment of laws on the management of the environment and natural resources. These laws have established institutional arrangements to superintend this process. The emphasis in these laws has been to create the necessary institutional coordination and harness the available synergies available in government for managing the resources. The participation of the public in achieving management objectives has been a key target of the law. The law has, therefore, emphasized the creation of the necessary avenues for public involvement through awareness raising. Another important trend in these developments has been the orientation of the law towards giving natural resources and the environment value by emphasizing economic and social instruments.

## CHAPTER TEN

### PUBLIC INTEREST LITIGATION IN ENVIRONMENTAL LAW: PRACTICE AND PROCEDURE IN UGANDA<sup>180</sup>

#### PITFALLS & LANDMARKS

*"And what is the argument for the other side? Only this that no case has been found in which it has been done before. That argument does not appeal to me in the least. If we never do anything which has not been done before we shall never get anywhere. The law will stand still while the rest of the world goes on and that will be bad for both."*

**Lord Denning PACKER-V-PACKER** [1953] 2 AER 127 @ 129

#### 10.0 Introduction

Public interest litigation describes legal actions brought to protect or enforce rights enjoyed by members of the public or large parts of it. It has been used as a tool of great social change in India, Pakistan, Bangladesh and the Philippines on such diverse issues as the environment, health and land issues.

According to *Bhagwati J, in Bandhua Mukti Morcha-v-Union of India* Air 1984 S.C;

*"Public interest litigation is not in the nature of adversary litigation but it is a challenge and an opportunity to the Government and its officers to make basic human rights meaningful to the deprived and vulnerable sections of the community and to assure them social and economic justice, which is the signature tune of our Constitution."*<sup>181</sup>

In Australia, the criteria used by the Public Interest Law Clearing House (Vic) Inc. and the Public Interest Law Clearing House Inc. (NSW) to determine public interest cases to support are that -

the matter must require a legal remedy and be of public interest which means it must:

- (a) affect a significant number of people not just the individual or;
- (b) raise matters of broad public concern or;
- (c) impact on disadvantaged or marginalized group; and
- (d) must be a legal matter which requires addressing *pro bono publico* ('for the

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<sup>180</sup> Phillip Karugaba. Mr. Phillip Karugaba is a Senior Partner with Adriko - Karugaba Advocates, and Spokesman of The Environmental Action Team (TEAN), an environmental advocacy NGO, Kampala, Uganda.

<sup>181</sup>Narayama: Public Interest Litigation [2<sup>nd</sup> Edition 2001]

common good')<sup>182</sup>

Public interest litigation is a new tool in the management of public affairs. It presents a strategic opportunity to engage the Judiciary in ordinary societal issues. It allows the public to jump from conferences tables and lamentations to strategic, decisive and enforceable action.

Article 39 of the Constitution of the Republic of Uganda gives a right to a clean and healthy environment. The said Constitution puts the Government under an obligation to protect the environment from abuse and degradation, to conserve the environment and to restore the environment where it has been polluted or degraded. Article 245 of the said Constitution enjoins the Government to make laws that will ensure that the environment is protected.

In other countries, such as South Africa, the Constitution provides the same right. Section 24 of the South African Constitution provides that -

*"Every person has the right to an environment that is not harmful to their health or well being."*<sup>183</sup>

The South African Constitution was framed in the negative to avoid importing in obligation upon the State to provide an environment conducive to a healthy well-being. The intention seems to have been that the right of action would arise only if something which is being done that adversely affects the environment and has a resulting negative impact upon the health and well being of any person, would constitute a right of action against pollution but not conservation, if strictly interpreted.<sup>184</sup>

The Ugandan Constitution, however, puts the obligations squarely in the hands of the state. These include providing, clean water, clean air, conservation of all natural resources, prevention of pollution of any form, among others. In other words, the Government is under Constitutional duty to ensure that the environment is safe and clean at all times; a task that is almost impossible considering the state of the economy. Uganda is still among the 25 poorest countries in the world. The Oxford Advanced Learners Dictionary<sup>185</sup> defines environment as natural conditions e.g. air, land and water in which we live on conditions and circumstances effecting people's lives. The National Environment Act, however, defines environment as –

*"the physical factors of the surroundings of the human beings including land, water, atmosphere, climate, sound, odour, taste, the biological factor of animals and plants and the social factor of aesthetics and includes both the natural and the built environment"*

A right to a clean and healthy environment would therefore almost encompass everything such as a provision of clean water, protection for diseases that result from poor sanitation, poor environmental conditions e.g. cholera, malaria, among others. Life and the environment are

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<sup>182</sup>PENNY MARTIN Defining and refining the concept of practicing in the public interest [Alternative Law Journal Vol. 28 Number 1 February 2003 PA]

<sup>183</sup> The Constitution of the Republic of South Africa Act 108 of 1998

<sup>184</sup> There will be a right of action against pollution but not conservation, if strictly interpreted.

<sup>185</sup> Oxford Advance Learner s Dictionary – Oxford University Press.

inseparable. The environment like life covers all forms of human existence. Life does not exist in a vacuum but in an environment conducive to it. That is why of all the known bodies in the universe, life so far exists, as we know it only on one planet, Earth.<sup>186</sup> This is simply because the "environment" on Earth is conducive to life. If the environment is changed significantly, it is likely that life will cease to exist on Earth as well. When conditions existed to support particular form of life e.g. the dinosaurs, they existed, but when environmental conditions set in to their detriment they became extinct. The existence or no existence of life or any form depends on the environment.<sup>187</sup>

In Pakistan, it has been held that the right to life also means and includes a right to a clean and healthy environment.<sup>188</sup> This means that even if the Constitution did not expressly provide for a right to a clean and healthy environment, the provision of the right to life would, by necessary implication, also cover this right.

Article 20(1) of the Constitution provides that fundamental rights and freedoms of the individual are inherent and not granted by the State. Further, article 20(2) of the same Constitution provides that the rights and freedoms of the individual and groups enshrined in this chapter shall be respected, upheld and promoted by all organs and agencies of Government and by all persons. This, therefore, means that Article 20(1) recognizes that fundamental rights are not granted by the Constitution but are inherent. The right to life being the most fundamental must be protected not only by ensuring that the person is not deprived of life deliberately. This assertion of the Constitution is further supported by Article 22(1) and 2 provides that -

*“ No person shall be deprived of life intentionally except in execution of a sentence passed in a fair trial by a court of competent jurisdiction in respect of a criminal offence under the laws of Uganda and the conviction and sentence have been confirmed by the highest appellate court. ”*<sup>189</sup>

*“No person has the right to terminate the life of an unborn child except as may be authorised by law.”*

The right to a clean and healthy environment is an inherent right to humankind, as the Supreme Court of the Philippines held in case of *Juan Antonio Oposa and Others vs Hon. Fulgencio Factoran and Another*.<sup>190</sup>

“As a matter of fact these basic rights need not even be written under the Constitution for they are assumed to exist from the inception of human kind, if they are now explicitly mentioned in the fundamental Charter. It is because of the well-founded fears of the framers that unless the rights to a balanced and healthy ecology and health are mandated as state policies by the Constitution itself.

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<sup>186</sup>The Impact of the Constitution of Environment Cheryl Loots Ass. Prof. of Law of the Witwatersrand South Africa

<sup>187</sup>Shehla Zia vs WAPDA Supra

<sup>188</sup>Supra per Salen Khetar J

<sup>189</sup>Constitution of the Republic of Uganda 1995 Supra

<sup>190</sup> Compendium of judicial decisions on matters related to environment, International decisions.(UNEP)



The same court went on to hold that the petitioner, in that case, had a right to sue on behalf of those not yet born "because every generation has a responsibility to the next generation to preserve the rhythm and harmony of nature further full enjoyment of a balanced and healthy ecology."

The Constitutional guarantee exists therefore not only for the present but also for the future generations, if this was now so the day would not be far when all else would be lost not only for the present generation but also for those to come which stand to inherit nothing but perched earth incapable of sustaining life.

### 10.1 The Enabling Law for Public Interest Litigation in Uganda

The bedrock of public interest litigation lies in Article 50(2) of the Constitution. It provides that:

*"Any person or organization may bring an action against the violation of another persons or group's human rights".*

Its simple language belies the problems that have beset its application. It is set against the backdrop of Article 50(1), which provides for the enforcement of individual constitutional rights. In the words, of the President of the Law Society Mr. Andrew Kasirye, this provision makes us *"our brother's keeper."*<sup>191</sup> By using an expression *"any person"* instead of say *"an aggrieved person..."*, it allows any individual or organization to protect the rights of another even though that individual is not suffering the injury complained of. Whenever there is an injury caused by any act/omission contrary to the Constitution, any member of the public acting *bonafide* can bring an action for redress of such wrong.

Another avenue to public interest litigation lies in Article 137(2), which allows any person who alleges a violation of the Constitution to have taken place to petition the Constitutional Court. Such a violation may stem from an act or omission of a person/organization or from an Act of Parliament being inconsistent with the Constitution. The article provides:

3) *"A person who alleges that -*

- (a) an Act of Parliament or any other law or anything in or done under the authority of any law; or any act or omission by any person or authority,*
- (b) is inconsistent with or in contravention of a provision of this Constitution, may petition the Constitutional Court for a declaration to that effect, and for redress where appropriate. "*

Justice Mulenga JSC in *Ismail Serugo-V-Kcc & Attorney General* [Constitutional Appeal No.2 of 1998] was emphatic that the right to present a constitutional petition was vested not only in the person who suffered the injury but also in any other person. This is particularly pertinent

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<sup>191</sup>Opening speech at Regional Workshop on Tobacco: "The Role of Civil Society Organisations in the development of Tobacco Control Legislation 18-20 August 2002.

since Article 3(4) of the Constitution imposes on every citizen of Uganda a right and duty at all times to defend the Constitution.

In environmental matters, it is also worthy of mention that section 71 of the National Environment Act empowers any person to apply for an environmental restoration order even though such person is not suffering any harm and has no interest in the matter.

There is also a now probably archaic S. 63(1) of the Civil Procedure Act (Cap. 65), which requires that suits for a public nuisance may be instituted by the Attorney General or two or more persons with the consent of the Attorney General.

## **10.2 Public Interest Litigation - Extending the *Locus Standi* Rule.**

The right to a clean and healthy environment has a corresponding duty to maintain the environment. The duty then extends the common law rule of *locus standi* and grants the right to carry individual action where it never existed before. Public interest cases may be instituted under common law. Public interest cases can be brought under the torts of nuisance, trespass or negligence. They may be actions brought under the rule in *Rylands Vs Fletcher*.<sup>192</sup> The procedure may be by representative action where one individual seeks leave of court to bring an action on behalf of others. The individual may also bring a test case, that is, an action whose result would benefit the public at large. In such a case, the remedies sought can include court declarations.

For every action under common law to be entertained in any civil court, however, the plaintiff must show that he or she has the *locus standi*.<sup>193</sup> to bring such an action. The common law position was stated by Justice Lugakingira in *Mtikila Vs Attorney General* as follows -<sup>194</sup>

*"In English common law the litigants' locus standi was the hand maiden of judicial review of administration actions. Whenever a private individual challenged the decision of an administrative body the question always arose whether that individual has sufficient interest in the decision to justify the courts intervention, traditionally, common law confines standing to litigation protection of public rights to the Attorney General and the Attorney General's discretion in such cases may be exercised at the instance of an individual."*

Over time, however, experience has shown that the interest of the public and the interests of Governments are not necessarily the same. The Attorney General may not be interested in taking up a matter which is of concern to the public. There are times especially in matters relating to constitutional rights, where the public and the Attorney General have opposing views and take adversarial positions. These matters need not be private and the plaintiffs or petitioners need not be directly affected. The courts recognizing the above have since the 1980's changed their

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<sup>192</sup>Supra

<sup>193</sup> Supra

<sup>194</sup>Supra

attitude towards the issue of *locus standi* as exemplified in the British case of *IRC vs National Federation of Self Employed and Small Business Ltd*<sup>195</sup> where Lord Diplock stated -

*"It would in my view be a great lacuna in our system of public law if a pressure group, like the federation or even a single spirited tax payer were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped."*

In Bangladesh, the Supreme Court held in the case of *Mohiddin Farooque vs Bangladesh* 48 DCR 1996 ruled that:

*"any person other than an officer may intervene or a way far without any interests in the case beyond the interest of the general people of the county having sufficient interest to the matter to dispute is qualified to be a person aggrieved and can maintain an action for judicial redress of public injury arising from the breach of some public duty or for violation of some provision of the constitution or law and seek enforcement of such public duty and observance of such constitution or legal provision."*<sup>196</sup>

Many common law jurisdictions, as is shown later on in this handbook, have adopted a very liberal approach on the issue of *locus standi* rejecting the old strict standards as outdated. This has been due to pressure from the public, the bar and also due to strong judicial activism, especially in the Far East countries, where courts are no longer bound by outdated and out-modeled legal technicalities.

Article 50 (1) not only grants locus standi to any person whose fundamental or other right, which includes a right to a healthy and clean environment, but it also gives locus to bring an action where such a right is under threat. The Article acts both as a shield and as sword. One does not have to prove injury or damage were proof of threatened injury or damage is enough not only to bring an action but also get a remedy.<sup>197</sup>

The reading of Article 50 (1) may seem to refer to a person whose right has been infringed or threatened to be infringed. In other words it may seem to indicate that the plaintiff must show that his right is being infringed or under threat of infringement but Article 50 (2) clearly indicates what a plaintiff needs to show is that a right under the Constitution is being infringed or threatened; it does not have to be his right. This emphasizes the point that violation of any human or fundamental right of one person is violation of the right of all.

"The enforcement of these rights therefore is a mechanism for the enforcement of fundamental rights which can be enjoyed by an individual alone in one of his individual rights is concerned but which can also be shared by an individual in common with others when the rights pervade and extend to the entire population".<sup>198</sup>

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<sup>195</sup> Supra

<sup>196</sup> Mohinddin Farooque vs Bangladesh 48 DCR 1996

<sup>197</sup> Mitikula vs Attorney General 's Case No.5/93 High Court Tanzania Supra

<sup>198</sup> 1981 2 All ER & 107

Article 50 therefore is a tool for an individual to enforce his own right, but he may use the same tool to enforce the rights of others in the same way as a group would enforce its rights as a group or enforce a right of an individual outside the group. Justice Mustapha Kamal of the Bangladesh Supreme Council Court made the statement below while interpreting Article 102 of his Country's Constitution and went on further to say that the enforcement Article (similar to Uganda's Article 50) is .....

"..... therefore an instrument and mechanism containing both substantive and procedural provisions by means of which the people as a collective personality and not merely is a conglomerate of individuals, have devised for themselves a method and manner to realize the objectives and purposes, policies, rights and duties which they have set out or themselves and which they have strewn over the fabric of the constitution."<sup>199</sup>

Uganda has therefore moved away from the traditional rule to locus standi that judicial remedy is available "only to a person who is personally aggrieved." This principle is based on the theory that the remedies and rights a re-co-operative and therefore only a person whose own right is violated is entitled to seek remedy. This principle only makes sense in private law where it can be applied with some strictness.

There exists great similarity between the Constitution of Uganda and that of the Republic of Bangladesh, Article 7 (1) of The Bangladesh Constitution reads as follows-

"All powers in the Republic belong to the people and their exercise on behalf of the people shall be effected only under and by the authority of the Constitution."

Article (1) of the Constitution of the Republic of Uganda 1995 reads as follows-

"All the power belongs to the people the Republic of Uganda who shall exercise it in accordance with this Constitution."

Interpreting a similar provision in the Constitution of Bangladesh Justice LATIFUR RAHMAN had this to say-

"The Constitution contemplates a society based on securing all possible benefits of its people namely, democratic, social, political and equality in justice in accordance with law. The Constitution is the supreme embodiment of the will of the people of Bangladesh and as such all actions must be taken for the welfare of the people. For whose benefits all powers of the Republic in the people, and the exercise of such powers shall be effected through the supremacy of the Constitution. If justice is not easily and equally accessible to every citizen there then hardly be a rule of law."<sup>200</sup>

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<sup>199</sup>Supra

<sup>200</sup>Dr. Muhinddin Faroque v Bangladesh, represented by the Secretary Ministry of Irrigation Water Resources & Food control and others

Justice PICKERING of the Transkei Supreme Court of the Republic of South Africa on June 21 1996 delivering his judgment in the case of *Wildlife Society of Southern Africa Vs Minister of Environmental Affairs and Tourism of the Republic of South Africa and Others*, Case No. 1672 of 1995<sup>201</sup> had this to say on the issue-

"I am not persuaded by the argument that to afford locus standi to a body such as the first applicant in the circumstances such as these would open the flood gates to a torrent of frivolous or vexatious litigation against the state by cranks or busy bodies. Neither am I persuaded given the exorbitant costs of the Supreme Court Litigation that should the law be so adopted cranks and busy bodies would indeed flood the courts with vexatious or frivolous applications against the state. Should they be tempted to do so I have no doubt that an appropriate order of costs would soon inhibit their litigation. In any event whilst cranks and busy bodies who attempt to abuse legal process do not doubt exist.

I am of the view that lawyers are sometimes orderly apprehensive and sometimes pessimistic about the strength of their numbers. The middle some cranks and busy body with no legal interest in a matter whatsoever, mischievously intent on gaining access to the court in order to satisfy some personal caprice or obsession is, in my view as has been often a spectral figure then is reality."

This does not, however, mean that courts must allow anybody who brings action purporting to be in the public interest as the India Supreme Court Judge Ghandi Jaising noted.

" But we must hasten to make it clear that the individual who moves the court for judicial redress in case of this kind must be acting bonafide with a view of vindicating the cause of justice and if he is acting for personal gain or private profit or out of political motivation or other oblique considerations the court should not allow itself to be activized at the instance of such a person"<sup>202</sup>

In public interest litigation, unlike traditional dispute resolution mechanism, there is no determination or adjudication of individual rights. While in the ordinary conventional adjudication the party structure is merely bipolar and the controversy pertains to the determination of the legal consequences of past events and the remedy is essentially linked to and limited by the logic of the array of the parties. In a public interest action the proceedings cut across and transcend these traditional funs and inhibitions.<sup>203</sup> The grievance in a public interest action, generally speaking is about the content and conduct of governmental action in relation to the constitutional or statutory rights of segment of society and in certain circumstances the conduct of governmental policies.<sup>31204</sup> All this put the ball squarely in the court of the judiciary.

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<sup>201</sup>Transkei Supreme Court Case No. 1672 of 1995

<sup>202</sup> Citation of case Indian Judge See. Page 42

<sup>203</sup> Attorney General vs Tinyefunza Supreme Court Constitution Appeal No.1 of 1998

<sup>204</sup>Rwanyarare & Another vs Attorney General (No.2) Constitution Petition 11/97

The Constitution does not contain empty phrases that are incapable of being given full effect by the judiciary. Much as the power of the people is vested in the Executive under the Constitution, it is also vested in the judiciary on behalf of the same people.

In his rather politico-judicial reasoning to support public interest litigation on behalf of the poor, indigent and unprivileged members of the Tanzanian Society by Public spirited organizations such as The Environmental Action Network Ltd., Rugakingira, J. of the High Court of Tanzania (as he then was) had this to say in the case of *Rev. CHRISTOPHER MTIKILA –Vs- THE ATTORNEY-GENERAL in Tanzanian Civil Suit No.5 of 1993 (unreported): -*

*“The relevance of public litigation in Tanzania cannot be over-emphasized. Having regard to our socio-economic conditions, these (sic) development promise more hopes to our people than any other strategy currently in place. First of all, illiteracy is still rampant. We were recently told that Tanzania is second in Africa in wiping out illiteracy but that is a statistical juggling, which is not reflected on the ground. If we were that literate it would have been unnecessary for Hanang District Council to pass by laws for compulsory adult education which were recently published as Government Notice No. 191 of 1994. By reason of this illiteracy a greater part of the population is unaware of their rights, let alone how the same can be realised.”*

Secondly, Tanzanians are massively poor. Our ranking in the World on the basis of per capita income has persistently been the source of embarrassment. Public interest litigation is a sophisticated mechanism which requires professional handling. By reason of limited resources that the vast majority of our people cannot afford to engage lawyers even where they are aware of the infringement of their rights and the perversion of the Constitution. Other factors could be listed out but perhaps the most painful of all is that over the years since Independence Tanzanians have developed a culture of apathy and silence. This, in large measure is a product of institutionalized mono-party politics which, in its repressive dimension, like detention without trial sapped up initiative and guts, the people found contentment in being receivers without being seekers. Our leaders very well recognize this, and the emergence of transparency in governance they have not hesitated to affirm it. When the National Assembly was debating Hon. J. S. Warioba’s private motion on the desirability of a referendum before some features of the Constitution were tampered with, Hon. Sukwa said Sukwa, after the interruptions by his colleagues, continued and said -----

“ Given all these and other circumstances., if there should spring up a public-spirited individual and seek the Court’s intervention against legislation or actions that pervert the Constitution, the Court, as guardian and trustee of the Constitution and what it stands for, is under an obligation to rise-up to the occasion and grant him standing”.

### **10.3 Practicing Public Interest Litigation in Uganda**

There are several issues that have beset practicing public interest litigation in the area of environmental law in Uganda. As jurisprudence evolves some of these issues will become a settled matter. This section, therefore, brings out those procedures and legal practices that environmental law is facing in Uganda as of 2003.

### 10.3.1 Procedure in Public Interest Litigation

The focus here is on procedure under Article 50 of the Constitution. The background is that the procedure of enforcement of the rights under the 1967 Constitution was only put in place in 1992 under the Fundamental Human Rights (Enforcement Procedure) Rules S.I No. 26 of 1992.

What has given rise to much confusion here is the dicta in the case of *Uganda Journalists Safety Committee-V-Attorney General [Constitutional Petition No.7 of 1997]* in which the Supreme Court agreed with the Attorney General's argument that no rules had made for the enforcement of Article 50. This has been further compounded by the High Court ruling in *Jane Francis Amamo- V-Attorney General [Misc. Application No. 317 Of 2002 arising from H.C.C.S No. 843 of 2001]* in which the learned trial Judge said in dismissing an action under Article 50,

*"The Constitution clearly and in no uncertain words said Parliament was to make laws for the enforcement of the rights and freedoms under the said Constitution. In my humble opinion this means that Courts can no longer apply the Rules passed in 1992. That would mean to me that until Parliament makes laws under Article 50(4), Article 50(1) is in abeyance."*

Aside from the fact that *Amamo* was wrongly decided, it was said that the Court was turning away a citizen, who was complaining of a violation of his fundamental rights, on basis of lack of procedure. The *Amamo* decision contrasts rather sharply with the approach of the Tanzanian Courts when faced with actions to enforce human rights before the relevant rules were made. In *Chumcha Marwa -Vs- Office In charge /Musoma Prison [Misc. Crim Case No.2 Of 1988] (Mwanza)* Justice Mwalusanya ruled that since the Articles provided that Government "may" enact such rules, then it was not a must that the rules were enacted prior to the enforcement of the Bill of Rights.<sup>205</sup>

The Tanzanian Court of Appeal took the same position in *DPP- V -DAUDI PETE* [1991] LRC (Const) stating that until Parliament passed the relevant legislation the enforcement of the basic rights, freedoms and duties may be effected under the procedure that is available in the High Court in the exercise of its original jurisdiction, depending on the nature of the remedy sought.<sup>206</sup>

This certainly appears to be the more deserving approach, as every effort should be made to give effect to the Constitutional protections and fundamental human rights enshrined in the Constitution, as the supreme law of the land.

It is most strange that the Rules Committee made all the other rules prescribed in S.51 (2) of the Judicature Act 1996, being Supreme. Court Rules, Court of Appeals Rules, Constitutional Court Rules but fell just short in making new rules for the enforcement of fundamental human rights.

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<sup>205</sup>Cited in JUSTICE KAHWA LUKAKINGIRA: The Judiciary and the interpretation of Tanzania's Constitution: Problems and Prospects [East African journal of Peace and Human Rights Vol. 7 1 2001 p.1]

<sup>206</sup> Ibid

Hitherto the High Court has had no difficulty in hearing Article 50 applications. In *National Association Of Professional Environmentalists vs AES Nile Power Ltd* [Misc. Application No. 268 Of 1999] probably the first action under Article 50, Court was quite clear that the correct procedure for the Plaintiffs to have followed in that case was by notice of motion as prescribed under the 1992 Rules.

In the cases of *TEAN vs Attorney General And NEMA* [Misc. Application No. 39 of 2001], [*Non-Smokers Rights Case*] and *TEAN vs BAT* [Misc. Application No. of 2002] (*Warning Labels*), *Pastor Martin Sempa vs Attorney General* [Misc. Application No. 71 of 2002] (*on Electricity Tariffs*), *Greenwatch vs Attorney General* [Misc. Application No. 140 of 2002] (*on polyethylene carrier bags*) the Judges had no problem in applying the 1992 Rules. It therefore appears and is certainly hoped that the *Amamo* line of decisions will remain isolated. Under the 1992 Rules, the procedure is by notice of motion and affidavit filed in the High Court.

With respect to Article 137(3) petitions to the Constitutional Court, the procedure is governed by legal Notice No.4 of 1996 Rules of the Constitutional Court (Petitions for Declarations under Article 137 of the Constitution) Directions 1996. These Rules were made under S.51 (2)(c) of the Judicature Act, 1996.

An important note is that to proceed under Article 50, the matter must relate directly to a fundamental human right in the Constitution. Pastor Martin Sempa's action (*Supra*) was brought to object to new electricity tariffs that had been imposed without giving the members of the public a hearing and that accordingly the Applicant's right to fair treatment under Article 42 of the Constitution. The Learned Trial Judge struck out the action on the ground that it did not disclose violation of a Constitutional right. He ruled

*"It is not enough to assert the existence of a right. The facts set out in the pleadings must bear out the existence of such a right and its breach would give rise to relief."*

Similarly in *Amamo* (*supra*), the Trial Judge was of the view that Article 50 was not suitable for actions for wrongful dismissal.

### **10.3.2 Competent Court**

Article 50 of the Constitution prescribes the forum for enforcement of human rights actions as a "competent court." The expression is not defined. The 1992 Rules, however, state that the application shall be filed in the High Court.

For Article 137 actions the correct forum is the Constitutional Court. The challenge always arises in determining whether the action should be under Article 50 or Article 137.

Wambuzi CJ (as he was then) in *Attorney General-V-David Tinyefuza* [Constitutional Appeal No.1 Of 1997] said:

*"In my view, jurisdiction of the Constitutional Court is limited in Article 137(1) of the*



*Constitution. Put in a different way no other jurisdiction apart from interpretation of the Constitution is given. In these circumstances I would hold that unless the question before the Constitutional Court depends for its determination on the interpretation or construction of a provision of the Constitution, the Constitutional Court has no jurisdiction"*

In the case of *Ismail Serugo -V-KCC & A.G [Constitutional Appeal No.2 Of 1998]*, the Court ruled that in the course of handling Article 137 matters the Constitutional Court could deal with Article 50 matters. Unless the action requires interpretation of the Constitution, however, the Court of first instance should be the High Court.

This use of the word "interpretation" in the mandate of the Constitutional Court prescribed in Article 137(1) of the Constitution has given rise to some difficulty. Actions have been dismissed in the Constitutional Court on the grounds that the requisite remedy is not Article 137 interpretation but Article 50 enforcement.

In *Alenyo-V-The Attorney General [Constitutional Petition No.5 Of 2002]* the Court considered the word "interpretation"

*"The Constitution does not define the word "interpretation". However Article 137(3) gives a clear indication of what the word means...*

*"We hold the view that the allegations made to the Constitutional Court, if they are in conformity with Article 137(3), give rise to the interpretation of the Constitution and the Court has jurisdiction to entertain them...*

*In the instant petition, the petitioner alleges that the Law Council is guilty of commissions or omissions which are inconsistent with or in contravention of the Constitution. He has petitioned this Court for a declaration to that effect. In our judgment these are the types of actions envisaged by Article 137(3)(b). He is not stating as a fact that he has a definite right that should be enforced. He is alleging that the conduct of the Law Council has violated his rights guaranteed by specified provisions of the Constitution and this Court should so declare. In order to do that the Court must determine the meaning of the specified provisions of the Constitution allegedly violated and whether the conduct complained of has actually violated those provisions. The carrying out of the exercise by the Court is an interpretation of the Constitution. It is not an enforcement of rights and freedoms. The Court is being called upon to interpret the Constitution. It can make a declaration and stop there or it can grant redress if appropriate. Whether the alleged acts and omissions of the Law Council contravene or are inconsistent with the Constitution is not relevant to the issue of jurisdiction. It is what the Court is called upon to investigate and determine after it has assumed jurisdiction. It is not relevant either that there is a remedy available to the petitioner elsewhere. That alone cannot deprive the Court of the jurisdiction specifically conferred on it by Article 137.*

**WAMBUZI CJ** said in *Serugo* (supra) that;

*"In my view for the Constitutional Court to have jurisdiction the petition must show on the face of it, that interpretation of a provision of the Constitution is required. It is not enough to allege merely that a constitutional provision has been violated. If therefore any rights have been violated as claimed, they are enforceable under Article 50 of the Constitution by another court"*

The position was turned on its head by Justice Kanyeihamba **in** *Tinyefuza Case* and despite its length, its is most instructive to set it out in *extenso*;

*"The marginal note to Article 137 states that it is an article which deals with questions relating to the interpretation of the constitution. In my opinion, there is a big difference between applying and enforcing the provisions of the constitution and interpreting it. Whereas any court of law and tribunals with competent jurisdictions may be moved by litigants in ordinary suits, applications or motions to hear complaints and determine the rights and freedoms enshrined in the Constitution and other laws, under Article 137 only the Court of Appeal sitting as the Constitutional Court may be petitioned to interpret the Constitution with a right of appeal to this Court as the appellate Court of last resort.*

*Under the Uganda Constitution, courts and tribunals have jurisdictions to hear and determine disputes arising from the application of such articles as 20, 23, 26, 28, 31, 32, 35, 42, 44, 45, 50, 52, 53, 67, 84, 107, 118 and generally under chapter 8 of the Constitution. In my opinion, Article 137(1) and 137(3) are not mutually exclusive. I do believe that the jurisdiction of the Constitutional Court as derived from Article 137(3) is concurrent with the jurisdiction of those other courts which may apply and enforce the articles enumerated above, but there is an important distinction that I see and that is that for the Constitutional Court to claim and exercise the concurrent jurisdiction, the validity of that claim and the exercise of the jurisdiction must be derived from either a petition or reference to have the Constitution or one of its provisions interpreted or construed by the Constitutional Court. In other words, the concurrent original jurisdiction of the Court of Appeal sitting as a Constitutional Court can only arise and be exercised if the petition also raises question as to the interpretation or construction of the constitution as the primary objective or objectives of the petition. To hold otherwise might lead to injustice and, in some situations, manifest absurdity.*

*Take the case of a pupil who comes late in a primary school. The teacher imposes a punishment upon the pupil who is required to clean the classroom after school hours. Can it have been the intention of the framers of the*

*Constitution that as an alternative to the pupil's right to complain and seek redress from the head teacher of the school board of governors, the pupil would be entitled to petition the Constitutional Court under Article 137(3)(b) on the grounds that his rights under Article 25(3) have been violated in that he or she has been compelled to do "forced labour"? A prison officer opens and reads a sealed letter addressed to one of the inmates suspecting that the letter contains secret information advising the prisoner how to escape from jail.*

*Would it be reasonable for the prisoner to petition the Constitutional Court on the grounds that the opening of his mail was inconsistent with Article 27(2) of the Uganda Constitution which provides that no person shall be subject to interference with the privacy of that person's home, correspondence, communication or other property or should the prisoner complain to the Minister of State responsible for prisons?*

*A resident in suburbia is constantly awakened from sleep by the loud noise from a disco nearby. Should the resident petition the Constitutional Court under Article 43(1) on the ground that the enjoyment of music by musicians and dancers has directly interfered with the right of quiet and peaceful enjoyment of the property? Or should the resident be advised to go to the local government council for possible reconciliation and redress? In my opinion, it could not have been the intention of the framers of the Uganda Constitution that such matters inconsistent as they may appear with the provisions of the Constitution would have direct access to the Court of Appeal which happens to be one the busiest courts in the land, entertaining appeals from other diverse courts and judges.*

*This Court must give guidelines on these matters by construing the Constitution so as to avoid these absurdities and so direct such suits and claims to lower tribunals, magistrates' courts and, where appropriate to the High Court.*

*It is to be noted that the Constitutional Court consists of not less than five seven judges of the Court of Appeal. The Court hears many appeals involving grave and important issues of public importance. It cannot have been in the contemplation of the makers of the Constitution for the present or the future that in the event of such small claims going direct to the Court of Appeal as a Constitutional Court, the Court of Appeal should be in a position of deciding whether or not to abandon appeals involving death sentences, treason and gross violations of other human rights originating from the High Court and entering the Court of Appeal by way of ordinary procedure in order first to resolve those trivial matters arising from allegations that they are inconsistent with the provisions of the Constitution under Article 137(3) and (7).*

*Therefore it is my opinion that while the Constitutional Court would have jurisdiction to hear and determine the petition, in exercising that jurisdiction in this case it exceeded its powers by taking into consideration and determining matters not contemplated under Article 137. I do not believe that the Constitutional Court was correct in accepting the arguments that Article 97 of the Constitution which is merely an enabling Article had been violated when in fact the only relevant law which needs to be considered and taken into account were the Acts of Parliament and other laws in which the immunities and privilege contemplated by that article are clearly defined, described and limited. Article 97 does not, by itself create any immunities or privileges for which the respondent could have taken advantage of. It merely directs Parliament to create, define and describe them. "*

### **10.3.3 The Disabling Law**

By "disabling law" is referred to that body of jurisprudence that has arisen from the preliminary objections raised by the Attorney General and other respondents to have actions struck out. The "objections" are a popular form in which they are raised and a discussion of the relevant cases and some answers to the objections are given. Hopefully, what was a shipwreck for those who went before will become a seamark for those to come.

#### **(a) "The applicant has no locus standi to bring this action"**

This has been raised severally in Article 50 proceedings

The Constitutional Court in *Rwanyarare-V-Attorney General [Constitutional Petition No. 11 Of 1997]* found it difficult to accept that an action could be brought on behalf of an unnamed group of persons. **Justice Manyindo DCJ** (then) ruled that the implications on costs and the doctrine of *res judicata* would be too great. To quote the Learned Judge:

*"We cannot accept the argument of Mr. Walubiri that any spirited person can represent any group of persons without their knowledge or consent. That would be undemocratic and could have far reaching consequences. For example ... how would the Respondent recover costs from the unknown group called Uganda Peoples' Congress? What if other members of Uganda Peoples' Congress chose to bring a similar petition against the Respondent, would the matter have been foreclosed against them on the grounds of res judicata. "*

The petitioners in that case sued on behalf of the members of Uganda Peoples' Congress (UPC) alleging that their political rights had been infringed. The action was brought before the Constitutional Court under Articles 50 and 137 and the Court went on to hold that it could not be brought on behalf of unnamed persons.

The question arose again in the Non-Smokers rights case – *TEAN vs Attorney General and NEMA*. This was an action brought on behalf of non-smokers for declarations that smoking in public places

violated the non-smokers constitutional rights to a clean and healthy environment and to life. It went without saying that all the nonsmokers in Uganda could not be and were not named in the motion. The Attorney General raised the objection that the action was not maintainable on the basis of the Rwanyarare decision.

The Court overruled the objection and found that in public interest litigation there was no requirement for *locus standi*. The Court relied on the English decision of *IRC vs Exp. Federation Of Self Employed* [1982] AC 643 and the Tanzanian decision of *Rev. Mtikila vs Attorney General* [H.C.C.S No.5 Of 1993]. The Court further ruled that the interest of public rights and freedoms transcend technicalities, especially as to the rules of the procedure leading to the protection of such rights and freedoms. The Judge ruled that it was compelling that the Applicant would stand up for the rights and freedoms of others and he would accordingly grant them a hearing.

In *Mtikila*, (supra) the Tanzanian Court relied on a similar provision in the Constitution which enabled citizens to bring actions in defence of the Constitution. The Court found that this provision vested citizens with both a personal and a communitarian capacity. The Court further justified public interest litigation based on the prevailing socio-economic conditions; the low literacy level, financial disablement and the culture of apathy and silence deriving from years of ideological conditioning. To the Court this justified any public-spirited individual taking on the burden of the community and it would be contrary to the Constitution to deny him or her standing.<sup>207</sup>

This reasoning was echoed again in *BAT Ltd vs TEAN* [Misc. Application No. 27 of 2003 Arising from Misc. Application No. 70 of 2002] where the trial Judge overruled an objection by the Applicant who sought to say that since the words "public interest" did not appear in our Constitution as they did expressly in the South African Constitution then public interest litigation was prohibited. The learned Judge stated:

*"It is elementary that "person", "organizations" and "groups of persons" can be read into Article 50(2) of the Constitution to include "public interest litigants" as well as all the litigants listed down in (a) to (e) of the South African Constitution. In fact the only difference between the South African provisions (i.e. Section 38) and our provision (under Article 50(2)) is that the former is detailed and the latter is not. That is my considered view based on the reality that there are in our society, persons and groups of persons whose interest is not the same as the interest of those who Lord Diplock referred to as "spirited" persons or groups of persons who may feel obliged to represent them i.e. those person or groups of persons acting in the public interest. To say that our Constitution does not recognize the existence of needy and oppressed persons and therefore cannot allow actions of public interest groups to be brought on their behalf is to demean the Constitution"*

Unfortunately no reference was made to the Rwanyarare Case in the ruling and the Attorney General's application for leave to appeal on this point was struck out as being out of time.

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<sup>207</sup>LUGAKINGIRA (Ibid)

*Locus standi* in the context of actions to enforce environmental rights also holds some potential issues. As we have seen from the treatment of Article 50, it entitles any person to enforce any of the constitutional rights including the right to a clean and healthy environment (Article 39).

Article 17(j) of the Constitution makes it the duty of every citizen, including members of the Bench, to create and protect a clean and healthy environment. In *Byabazaire Thadeus-V-Mukwano Industries [H.C.C.S No. 466 Of 2000]*, it was held that it was only the National Environment Management Authority (NEMA) that could bring an environmental action, based on the provisions of S.3 of the National Environmental Act.

A purposive reading of the Constitution read with the National Environment Act should open the gates to all citizens seeking to do their duty in protecting the environment.

(b) ***“The applicant failed to comply with O.1 r.8 of the Civil Procedure Rules (CPR) for bringing representative suits”***

Order I rule 8 of the CPR provides -

*"where there are numerous persons having the same interest in one suit, one or more of such persons may with the permission of the Court, sue or be sued, or may defend in such suit on behalf of or for the benefit of all persons so interested."*

This is the basis for representative suits, where all parties have the same interest and therein lies the distinction between representative actions and public interest litigation. The issue arose in the Non-Smokers rights case where it was contended that TEAN did not have the authority of the non-smokers in Uganda to bring an action on their behalf. It was contended that TEAN should have first sought an order under O.Ir.8 CPR to bring the action.

The Court found O.I r.8 inapplicable in so much as the Applicant, did not have the same interest as the non-smokers on whose behalf the action was being brought. The requirement of having the same interest is key to the application of O.I r.8 while there is no such requirement in Article 50 of the Constitution. The issue arose again in *British American Tobacco Uganda Ltd-V-Tean [Misc. Application No. 70 Of 2002]*. The Court dealt with the *Rwanyarare* case on the point of whether one could sue for unnamed other persons without their authority and properly distinguished it.

The learned Judge stated:

*"I do not agree at all with Counsel's argument that no distinction can be drawn between these groups of persons and the group of persons represented or purported to be represented by Dr. Rwanyarare and others in Constitutional Petition No. 11 of 1997.*

*The distinction is quite obvious; Dr. Rwanyarare and another were representing the group described in the application or "specific and identifiable existing persons or*

*groups". Such group is the one referred to as Uganda Peoples Congress. With due respect to the Constitutional Court [they] cannot have been talking about the type of persons I have referred to above namely; the children, the disabled and the illiterates. These are persons who cannot be served under O1r.8 CPR, the reasons being they are not easily identifiable; they cannot be served as they would have no capacity to respond with a view to requesting to be joined in the action and they have no similar interest with those who represent them. To say that either these people are lumped together with the members of Rwanyarare's interest or that they do not fall under the Constitution in Article 50(2) of the Constitution is to belittle the foresight of the framers of the Constitution. "*

Later in the judgment

*"Dr. Rwanyarare and another had similar interest with fellow UPC members. They could therefore sue on behalf of the fellow members of UPC and actually and logically O.1r.8 CPR should apply. The same should apply to members of a football club, of a golf club or of a trade union. But the question is can the rule apply to groups of people who because of inability or incapability engendered by say ignorance, poverty, illiteracy, etc cannot sue or be sued or defend a suit for the simple reasons that apart from being indigent, they cannot even identify their rights or their violations. These are the groups who badly need the services of "public interest groups" like TEAN to bring action on their behalf under what in paragraph 38(d) of the South African Constitution is referred to as "public interest persons" but who have no similar interest on the action with those they represent.*

*It cannot be denied that such group of persons abound in our society and we cannot hide our heads in the sand by saying that the Constitution does not expressly mention them and therefore they must be excluded from the Constitutional provision regarding recourse to remedies when rights are violated. It is to be remembered that such groups cannot be served either directly or indirectly. They have neither postal address nor telephones. Their fate depends entirely on the public interest litigation groups or persons and they are not personally identifiable; yet they exist and can be identified only as a group or groups.*

*The Constitution cannot escape from authorizing representative action without interest sharing with those who represent them. That is why Article 273 of the Constitution becomes handy because the rules of procedure [O.1r.8] are in this respect, rendered inoperable by the Constitution. Needless to say that it would be illogical to argue that actions brought by such persons or groups of persons for the redress of the violation of their inalienable rights should be governed by the procedure under O.ir.8CPR. The procedure cannot govern them simply because they do not share the concerns of violating their rights with those who bring action on their behalf. "*

A subsequent case, the polyethylene carrier bags case (supra) also followed the reasoning in the Non-Smokers case on distinguishing representative suits from public interest litigation.

There is a strategic reason for using such "an outsider" in public interest litigation as opposed to representative suits in some matters. In the case of *Siraji Waiswa vs Kakiira Sugar*, [H.C.C.S No. 69 of 2001] the Plaintiffs brought an O.1 r.8 representative action to restrain the Defendants from depriving them of their woodlots in the Butamira Forest reserve.

The Court ruled that the suit was effectively and fully withdrawn by the lead Plaintiff when he signed a notice of withdrawal, even though he did so improperly without the full consent of the parties he was representing. The situation was remedied by the woodlot farmers filing a fresh suit and having all of them remain as independent plaintiffs.

If, however, the civil society groups that backed the woodlot farmers had in the first place, brought the action themselves on behalf of the woodlot farmers, this could have been avoided and it is submitted, the trial would have proceeded much faster.

**(c) *"The applicant did not give statutory notice"***

This refers to the requirement under the Civil Procedure (Limitation and Miscellaneous Provisions) Act (Cap. 72) as amended, that a 45-day notice be issued before commencing any proceedings against the Government, or any scheduled corporation.

This was another ground of objection in the Non-Smoker's rights case. Fortunately the matter had already been adequately laid to rest in the previous decisions of *Rwanyarare vs Attorney General* [Misc. Application No. 85 Of 1993] and *Okecho vs Attorney General*. [Misc. Application No. 124 Of 1999].

In the RWANYARARE, (1993) (supra) Court considering the equivalent Article of the 1967 Constitution and the 1992 Rules, found that the Civil Procedure (Limitation and Miscellaneous Provisions) Act (Cap. 72) did not apply to actions to enforce human rights. The Learned Judge found that it would be incompatible with human rights enforcement.

**(d) *"The matter is Res Judicata"***

Certainly it would appear from the wording of S.7 Civil Procedure Act (Cap. 71) that the doctrine of *res judicata* therein prescribed, does apply. The doctrine provides that once a matter has been heard and determined by a competent court, it cannot be tried again. Explanatory note no. 6 under this section, provides that

*"where persons litigate bonafide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall for the purposes of this section be deemed to claim under the person so litigating"*

It is however suggested that the construction would be stretching the interpretation of the section to cover a form of action not anticipated by nor created by the Civil Procedure Act. Public interest litigation is a creature of the 1995 Constitution and it cannot be limited by earlier Act



that is premised on requirements of *locus standi*. Attractive that argument may be the practical problem arose in *Norbert Mao-V-Attorney General [Constitutional Petition No.1 Of 2002]*. In that case, the Petitioner brought the action on behalf of 21 persons from his constituency for declarations under Article 137 and for redress under Article 50, arising from an incident in which UPDF officers attacked a prison and forcibly took away 20 prisoners and killed one in the process.

Unknown to the petitioner another action had been filed and had proceeded to judgment. *Ronald Regan Okumu-V-Attorney General [Misc. Application No. 0063 of 2002]* had been filed in the High Court of Gulu under Article 50 seeking similar relief.

The Constitutional Court dismissed the petition on the plea of *res judicata* and in accordance with that doctrine, ignored the petitioner's pleas that there were important constitutional declarations sought that had not been and could not be addressed in the lower court. The doctrine of *Res Judicata*, allows a litigant only one bite. It prevents a litigant, or persons claiming under the same title from coming back to court to claim further relief not claimed in the earlier action. Accordingly, Mao, like the Dickensian character Oliver Twist, could not ask for more.

**(e) A respondent?**

The 1992 Rules require that the Attorney General be served. It is not the same thing as requiring that he be named as a party. In considering similar provisions under Article 137, in *SERUGO* (supra) the Court ruled that a petition could be made *ex parte*, although the Attorney General could be joined at the instance of the Court.

The Constitutional Court has power to entertain a petition that does not name a respondent but may of its own motion join the Attorney General. Lack of a respondent does not in itself make the petition incompetent. [*Dr. James Rwanyarare & Badru Wegulo vs Attorney General (Constitutional Appeal No.1 of 1999)* *Paulo Ssemwogere vs Attorney General (Constitutional Appeal No.1 of 2000)*].

In *Zachary Olum & Julie Rainer Kafire [Constitutional Petition No.6 of 1999]* the Court took issue with the Attorney General raising a preliminary objection that the petition did not show any liability of Government and that consequently the petition did not disclose a cause of action against the Attorney General. Court followed earlier decisions of *Ssemwogerere & Olum vs Attorney General And Rwanyarare & Another [Constitutional Petition No.5 of 1999]*, which held that in matters of great public interest, the Attorney General should be made a party even by Court on its own motion. Court therefore found it remarkable that the Attorney General would seek to be struck out of a petition seeking to strike down a provision of law concerning an important organ of state.

In **BAT vs TEAN** an attempt was made to argue that a private organisation cannot be named as a respondent in an action for enforcement of human rights. It was argued that as between private citizens only municipal law could be enforced. The premise for this is the theory of vertical versus horizontal application of the Constitution that the Constitution applies as between citizen and state and not as between private citizens.

Unfortunately the point was not addressed. It however seems settled by Article 20(1), which provides that all shall be bound by the Constitution.

As was stated in *Sarah Longwe vs Intercontinental Hotels (1993) LRC 221* this would be tantamount to saying that a private organization was above the Constitution.

**(f) *"There is no cause of action"***

This argument arises from the fact that there is no liability in the usual sense on the part of the Attorney General for say an Act of Parliament breaching the Constitution. In this light, judged by the ordinary standards for disclosure of a cause of action", there would be none.

However the subtle distinction was made in *SERUGO* (supra), by Mulenga JSC between a cause of action in an ordinary civil suit and a cause of action in a constitutional petition. He stated:

*"A petition brought under this provision (Article 137), in my opinion sufficiently discloses a cause of action, if it describes the act or omission complained of and shows the provision of the Constitution with which the act or omission is alleged to be inconsistent with or which is alleged to have been contravened by the Act or omission and prays for a declaration to that effect. It seems to me therefore that a cause of action in tort or contract as described in AUTO GARAGE-V-MOTOKOV. Thus apart from the drafting requirement introduced through the Rules under Legal Notice No.4 of 1996, that the Petitioner be described as "aggrieved" it is not an essential element for the petitioner's right to have been violated by the alleged inconsistency or contravention."*

**(g) *"The affidavit in support is defective leaving the application without evidence"***

In *Charles Mubiru-V-Attorney General [Constitutional Petition No.1 Of 2001]* the petitioner contended that the statutory law relating to the grant of bail were unconstitutional. The petitioner was released on bail before the determination of the petition and it was accordingly withdrawn. The Court however chose to deliver a ruling on preliminary objections raised earlier one of which was an objection to the affidavit in support of the petition.

It was contended that the affidavit in support of the petition offended O.17r.3 (1) CPR which provides that save in interlocutory applications, an affidavit must be restricted to such facts as the deponent is of his own knowledge able to prove. It was argued that the affidavit was therefore defective since it included matters on information and belief.

The Court ruled that the affidavit offended O.17r.3 (I) and was therefore defective and ordered it to be struck out. The Court then concluded –

*"...clearly on the face of it, the provisions of S.14(A)(I) of the T.LD as amended appear to conflict with Article 23(6)(a) of the Constitution. This*

*Court therefore would have had jurisdiction in this aspect of the petition, if the petition was supported by evidence. As we have found the petition lacked evidence and could not be entertained."*

In all likelihood, following the liberal line on affidavits adopted in *Kiiza Besigye vs Yoweri Kaguta Museveni [Election Petition No. 1 of 2001]* it is unlikely that his point would still be decided the same way. Also worthy of comment is that the Constitutional Court, after observing a law in apparent contravention of the Constitution and governing such a fundamental right to liberty and to bail when charged with an offence, still chose to let the matter lie! Is this not countenancing an infringement of rights to continue? Even in ordinary civil matters the dictum is that Courts should not suffer illegalities.

**(h) "The suit is time barred"**

Rule 4(3) of the Constitutional Court Rules 1996 requires that a petition be filed within 30 days of the breach of the Constitution complained of. The irony of a limitation provision for constitutional actions was well articulated by ODER JSC in *SERUGO* (supra) where he stated:

*"It is certainly an irony that a litigant who intends to enforce his right for breach of contract or for bodily injury in a running down case has far more time to bring his action than one who wants to seek a declaration or redress under Article 137 of the Constitution"*

From an initially very strict position on this requirement the Court has now moved to mitigate its harshness. The case of *Attorney General vs Dr. James Rwanyarare [Misc. Application No.3 of 2002]* arising from *Constitutional Petition No.7 of 2002* gives a full review of the Court's approach on the 30-day limit. They refer to what can only properly be called lamentations of the Supreme Court on the harshness of the 30-day rule made in the case of **SERUGO** (supra). The Justices of the Court noted that the 30-day rule had the effect of stifling the constitutional right to go to the Constitutional Court rather than encouraging it and they called on the appropriate authority (who is in fact the Chief Justice) to do something.

The *RWANYARARE* case then reviews the post *SERUGO* cases where the Constitutional Court took steps to modify and mitigate the harmful effects of Rule 4. In, its decisions in *Zachary Olum (1999)*, *Mugerwa-Kikungwe (2000)*, *Alenyo (2001)* *Nakachwa (2002)*, the Court adopted the position that the 30 days would begin to run from the day the petitioner perceives the breach of the Constitution. Their Lordships felt that this would "make the rule workable and encourage, rather than constrain the culture of constitutionalism"

The question in *RWANYARARE* was when does the perception that an Act of Parliament has breached the Constitution take place? The Court found that for a mature mentally normal person the date of perception of breach of the Constitution by an Act of Parliament would be the date when the Act comes into force because of the presumption of knowledge of the law and the old adage that "*ignorantia juris nemien excusat.*" Clearly the Court still remains uncomfortable with their own interpretation. They go on to ponder the fate of infants and unborn children who may grow up to find that the continuing effect of a constitutional breach by an Act of Parliament

contravenes their rights and freedoms or even threatens their very existence. The Court concluded on this note after reviewing part of the preamble to the 1995 Constitution.

*"It seems to us that a Constitution is basic law for the present and future generations. Even the unborn are entitled to protection from violation of their constitutional rights and freedoms. This cannot be done if the 3-day rule is enforced arbitrarily. In our view Rule 4 of Legal Notice No.4 of 1996 poses difficulties, contradictions and anomalies to the enjoyment of the Constitutional rights and freedoms guaranteed in the 1995 Constitution of Uganda. We wish to add our voice to that of the Supreme Court that this rule should be urgently revisited by the appropriate authorities"*

What happens if what is being challenged is existing law, like in the case of the *Uganda Association Of Women Lawyers-V-Attorney General [Constitutional Petition No.2 Of 2003]* where FIDA and 5 other persons are challenging the constitutionality of the Divorce Act (Cap. 215). When does the perception of breach occur? [This case is still pending and no further comment can be made on it] It nonetheless demonstrates the folly of the Constitutional Court's "case by case" approach advocated in NAKACHWA.

Perhaps the most comprehensive attack on the rule has been made by maybe its most frequent victim. PETER WALUBIRI in his book "Constitutionalism at Crossroads" argues extensively why the 30-day should be done away with. Interestingly one of the lines of his attack is that the Chief Justice had no power to rule limiting access to the Courts.

#### **(i) *An alternative remedy?***

The Constitutional Court has dismissed actions before it, which it felt, were best to alternative remedies. This was the case in the cases of in *Rwanyarare vs Attorney General [Constitutional Petition No. 11 Of 1997]* and also *Kabagambe vs UEB [Constitutional Petition No.2 Of 1999]*. In the latter case a petition was dismissed because the Court felt that it was disguised wrongful dismissal case better handled by a competent court under Article 50 and 129.

Also in *Karugaba vs Attorney General [Constitutional Petition No. 11 Of 2002]* the Petitioner sought to challenge Rule 15 of the Constitutional Court Rules 1996 which provided for the abatement of any petition after the death of a sole petitioner. The Rule had been applied to this effect in NAKACHWA (supra). It was argued that the right to bring an action was "*property*" of the petitioner as a *chose in action* and could therefore not be taken away from the Petitioner's estate (simply by fact of the petitioner's death) The Court found that the right of a citizen to petition the Constitutional Court for declarations (as opposed to redress) was a special right which was extinguished by the petitioner's death. The petitioner's claims for redress could be saved and continued in a competent court under the Law Reform (Misc. Provisions) Act.

That may well be but how can this and the KABAGAMBE decision be reconciled with the dicta in ALENYO where the same Court clearly stated;

*"... it is not relevant either that there is a remedy available to the petitioner elsewhere. That alone cannot deprive the Court of jurisdiction specifically conferred on it under Article 137. "*

In *Sara Longwe vs Intercontinental Hotels [1993] 4 LRC 221*, while considering the argument on alternative remedies, the Court held:

*"I must also state that it is true that most of not all the rights which have been provided for by the Bill of Rights are also covered by personal or private law such as the law of torts or commercial law. But that state of affairs does not deprive an aggrieved of his choice, whether to proceed under the Bill of Rights or under another branch of the law. The golden choice in this regard is the aggrieved person's".*

The same position was reached in *Punbum vs Attorney General [1993] 2 LRC 317*, where it was held that it was no defence to a constitutional action that there are alternative remedies. A complainant was free to choose the most beneficial method legally open to him or her to prosecute his or her case.

It is certainly preferable that the citizen be free to choose his remedy. Should he seek the solace of a Constitutional Court declaration rather than the remedy of a civil suit the so be it.

#### **(j) Costs**

So far parties in public interest litigation appear to have been content with not seeking costs orders in their favour and the Courts have been "largely" pleased to oblige. This may have been a matter of strategy and prudence.

As far back as *Edward Fredrick Ssempebwa vs Attorney General [Constitutional Case No.1 of 1987]*, however, there is authority to support the proposition that where a matter is brought *bonafide* in the public interest seeking clarification on important matters of law, that the costs be paid to the petitioner in any event. This is so in other jurisdictions as far flung as Australia.

In *KARUGABA* (supra) in their separate judgments, all Judges of the Court made no order as to costs "on the grounds of public interest", however without further explanation.

One interesting aspect to this is that under the Constitutional Court Rules 1996, where no order is made as to costs, the petitioner is entitled to recover the deposit of Ug. Shs. 100,000/= made on filing of the action.

#### **(k) Affidavits and evidence**

Another objection that is usually raised is in regard to evidence by affidavit. In the case of *Greenwatch –vs- Attorney General and National Environment Management Authority Misc. Application No. 140 of 2002*, the applicants sought to rely on reports released by the World Health Organisation (W.H.O) and other documents such as United Nations Convention of Rights of the Child and National Health and Medical Research Council Report. Some of these reports had been sourced from the Internet. The Attorney General contended that such reports were

inadmissible as they amounted to hearsay as they were attached to Mr. Phillip Karugaba's affidavit in support of the application. On this the learned Principal Judge had this to say:

*"Besides, Mr. Oluka's preliminary point in which he brands the documentary presentation, by affidavit, of scientific findings and reports, is premature and therefore misplaced. The veracity and credibility of evidence is challenged during the hearing when such evidence is adduced and not preliminary objection. I would overrule this preliminary objection based on the evidence the applicant seeks to adduce by affidavits"*

The very point was raised again in the case of *Greenwatch –vs- Attorney General and National Environment Management Authority Misc. Application No. 140 of 2002*.

The presiding Judge Ag. Lameck Mukasa had this to say:

*"The third ground of objection is that the Application is supported by defective affidavits which should be rejected. Mr. Oluka argued that in both affidavits in support of the Application, the deponent, Sarah Naigaga, avers that what was stated in each of the affidavits was true and correct to the best of her knowledge. Yet in paragraphs 4 and 7 of the affidavit dated 11th March 2003 she states that she has obtained from the Environmental Law Alliance Worldwide which is an International Non-Governmental Organisation Network a scientific study analysing Plastic Waste Management in India by Priya Narayan which study was annexed to the affidavit. Counsel argued that the findings as annexed and referred to in the affidavit were not by the deponent, Sarah Naigaga, since she was not involved in the research. He submitted that these findings were hearsay and contravened the provisions of Order 17 rule 3 (1) CPR."*

Further, that Sarah Naigaga was not an Expert on Environmental matters: Order 17 rule 3 (1) CPR provides:

*"Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove, except an interlocutory application, on which statements of his belief may be admitted, provided that the grounds thereof are stated."*

Counsel submitted that this application was not an interlocutory application. In the two affidavits in support of this application the deponent avers that the matters contained in each of the affidavits were based on the deponent's knowledge. Knowledge can be acquired through human senses like seeing, hearing, smelling, tasting or touching followed by understanding and perceiving what are has sensed.

#### ***(I) Choice of parties***

In Public Interest Litigation the choice of parties is very important since the party does not have to prove personal injury or injury to his property it follows that there is a wide choice of parties in such a suit to an advocate conducting a public interest suit. The complainant must not always

be the party to the suit as it may be found he is not the most suitable. Matters that require consideration in the choice of parties include;-

Ability to pay costs - a party must be in position to pay costs of the other party and his own legal costs the question of costs is always crucial in all suits because they may be used to silence litigation and shut down a just cause. So where peasant farmers are complaining of pollution or degradation of their environment by a rich developer, a local authority would be a better plaintiff than an individual peasant or an NGO may be better placed to fight their cause.

The facts, however, of the case may be such that a group action of hundreds of peasants may have more bearing than an NGO. More people bringing an action are likely to be taken seriously than an individual NGO. This is most likely the case where government is the defendant. Any government is likely to take serious action by tax payers and voters more so where the matter is one of policy e.g. mass resettlement of people or animals, degazetting areas for industrial development.

Whether the plaintiffs should be a group of women, or children suing through their parents is always an important and strategic consideration. The choice appeals to the sentiments of other people, may rise general awareness of the issue, may turn the case into a public debate and influence policy charge on behalf of government.

Parties also appeal to the sentiments of judges presiding over the case. The issue at hand can easily be portrayed through the plaintiff whether they are school children likely to suffer from cancer as a result of High Voltage Power lines or whole families facing eviction from their homes and lands to give way to industrial development.

Social consideration influences judges in making decisions and in interpreting Acts even in very conservative jurisdictions such as Britain. Thus, Lord Wright while interpreting a duty of a Landlord to keep his house in all respects reasonably fit for human habitat said;-

*"The Sub-Section I think must be construed with due regard to its apparent object... The provision was to reduce... bad housing accommodation and to protect working people by compulsory provision, out of which they cannot contract against accepting improper provisions. It is a reasonable at social amelioration. It must be construed so as to give a proper effect to that objective"*<sup>208</sup>

1943 AC.<sup>209</sup> The choice of plaintiff might also help to portray injustice and inequality as is almost always the case in environmental cases. Judges might just be inclined to apply substitute justice in order to address this - or where there seems to be abuse of authority.

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<sup>208</sup>Summers Vs Salford Corp 1943 AC

<sup>209</sup>1913 Ch 127 at 140

*"If I thought that injustice has been done to him" said Lindly L.J. "I should have found some method I have no doubt of getting rid of the technical objection"*<sup>210</sup>

An NGO based in Kampala may not be the best place for the plaintiff to bring an action to protect a forest on Mount Elgon, threatened by a local developer supported by a Local Government. However it may be the right plaintiff if the right plaintiff of the same forest is to be degazetted by the Central Government to allow for National Project or multi National Project say construction of an Railway line to Kenya.

The choice of the defendant is also equally important. For example injunctions cannot issue against government so in an action seeking an injunction the defendant ought not to be government. In *NAPE Vs AES Nile Power* the action was brought against AES Nile Power LTD not government because an injunction would not issue against government. In the case of *Greenwatch Vs Sterling* the first issue was whether action had been brought against the proper defendant as there were several companies.

Under the Sterling Group of Companies, A choice has to be made as whether to sue NEMA for failure to carry out its statutory duties or to sue the developer directly where NEMA would be better placed as witness and not as a party to the suit. At times it may be unclear as to who the proper defendant is as was the case in Water hyacinth case no clear distinction existed between the developer, the lead agency, the contractor and the consultant. Choice of parties may thus be one of the most important decisions in public interest litigation and may be ultimate deciding factor whether or not the action succeeds.

#### **10.4 The Future**

*“Speak up for those who cannot speak for themselves, for the rights of all who are destitute, speak up and judge fairly; defend the rights of the poor and needy”*

#### **Proverbs 31:8-9**

Several civil society organizations have submitted a joint memorandum on proposed amendments to Article 50 to facilitate public interest litigation. Some of the proposals address issues of costs and filing fees. There is also a proposal to extend Article 50 jurisdiction to the lower courts.

The potential of public interest litigation to force issues that the Government is unwilling to legislate or otherwise act upon, will come to nought if the Judiciary is unwilling to take bold steps in this new direction. We need a bold and courageous Judiciary to take the challenge of public interest litigation and through judicial activism to give life and vibrance to the

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<sup>210</sup>Starkowski vs Attorney General 1954 AC 155



Constitution.

We need judicial creativity to bring new thinking to old problems and seek new solutions. We also need judicial courage to follow on these new solutions to give full meaning to the Constitution.

The courage demonstrated by the Bench in *Osotraco vs Attorney General [H.C.C.S No. 1380 of 1986]* is a good development. In that case, the learned Judge declined to apply S.15 of the Government Proceedings Act (Cap. 69) prohibiting making of orders for recovery of land against Government on the grounds that it did not conform with the Constitution. He ordered the Attorney General to give vacant possession of suit property to the Plaintiff.

In *Rwanyarare vs Attorney General (Constitutional Application No.6 Of 2002 Arising From Constitutional Petition No.7 of 2002)* the Court also found courage to do away with the protections under the Government proceedings Act and to grant an injunction against the Government.

The Non-Smokers rights case was also path breaking by the trial Judge. As one commentator put it *"by courageous and liberal interpretation to the Constitution, this decision seems not only to have potentially opened wide the flood gates for public interest litigation in Uganda, but to have torn out the gate posts and cast them asunder."*<sup>211</sup>

In *Lub vs Lub [Divorce Cause No. 47 of 1997]* the High Court applied Article 31 of the Constitution and found that even though the Petitioner had not proved desertion or cruelty, she would still be entitled to a divorce on proof of adultery.

There are, however, still very sad traces of restraint by the Bench. Lillian Tibatema - Ekirikubinza<sup>212</sup> highlights a number of cases where the Bench while identifying a human rights problem has still shied away from resolving it.

One such case is *Uganda-V-Haruna Kanabi [Criminal Case No. 997 Of 1995]* where the accused was charged with sedition and in the course of her judgment, the presiding Chief Magistrate of her own brought up the issue of the constitutionality of the charges. After expressing his doubt, the Court said

*"This Court is not a constitutional court. It therefore lacks capacity to interpret the provisions of the constitution beyond their literal meaning. As such I am of the view that where the State having regard to its supreme law keeps on its Act books a law that makes it an offence to do a certain act and hence to limit the enjoyment of a specified freedom, this Court will accept that restriction as lawful and shall go ahead to punish any transgression of the same according to the existing law until such a time as the State deems it fit to lift such restriction after realizing that such*

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<sup>211</sup> Law Africa Commentaries

<sup>212</sup> In her paper "The Judiciary and enforcement of Human Rights: Between Judicial Activism and Judicial Restraint [East African Journal of Peace and Human Rights vol. 8 No.2 2002]

*restriction violates a certain right"*

The Court went on to use the existence of the Constitution and the individuals right to freedom of expression as a point of mitigation!

The question is why the Court didn't refer the matter for interpretation. Why did it convict and sentence in light of what it felt was a contravention of the Supreme Law of the land. Even more strange is that on appeal to the High Court, again though not raised by the parties, the Court ruled the trial Magistrate's concerns on constitutionality and stated that it should have been referred to the constitutional Court. The Court declined to do so itself since, the matter was not brought up before it.

It is not, however, for the Judiciary to do it alone. Even to the Bar, there is a call to action. George Bizos a leading South African Human rights lawyer said;

*"It has been said that the Courtroom is the Last forum in which the oppressed can speak their minds. Our Jobs as lawyers is to facilitate that opportunity"*<sup>213</sup>

In Uganda's context this is doubly important. DR. RWANYARARE's unrestricted access to the Courts should be seen as fundamental to the resolution of political disputes. As seen before and continue to see, when out of choices aggrieved citizens go to the bush.

Bizos<sup>214</sup> has further advice for the Bar.

*"Lawyers should do enough work to make a good living, but if they have a social conscience then they should not shun badly paid or even, if circumstances present themselves, they should in some cases work for nothing. If they do that, not only is it good for their country or community but it is also socially significant"*

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<sup>213</sup>International Bar News September 2003."Driven to defend the disadvantaged. A profile of George Bizos."

<sup>214</sup>Ibid

## 10.5 COSTS IN PUBLIC INTEREST LITIGATION

The question of costs is central in Public Interest Litigation. It determines whether or not an individual or group brings an action in public interest or not because ultimately costs would be the price to be paid by the losing party.

The courts on the hand have always held that costs must be born by the party who loses the action and indeed that is the law.

The principle being that the successful party ought to be indemnified. The other has been especially in public interest litigation, that costs are an effective way of controlling the flood gates to a torrent of frivolous litigation by cranks and busy bodies and other mischief makers (see the case of Wildlife *Society of South Africa and others versus Minister of Environmental Affairs and Tourism*, Supreme Court of South Africa Case No. 1672 of 95

The very nature of public interest litigation is that it is a matter that concerns the general public or a large part of it. It is therefore not an action from which the plaintiff will benefit solely as an individual. The benefit to the plaintiff will just be the same as the benefit of the general public or to the large part of the public on whose behalf or in whose interest the action is brought.

Public Interest Litigation is brought for the good of the public and must not be frivolous, malicious or vexatious. Therefore, the principle that applies to ordinary cases as to costs does not apply to Public Interest cases.

The imposition of costs would have a chilling effect on future litigants and as such, would negatively impact on the number of cases brought in public interest. This in turn would shut down an avenue for peaceful resolution of disputes that involve large parts of the public. The result will be that the public would have to resort to extra judicial means of conflict resolution and this would be bad for both the law and the public.

The courts, it seems have been alive to this and have in several land mark cases held that in public interest cases, each party should bear its own costs. Courts have held that in awarding costs, the courts must balance the principle that justice must take its course by compensating the successful litigant and the principle of not raging the poor from justice by award of exorbitant costs.

In several cases of significant public interest and of constitutional nature, the Supreme Court has ordered its party to bear its own costs.

*Prince J. Mpuga Lukidi Vs Prince Solomon Iguru and others.* C.A 18/94(SC)

*Attorney General Vs Major Gen.Tinyefuza* C.A 1/97 (SC)

Election petition of No.1 of 2001 Col.(RTD) *Dr. Kiza Besigye Vs Museveni Yoweri Kaguta and the electoral commission.*

This position is also the same in other common law jurisdiction such as India, see Charan Lal Sahu and others Vs Singh (1985) IRC

Odoki JSC, (as he then was) in *Prince Mpuga Vs Solomon Iguru (Supra)* reversing the decision of the High Court on costs had this to say;

“In this case the learned Judge applied the general rule in exercising his discretion in favor of the successful party, the respondents he did not consider the special nature of the case and the relationship between the parties before he came to his decision on costs. This was an important case, which settled the question of succession to the throne of Bunyoro Kitara and therefore paved way to the restoration to the institution of traditional ruler in Bunyoro Kitara Kingdom. It was a matter of great public importance. The fact that the question has been settled also means that there is need for reconciliation among the contestants for the well being of the Kingdom. In those circumstances, I agree that each party should bear its own costs here and in the Court below.”

The Chief Justice Benjamin Odoki, in *Besigye Vs Museveni & Another (Supra)*, still held the same view.

J.W.N Tsekooko, JSC in *Kiiza Besigye Vs Museveni & Another (Supra)* had this to say;

“I think that orders for award of costs should be made depending on the facts of each case. This is implicit in Rule 23(1) (supra), In election petition, costs must not be awarded in such a manner as to inhibit future petitioners, who may have genuine complaints that should be investigated by Courts, from taking such complaints to Courts. It is of the essence of a working democracy that grievances arising from elections should be investigated by independent Courts. I derive support for this view from the Indian case of *Charan Lal Sahu & ORS Vs. Singh (1985) LRC (Const.)*

In the election for the office of President of India, held on 12<sup>th</sup> July 1982, 36 prospective candidates filed nomination papers. The petitioners included Charan Lal Sahu and Nem Chandra Jain (two of the petitioners). The returning officer accepted two nominations, excluding these two petitioners, and on 15<sup>th</sup> July 1982, he declared that the Respondent had been elected. A number of petitions were filed asking the Supreme Court of India to annul the election on various grounds. Under a certain Act of Parliament for India, an election petition may be presented by twenty electors or “by any candidate at such election” and S.13 (a) thereof, provided that “candidate” means a person “who has been or claims to have been nominated as a candidate”,

Preliminary objection was taken that two of the petitioners, i.e., Charan Lal Sahu and Nem Chandra Jain, had not been candidates at the election and therefore lacked *locus standi* to file their petitions. The petitioners submitted that, even if they were not duly nominated and therefore to be eligible to present their petitions.

The Supreme Court upheld the preliminary objection and struck out the two petitions because they lacked the cause of action. The Court further observed that;

*“It is regrettable that election petitions challenging the election of the high office of the president of India should be filed in a fashion as cavalier as the one that characterizes these two petitions. The petitions have an extempore appearance and not even a second look, leave alone a second thought, appears to have been given to the manner of drafting these petitions or to the contentions raised therein. In order to discourage the filing of such petitions, we would have been justified in passing a heavy order of costs against the two petitioners. But that is likely to cause a needless misconception that this Court, which has been constituted by the Act as the exclusive forum for deciding election petitions where by a Presidential or Vice Presidential election is challenged, is loathe to entertain such petitions. It is of the essence of the functioning of democracy that elections to public offices must be open to the scrutiny of an independent tribunal. A heavy order of costs in these two petitions, howsoever justified on their own facts, should not result in nipping in the bud a well-founded claim on a future occasion.”*

The two petitions before the Indian Supreme Court could be described as frivolous and vexatious. And yet the Supreme Court found no need to order costs against the two petitioners.

In my view the present petition is no where nearly the two. The present petition was well founded. Adopting the reasoning of the Indian Supreme Court, I think that ordering the petitioner in these proceedings to pay costs would amount to nipping in the bud future well-founded petitions. For these reasons I agreed that each party should bear its own costs.”

Karokora, JSC had this to say;

“So normally costs follow the events unless the court or judge for good reason shall otherwise order. Therefore, the law gives wide discretion to the Judge to determine by whom the costs must be paid. However, in deciding who should pay the costs or not pay he or she must be exercised be paid. However, in deciding who should pay the costs or not pay he or she must be exercised judicially.

In the instant case, it would not be correct to say that the petition was frivolous as counsel for both respondents appeared to suggest in their address to us on the issue of costs. It must be noted that the petition contained several allegation of non-compliance with the law allegedly committed by the 2<sup>nd</sup> respondent or/ and his agents or servants. Against the 1<sup>st</sup> respondent, the complaints were that he committed illegal practices and other offenses in connection with the election.

There is no doubt that these allegations of non-compliance with the law which were raised deserved serious consideration by the Court. And as submitted by Mr. Balikuddembe, Counsel for petitioner, most of his allegation for non-compliance with the law was upheld. It would therefore not be correct to say that the petition had not been founded on reasonable grounds, which deserved to be investigated. Although the investigation of the grounds in the petition ended in favor of the respondent, it cannot be said it was not well founded.

In my view, even if the petitioner lost the petition, I would not hesitate to adopt the reasoning of the Indian Supreme Court in the case of ***Charan Lal Sahn & others v Singh***

Reported in 1985 LRC (const) 31 where the Court held that ordering the petitioner to pay costs in those proceedings would amount to nipping in the bud future and well-founded petition.

In the instant case, considering the nature of the allegations raised in the petition, the historical nature of the petition where the petition had contested against the incumbent President and decided to take the incumbent to Court, challenging the election results and seeking the Court to annul the election result, was very courageous of the petitioner.

So the petition was very important in the legal history, because when in 1981, the election was allegedly rigged, the aggrieved party decided to go to the bush and wage war. In the instant case, the aggrieved party instead of thinking of waging a war decided to go to Court.

He came to Court before us to decide the matter. We decided it. Although he lost, I must say it was not a frivolous petition.

An order to encourage people like the petitioner to come to Court and help in the development of our legal, historical and constitutional development in Uganda, such people should be encouraged. Costs should not be awarded by way of penalizing them so that they should get scared from coming to Court.

Clearly, this petitioner has revealed how perfunctorily the Presidential Elections were organized by the Electoral Commissioner. It is hoped that when there is another election for them to organize/arrange, citizens will have properly organized elections.

It was for the above reasons that I considered it appropriate that each party meets its own costs.”

Mulenga, JSC, had this to say;

“The petitioner brought to Court a tangible case, which deserved to be inquired into. Although some issues that came in during the trial may have been farfetched or even trivial, the case as a whole could not be described as frivolous as suggested by Counsel for the 2<sup>nd</sup> respondent. I agreed with the view expressed in the extract from Guildford case: *Elkins v Onslow (1986) 19 LT 729*, cited in the Digest: Annotated British, Commonwealth and European cases Vol.20 at p. para. 642.

*‘Where the case has disclosed under a petition is proper for the examination and the petition is founded upon prima facie grounds and attended with reasonable and probable case for pursuing the inquiry to termination the petitioner will not be condemned in the costs of the respondent although the result may be in favor of the latter.’*

I hasten to add however that each case has to be considered on its own merits. For the reasons I have indicated, I found it appropriate for the Court to order each party to bear its own costs of the petition.”

Oder, JSC, had this to say;

“Although costs should normally follow the event the section of the Civil Procedure Act above referred to gives the Court wide discretionary powers to order otherwise for good reason. Like all judicial discretion, this one must be exercised judiciously.

In the case of *Major Gen. D. Tinyefuza Constitutional Appeal No.1 of 1997 (SCU)* (unreported) this Court ordered each party to bear its costs although the appeal was dismissed. The Court’s reasons for doing so were that in order to encourage constitutional litigation parties who go to Court should be saddled with the opposite party’s costs if they lose. If potential litigants know that they would face prohibitive costs of litigation, they would think twice before taking constitutional issues to court. Such discouragement would have adverse effect on development of exercise of the court’s jurisdiction of judicial review of the conduct of authorities or individuals, which are unconstitutional. It would also stifle the growth of our constitutional jurisprudence. The culture of constitutionalism should be nurtured, not stunted in this country, which prohibitive litigation costs would do if left to grow unchecked. I agree with the principles in that decision. In my view they should equally apply to the instant petition.

I think that there are even more compelling reasons for applying them to the instant case. First, this is the first time in history of this country that the result of a Presidential Election has been challenged in court, not elsewhere.

As Mr. Balikuddembe said, the petitioner went to court in order to encourage the development of peaceful settlement of political and election disagreements.

This is important for the sake of peace and stability of the country. The petitioner took the right step by coming to court, in my view.

Second, access to court for peaceful settlement of constitutional, political and election disputes should be available to all, the rich and the poor alike, which prohibitive costs of litigation would discourage effectively.

The third reason for ordering each party to bear its costs, is that even by the majority decision, the petitioner won on certain issues, though few. The manner in which the second respondent conducted the election fell below expected or normal standards. So, the petition was not frivolous. It had some substance.

However, the above notwithstanding several cases that are clearly in public interest have been dismissed with costs notably *TEAN vs BAT (U) Misc. Application No. 39 of 2001*.

In other cases, the respondents have thought to block the trial through imposition of prohibitive security for costs. *Greenwatch & Another s Golf Course holdings, HCCS No. 834/2000* in which court ruled that Greenwatch deposits Uganda Shillings five million (Ug. Shs. 5,000,000) as security for costs before the trial of the main suit could proceed.

Greenwatch appealed against the decision and the appeal is pending.

In conclusion we do think that the law has been well set out by the Supreme Court in the case sighted above in respect of costs in Public Interest Litigation.

Each party should bear its own costs.”



## CHAPTER ELEVEN

### THE CRIMINAL ASPECTS OF ENVIRONMENT LAW AND PROCEDURAL ASPECTS IN PROSECUTING ENVIRONMENTAL CRIMES<sup>215</sup>

*“Your today’s actions determines our tomorrow”* Robert Wabunoha

#### 11.0 Introduction

An environmental crime is any deliberate act or omission leading to degradation of the environment and resulting into harmful effects on human beings, the environment and natural resources. Environmental crimes include all violations of environmental laws attracting criminal sanctions. Environmental crime prosecutions therefore refer to the prosecution of environmental cases in the criminal courts.

Historically, traditional criminal law did not care about environment protection hence there has been a tendency of advocating for it to be included among those crimes that affect or are affected by public order, morality and social economic development. The question has always been whether the environment deserves the response of criminal law.

The objective of environmental law enforcement and compliance<sup>216</sup> is the same like other branches of law i.e. to deter detected violators from violating again; to deter other potential violators from violating by sending a message that they too may experience adverse consequences for non compliance.

The objectives of deploying criminal law in environmental law enforcement are to confirm standards established in the interest of protecting the environment or public health; ensuring government credibility and control; ensuring fair competition among competing activities; and protecting or restoring environmental damage to ensure sustainable development.

The modern environmental laws are regarded as 'public welfare' laws - creating public welfare offences. The law is aimed at protecting human health and the environment. The offender, a reasonable person, is deemed to know that his or her conduct is subject to stringent public regulation and may seriously threaten the community's health or safety.

#### 11.1 The Legal Framework for Environmental Crimes

There are a few provisions in the Ugandan Penal Code Act relating to environmental protection in the sense of protecting the right to a clean and healthy environment. These relate to nuisances and offences against health and convenience under Part XVII, offences endangering life or health under Part XXII, negligent acts likely to spread infection of disease, adulteration of food or

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<sup>215</sup> Robert Wabunoha and Vincent Wagoona. Mr. Robert Wabunoha is the Senior Legal Counsel at NEMA, Uganda and Mr. Vincent Wagoona is a Senior State Attorney with the Directorate of Public Prosecutions, Uganda.

<sup>216</sup> Environmental enforcement relates to those sets of actions that Government or other persons take to achieve compliance within the regulated community and to correct or halt situations that endanger the environment or public health. Enforcement by Government usually includes inspections, negotiations, compliance promotions and legal actions of civil litigation and criminal prosecution.

drink, fouling water and air.

The effectiveness of the above provisions on environment and/or public health protection is limited because they are generalized crimes and not specific and therefore difficult to interpret. They also do not offer other alternatives that can lead to protection of the environment.

The National Environment Act, therefore, provides for a more comprehensive and effective legal framework for criminalisation of and sanctions against those who commit environmental violations, as one of the ways of ensuring compliance with environmental protection provisions. The Act introduced a fundamental change in the management of all aspects of the environment where new methods, aspects and legal provisions of the law have come into play.

The phenomenon of environmental law enforcement is the same like other branches of law, i.e. to deter detected violators from violating again; to deter other potential violators from violating by sending a message that they too may experience adverse consequences for non-compliance.

## **11.2 Legal Aspects of Environmental Criminal Law Enforcement in Uganda**

The regulation of activities that have or are likely to have an impact on the environment is the main province of environmental law. The law is anticipatory in that even attempts to commit an offence are as bad as commission of a criminal offence. Even where a violation of the law may not necessarily result in any direct or immediate injury to person or property, failure to comply with the law is an offence. In such cases, the law seeks to guard against the danger or probability of injury or damage and thereby minimize it.

This is especially to areas of EIA, management of hazardous wastes and toxic chemicals and transboundary movement of wastes.

Several criminal measures have been introduced in Uganda's legislation in order to achieve environmental goals. There may be divided into several aspects: prohibition, prevention, licensing and inspection, orders, restoration to previous conditions, penalties and public participation, among others.

### **(a) Prohibitions**

The prohibitions in the National Environment Act are absolute, dispensing of the need to prove intent or negligence - *mens rea*. In case of pollution or degradation violations (e.g. prohibition of water pollution, soil erosion, etc), the condition of the area in question prior to pollution or degradation is not a factor in the considerations leading to conviction. The very act of prohibition is prohibited, not the results. This makes the burden of proof easier since it is a form of strict liability offence. Examples here include—

Waste<sup>217</sup> management where it is provided that every person is under duty to manage wastes

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<sup>217</sup> Waste are defined under section 2 of the National Environment Act as any matter which has been prescribed to be a waste, whether liquid, solid, gaseous, or radioactive which is discharged, emitted or deposited in the environment in such a volume, composition or manner as to cause an alteration of the environment. The operation of

generated by his/her establishment in such a manner that he/she does not cause ill health to the person or damage the environment. It is also provided that every person is under obligation treat, reclaim and recycle the wastes as a waste minimization measure. No person is allowed to dispose of wastes into the environment unless he or she follows the law and the standards.

Further, it is a criminal offence to import any wastes which is toxic, extremely hazardous, corrosive, carcinogenic, flammable, persistent, explosive, radioactive, etc. A person who imports any hazardous wastes is under duty to take back the wastes outside the country. A person who falsifies, withholds or tampers with information relating to illegal traffic in hazardous or other wastes also commits an offence. Failure to comply with the law attracts not less than 36 months imprisonment or a fine of not more than Ug. shs 36 m/ = or both.

Regulations have been made to provide for the sorting of domestic waste, location of landfills and transportation and processing of wastes.<sup>218</sup>

In the area of environmental inspections, section 79 of the National Environment Act creates environmental inspectors who have powers to enter, confiscate and inspect facilities to ensure that there is compliance with the legal requirements. Hindering or obstructing an environmental inspector or failing to comply with a lawful order, such as an improvement notice, creates a criminal offence, which on, conviction attracts imprisonment of a term not less than 12 months or a fine of not less than Ug. Shs. 120,000/= and not more than 12 million or both.

#### **(b) Anticipatory Prevention**

Environmental law is anticipatory, as it requires prior activities to be done before the environment is modified. The provisions relating to environmental impact assessment, environmental audits and where damage has occurred the "polluter pays principle" play the role of ensuring that anticipated modification or any modification of the environment does not adversely affect the environment.

In environment impact assessments, the criminal implication is that failure to submit or prepare an EIA, per se, creates a criminal offence which can lead to 18 months imprisonment or fine of not less than Ug. Shs.180,000/= and not more than Shs.18m/= or both. Further, developing a project without an EIA is, per se, an environmental crime. The burden is on the developer to conduct and submit an EIA report. The obvious evidence in EIA related environmental crime is absence of an approval from NEMA and the developers activity such as a building or farm.

#### **(c) Permits and licenses**

An especially effective means of ensuring compliance in environmental management is the granting of licenses and permits by regulatory authorities, such as NEMA and other lead

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this definition is that wastes have to be classified and prescribed as wastes in volume, composition or manner of discharge.

<sup>218</sup> National Environment \*Waste Management Regulations, 1999.

agencies. This grants these regulatory authorities the power to issue, revoke or incorporate conditions in it.

As regards the criminal aspects of permitting and licensing, the very act of managing a project without a licence or permit, even where no environmental damage has occurred, constitutes an environmental offence under the law.

### **Improvement and Restoration Orders**

Apart from the issuance of permissions and statutory prohibitions, the National Environment Act authorizes an environmental inspector or court to issue an improvement order or a restoration order to an owner or operator of a facility directing him to adopt specific measures in order to abate the environmental degrading activities. The improvement notice is an administrative order empowerment given to NEMA to ensure that activities that are causing pollution or degradation are stopped as soon as possible. An improvement notice is meant to improve or restore the environment to as near as possible as it was before the degrading activity. The order is given especially where there are other permissions or statutory prohibitions may not be effective or are not required. The notice is issued with time limits of compliance. Further, restoration orders can either be issued by the Executive Director or court.

Failure to comply in accordance with the directions contained in the notice is, *per se*, deemed a criminal offence irrespective of the impact of the activity on the environment.

### **Prohibitions relating to environmental standards**

The law also provides for regulation of environmental damage through the setting of limits, standards and measures for emissions, discharges and other environmental degrading activities. Maximum environmental standards are prescribed for the discharge of effluent and waste-waters, noise, soil quality, ozone and solid waste, among others.

Every person who operates an establishment is under a legal duty to operate within the prescribed environmental standards, criteria and measurements. Failure to operate within the prescribed standards or guidelines attracts imprisonment of not more than 18 months or a fine of not more than Ug. Shs.18m/= or both. The breach of an environmental standard is both a strict and vicarious liability. Environmental standards, however, require scientific measurement and proof. The measurement is carried out using specialised and prescribed equipment.

### **Control of Pollution and Discharge of Oils into the Environment**

The law creates an obligation not to pollute the environment. It is an offence to pollute or lead any other person to pollute the environment in excess of the set standards or guidelines.

### **Conservation of Wetlands, Lakeshores and River Banks**

The National Environment (Wetlands, River Banks and Lake Shores Management Regulations, 2000, prohibits any reclamation or drainage, depositing of any substance, damaging or

destruction of any wetland without a permit from NEMA. Riverbanks and lakeshores are also protected. Depositing any substance in a lake or river or their banks and shores or drain a river or lake without a permit or reclaiming or draining or destroying a wetland attracts 12 months or a fine of Ug. Shs. 120,000/= and not more than 12 million or both.

### **11.3 Common Environmental Crimes in Uganda**

The types of environmental crimes that are likely to feature in Uganda's courts generally include carrying out any of the following environmental violations -

- setting up and operating a project without an EIA;
- discharging effluent from an establishment without a permit;
- offences relating to environment inspectors and inspections;
- failure to comply with requirements of a restoration or improvement order;
- maintaining and operating a facility that emits noise without a permit or beyond the set standards;
- discharging harmful or polluting substances or waste substances into water systems contrary to the law;
- disposing, storing and treating or transporting of hazardous waste without a permit;
- degrading activities relating to wetlands, river banks and lakeshores (using wetlands, river banks and lakes shores without a permit, area related prohibitions (protected zones). This is elaborated more in the National Environment [River Banks and Lake Shores Management ] Regulations, 2000;
- exporting genetic resources or their derivatives without a permit; and
- all the degrading prohibitions relating to fragile soils protection, hilly and mountainous areas.

### **11.4 Legal Technicalities and Procedural Aspects in Environmental Crimes**

Environmental laws penalise violations of legal provisions as contained under the various laws. Unlike the traditional criminal offences under the Penal Code Act which prohibit specific acts and impose penalties for those acts, environmental laws tend to provide for criminal penalties for violation of any of the provisions of the law. The law can provide that “the contravention of any provision of these Regulations shall lead to prosecution.”

Environmental criminal offences tend to impose strict or vicarious liability. Although the burden of proof lies with the prosecution, in some cases there is no need to prove *mens rea* (criminal intention). This is especially so in crimes relating to permissions and total prohibitions. The offence sections of the law also provide for employer or proprietor liability for acts or omissions of employees.

Development of environmental criminal law in Uganda is still not advanced as the civil law simply because of the policy direction of using less of the stick and more of the carrot in ensuring compliance with the law. There are, however, a number of technical and legal aspects

that have to be borne in mind in environmental criminal law in Uganda. These technical and legal aspects are, however, not mutually exclusive. The following are some of the legal technicalities and procedural matters that one can face in the process of prosecuting environmental crimes -

There is no requirement to issue notice of violation of the law before instituting criminal proceedings. Although sometimes there are attempts to handle environmental violations amicably. In this regard, in practice, the offender may be notified that they are violating the law. The notice, however, is not a legal requirement and is therefore not a legal pre-requisite for instituting criminal proceedings. Criminal proceedings can be commenced even without a prior notice of violation.

There is no requirement for prior civil proceedings before commencing criminal proceedings.

Like all other criminal offences, causation must be established, i.e. that the prohibited action or omission was caused by the accused's acts or omissions.

The provisions of the Magistrates Courts Act<sup>219</sup> (as amended) and the Criminal Procedure Act and the rules made thereunder apply in prosecuting and during the trial of environmental crimes. The decision to prosecute lies with the Director of Public Prosecutions. Environmental regulatory authorities, such as NEMA, however, play an important role in alerting and collecting evidence to enable successful prosecution of a case. It is hoped that, in future, the public will be able to cause the police to handle environmental crimes in the same manner as they handle other crimes. Environmental crimes are registered like any other crimes with the police, and criminal summons and arrest warrants may be applied for, to commence prosecution. Most of the environmental crimes, other than some which are found under the Forestry and Tree Planting Act, are misdemeanors and therefore, are under the jurisdiction of the Magistrate courts.

In investigating environmental crimes, the environmental inspector play a key role gathering scientific and technical evidence and also in making the necessary reports. Environmental inspectors and other competent personnel play the role of expert witnesses in court proceedings. Even when the Police handle the investigations, environmental inspectors still play a crucial role in the chain of evidence. The experience, wisdom, and concerns of both legal and technical staff involved in enforcement are important. Since environmental matters are sometimes a question of visual impression, the use of proper photographs can be used in proving a case of violation.

Sound environmental management is a fairly technical and scientific matter and, therefore, the evidence required is mostly of scientific nature. The documentary evidence and exhibits which courts expect to rely on include reports of environment inspectors, laboratory reports, - photographs, maps in addition to oral expert and witness evidence. Trials of environmental crimes are characterised by scientific evidence to prove ingredients. A lot of background study is expected from the Prosecutor.

In sound environmental management, the sanctity of the environment is the ultimate goal. In seeking for sentencing of the environmental offender, the further orders other than imprisonment

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<sup>219</sup> Magistrates Courts Act.

or fine play a more important role. Fines and imprisonment cannot directly restore the degraded environment. Under most of the environmental laws in Uganda, such as the National Environment Act or Water Act, the offences are punishable by imprisonment or fine or both. Courts are, however, empowered to give further orders in addition to the imprisonment or fines. Under S. 105 of the National Environment Act, for example, courts may in addition to any other orders, order -

- that the substance, equipment and appliance used in the commission of the offence be forfeited to the state;
- that any license, permit or other authorization given under the Act and to which the offence relates be cancelled;
- that the accused do community work which promotes the protection of the environment; or
- issuance of an environmental restoration or improvement order against the accused.

The use of community service sentencing or orders is one of the means of ensuring enforcement of environmental requirements. In this case a person committing an environmental wrong is sentenced as a further or alternative order to perform duties in the community such as cleaning streets, mowing parks, planting trees or restoring the degraded environment as a reparation to the community for the wrong done to the environment. The community service order also acts as a measure for mobilizing shame in a public manner. This may act as a deterrent more effectively than fines or prison sentences.

Environmental offences are not committed by "criminals" in the normal sense of the word. The people who commit environmental crimes are respected members of society like factory managers and proprietors, mayors of local authorities, etc. Perception is so important in creating deterrence in the environment management. How environmental requirements are enforced is just as important as the criminal prosecution itself. Enforcement actions can have significant effects far beyond bringing a single violator into compliance if they are well placed and well publicized. Publicity of court judgments in environmental violations therefore play an important role in environmental criminal justice.

### **11.5. International Aspects of Environmental Crimes**

International environmental crime takes several forms. The so-called waste tourism or imperialism, which involves illegal cross-border transport of waste and illegal dumping of waste are some of the forms of international environmental crimes.

International environmental crimes are a very profitable business gathering waste from one country and dump it, sometime under false pretence, in another. Illegal activities committed are still small hence attracting lesser attention than say, drug trafficking, and the chances that the perpetrators are not caught are high. The United Nations has recognized the importance of using penal law in the protection of the environment by urging governments and international organizations to intensify the struggle against the ecological criminality.

## CHAPTER TWELVE

### ENVIRONMENTAL LAW: A TOOL IN PEACEFUL RESOLUTION OF CONFLICT

*By Kenneth Kakuru<sup>220</sup>*

#### 12.0 HISTORICAL BACKGROUND:

##### **Natural Resources ownership, use and Management**

The determining factor in history is in the final instance the preservation, production and reproduction of immediate life. On one side the production of means of existence, of food, clothing, shelter and the tools necessary for that production on the other side production of human being themselves and the propagation of species.

The social organisation under which the people of a particular historical epoch and a particular country live is determined by both kinds of production, by the stage of development of labour on the one hand and the family on the other.

The earliest social economic system commonly known as *primitive communalism* is said to have first emerged about two million years ago, and only ended between seven and nine thousand years ago.

This mode of production first consisted mainly of appropriation of natural products. Later transferring into a reproductive economy. In the first stage production was by subsistence, gathering fruits, grain, vegetable foods and by hunting. Stones and sticks were the main tools of labour, later supplemented by the stone axe, bows and arrows. Later man learnt to harness and later make fire. This enabled him to have better food, make more implements, and live in colder climates. Later gathering led to the emergence of arable farming, as man was able to grow grain and other foods. With fire man was able to make clay pots and cook food without roasting or burning it. Hunting developed into livestock keeping and breeding as certain animals became domesticated. All this facilitated population growth.

The increase of production in all branches, cattle raising, agriculture, domestic handcrafts, better tools, weapons and other implements gave man the capacity to produce more food than was necessary for his existence and maintenance. As a result therefore division of labour emerged between groups of people. Those who settled in one place and engaged in cultivation of crops who were formerly gatherers and those who domesticated animals and became pastrolists, who were formerly hunters. These two groups engaged in the first major trade in favour of exchange of commodities.

On the other hand there was increased industrial achievements at this stage, mainly the smelting of metals and working of metal into labour tools such as hoes, axe and the plough and making hunting weapons such as spears, arrowheads, which later rapidly turned into weapons of war.

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The increase in the daily amount of work to be performed by each individual, family or community became unbearable. The only solution to this was to recruit new labour force; reproduction being too slow a process war was waged instead. War provided not only prisoners of war as free labour in form of slaves but also herds of domestic animals and qualities of tools and weapons. What began as process of survival slowly turned into a process of subjugating nature and natural resources and subsequently into a process where man subjugates man in order to use him to exploit nature. This process has continued to date albeit in more complex forms.

Slave economy possessed no internal mechanism of self-production of its labour force. The supply depended largely on foreign conquest. The decrease in the number of slaves resulted into and corresponded to an increase in wars in the Roman Empire around 1000 AD. When the slave mode of production declined with it came decay in commerce, handicraft arts and agriculture. Old large-scale slave farms were replaced with pasture for sheep and oxen since this type of farming required less labour. Country slave estates fell into disuse due to lack of labour. They were divided up into smaller estates and leased to tenants for a fixed sum. The freed slaves surrendered themselves to patronage of these landowners who in turn entrusted their land to them for life.

The landowner became the feudal lords hence the reference to this mode of production is feudal mode of production. Its economic basis was the ownership of land with agricultural production being the main economic activity. Products were mainly consumed in the locality within which they were produced. Later with better implements, wide spread use of iron, better ploughs, better harness, loon mills, this mode of production was bound to produce more surplus, which was appropriated by a feudal hierarchy land of Lords, Bishops, Kings, Emperor and The Pope.

## **12.1 Colonialism**

Development in the past has always meant the increase in ability to guard the independence of a social group and that group's ability to infringe upon freedom of others. Colonialism was a legal and political system under which a powerful country by force occupied and subjugated another and imposed on it legal and political system specifically for exploitation. Therefore colonialism brought with it new forms of land ownership replacing the customary land system that had existed before its advent.

Under article 15 of the Buganda Agreement of 1900, about 9950 square miles of land in Buganda was granted to the *Kabaka*, regents, colonial chiefs, members of the Buganda Royal family and about 1000 other colonial collaborators most of who had assisted the British colonialists in fighting and defeating Omukama Kabalega of Bunyoro. This was indeed very ironical because all the land in Buganda belonged to the *Kabaka* in trust for all his people, how then could an Englishman grant the *Kabaka*, land he already owned?

A part from being a factor of production, land is of great cultural significance in Buganda since its people trace their ancestry from it. Terms like *Butaka* – land.... *Abataka* clan leaders and *Ssabataka*- the head of all *Bataka* who is the *Kabaka* are all derived from land.”

The Buganda clan leaders also hold land in trust for clan members – Each clan traces its origin from a specific land or part of Buganda. Each family or group of related families' own commercial land as burial grounds known as *Ebigya*. This land is considered sacred and usually has a caretaker. Suffice it to mention that other natural resources such as forests, rivers, swamps wetlands, open water sources, under ground water minerals and salts were all commonly owned, individual ownership only restricted to use.

The colonial land tenure system brought with it several problems. Private ownership of land was unknown and the new land law imposed land use tax – inform of rent (Busulu) and tribute (Envujjo). Hundreds of thousands of people found themselves as 'tenants' on their own land of absentee mailo owners. Although the Busulu and Envujjo law of 1928 tried to regularise this land tenure system and to create some security of tenure for the Bibanja holders –tenants, the basic problem remained.

The second major problem was that, under the Buganda Agreement three large counties of Bunyoro that is Bugangaizi, Bugahya and Buyanja had been annexed to Buganda after the defeat of Kabalega by the British Colonialists at the end of the 19<sup>th</sup> Century. Land on which Banyoro people lived and considered it their own had on paper been transferred to Buganda, and Buganda Chiefs and other collaborators had been granted mailo (free hold) titles over the land. The Baganda landowners never in reality had any attachment to this land, it was not their land it was not Buganda. The Banyoro on the other hand always considered it their land, the law and politics notwithstanding.

The Colonial Government also introduced leasehold and freehold land tenure systems. The Governor had powers under the crown land ordinance of 1903 to make grants in leasehold and freehold as all the rest of land and all other natural resources had been vested into Her Majesty's Colonial government. This remained so until 1962-Independence constitution, which vested land in the kingdoms and District Land Boards.

This briefly establishes the background for conflict over natural resources, between individuals, between communities, between government and communities and government and individuals.

Another phenomenon was the restriction of acquisition of land by foreigners non-Africans. It seems the British seeking support of Buganda to fight Bunyoro had to assure the Baganda that their land was not under threat from white settlers. The British too realised the strong cultural attachment of the Baganda to their land, hence they opted to colonise Uganda as a protectorate and not a colony like Kenya. Because of this, Uganda had no white settlers and therefore no large displacement of people from the land. The Asians too were restricted by this policy from acquiring large trunks of land.

The result was that the communities with money remained in urban areas and little capital was invested in large-scale agriculture. Production of food and cash crops was left almost solely in the hands of small-scale peasant farmers except in the tea plantations in Toro, Mityana and the sugar cane plantations mostly in Busoga. This restriction still largely persists. Then there was the policy of government direct exploitation of natural resources. All forests, minerals, water bodies, wildlife, wetlands and other natural resources remain in the hands of the state. The state has

forcefully excluded human settlement or even presence in these restricted areas such as national parts, or forest reserves.

In many instances people were evicted from these areas, where they had lived for centuries. This policy allowed government to issue permits or concessions to anyone else to exploit the natural resources. These included– forest permits; hunting permits; trapping of crocodiles etc. This was done without any policy requiring the exploitation to be sustainable. This again was and remains a source of conflict. Another source of conflict was the Ankole, Masaka Singo Ranching Schemes, American sponsored ranching project in which a few wealthy individuals were given five or more square miles of commercial land which had with the help of US donor funds, had fully developed infrastructure and were fully stocked with exotic cattle breeds.

## **12.2 The early conflicts 1890 – 1962**

The earliest conflicts were Bunyoro's resistance to colonial rule, The Buganda religious wars notably the battle of Mengo, The discontent of *Bibanja* holders in early 1900 – 1920, later the *Bataka* movement and the agitation for independence of the 1940 and 1950s, The Lango land riots of 1950's and the Buganda crisis of 1953 – 1955.

At the time of independence, the ground was already very fertile for conflict. Although this has always manifested itself as political conflict, in actual sense it has always been a conflict over resources.

## **12.3 The later conflicts: 1962 – 1985**

The major conflicts over land natural resources during this time were briefly the following-

- the continuation of the issue of lost counties – culminating into the controversial referendum that saw their counties returned to Bunyoro. Kabaka of Buganda, President of Uganda refusing to sign the transfer into law of the decision of the referendum paving way for the 1966 political and constitutional rights crisis;
- the 1967 Constitution confiscating land belonging to the *Kabaka* and the Royal family
- The 1969 Nakivubo pronouncements of the “move to the left” and nationalisation of major foreign concerns;
- the 1972 Economic war of President Idi Amin and the expropriation of properties belonging to all Asians and Europeans;
- the 1975 nationalisation of land under the Land Reform Decree and the scrapping of security of tenure of *Bibanja* holders, abolition of *mailo* and freehold tenure;
- the 1978 annexation of the Kagera sariant by Uganda Armed Forces under Idi Amin sparking off the 1979 liberation war, which ousted Idi Amin from power;
- 1979 looting of major towns and confiscation of property belonging to Muslims, Nubians and others thought to have been close to Idi Amin's regime, including land, farms etc;
- 1983 expulsion of people of Rwandese origin from Mbarara District, confiscating their land by the Uganda People's Congress functionaries;
- 1984 Creation of Lake Mburo National Park and expulsion of pastoralists from the park and confiscating land and cattle, belonging to mainly Hima pastoralists; and
- 1985 expulsion of none Baganda from Bugerere and other areas on account of their support for Obote government.

## 12.4 The recent conflicts: 1986 – 2003

The conflicts in this period relate mostly to reclaiming property lost in the earlier periods under Obote I and Obote II and also new conflicts emerging between communities and foreign investors and between government and communities over protected areas. These include:

- massive re-possession of properties lost by Asian and non-African Ugandan citizens during the 1972 Exodus;
- the return of the People of Rwandese origin who had been expelled from western Uganda;
- the re-gazetting of Lake Mburo National Park with reduced boundaries;
- the eviction of large populations from gazetted protected areas of Mabira forest, Kibale forest, Bwindi;
- degazetting Namave forest reserve;
- the restructuring of Ankole Masaka Ranching scheme also ranches in Kabale, Singo and Ssembabule;
- escalation of Karamajong cattle raids into Teso, Katakwi, Pallisa and Sebei;
- Butamira forest reserve conflict;
- Kibale-Bakiga settlers conflict with Banyoro;
- the conflicts over developments in and around wetlands in Kampala
- the Teso wetlands conflict; and
- the conflicts over fishing zones in Lake Victoria.

As already indicated above, these conflicts almost always manifest themselves as political or social conflicts. The methods and means of resolving them have largely remained social-political. I think this has been a mistake.

## 12.5 Existing methods of conflict resolution

Constitutional law  
Administrative law  
Public law  
Land law  
The law of tort  
Customary law  
Law of trusts.

The above still remain the laws available for resolution of natural resources-based conflicts. They are grossly inadequate in doing so. They are specifically made and tailored to resolve conflict arising out of ownership of private individual property, whether such property is movable or immovable in dealing with individual rights freedoms, duties and obligations. For example under Constitutional law the rights were to individuals and they alone could enforce them. The notion of collective rights is only a recent innovation enshrined in Article 50 of the 1995 Constitution, the interpretation an approach of which is still debatable – *Rwanyarare –vs- Attorney General*. See judgment of Manyindo DCJ

*Greenwatch –vs- Golf Course Holdings Ltd, HCCS 834 /2000.*

*Byabazaire –vs- Mukwano, HCCS 466 of 2000..*

*Attorney General vs Tinyefuza, C.A. No. 1/97 (SC)*

In administrative law the issue of *locus standi* is central in determining cause of action, whether in tort, or contract see *Auto Garage and others Vs. Motokov 1971 E.A. 514*. Customary law, which would otherwise have been better placed to resolve some of these conflicts, has always been limited in application by judicature statutes past and present.

There is no available and legal avenue for peaceful resolution of conflict between communities between groups of individuals and individuals and between government and countries over natural resources. This seems to stem from the law, which does not recognize group, community or tribal ownership of land and other natural resources.

The principles of environmental law here submitted offer by far the best alternative method of dispute resolution. They address issues and give answers which are not provided for or available in other branches of the law.

## **12.6 Environmental Law and resolution of conflicts**

### **12.6.1 The Principle of Sustainable Development**

There is no doubt that conflict escalates with scarcity of food and or resources. There is therefore less likelihood of conflict where there is plenty.

As noted earlier, natural resources are not inexhaustible, not even in vast resources such as high seas. Increased population has inevitably led to increased scramble for less and less resources, even in areas which previously had abundant resources.

The notion of Sustainable development requires that resources are used in a manner that is equitable and sustainable. That they are managed in such a way as to meet the needs of the present and the future generations.

The National objectives and Directive principals of state policy set out in the 1995 Constitution in regard to environment, state,

“ xxvii (i) *the state shall promote sustainable Development and public awareness of the need to manage land, air, water resources in a balanced manner for the present and future generations.*

(ii) *The utilization of Natural Resources of Uganda shall be managed in such a way to meet the development and environmental needs of the present and future generations of Ugandans 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 population pressures and other causes.”*

The above principles are not contained in the body of the Constitution and are therefore not enforceable as such leaving it to government or whoever is in authority to take a subjective decision as to how they are to be applied.

The same principles are repeated even in more detail in S. 3 (2) of NEA. Whereas, Art. 39 of the Constitution recognizes a right to a clean and healthy environment, and s. 4(1) of the NEA does

the same, the authority to ensure that the above principles are observed is vested in NEMA under S. 3(1) of the NEA. And whereas the duty to maintain and enhance the environment is imposed upon every person, under S. 4(2) of the NEA the specific right to enforce compliance is only expressly given to NEMA and the local Environment court under S. 4(4) of the NEA, debatable as this may be.

It is submitted that whereas the constitution and the law recognizes the fundamental importance for sustainable development, both fail to set the necessary legal mechanism to ensure it. The people themselves should have been given express authority to ensure the observance of the principle of sustainable development both under the constitution. In this way, they would have been provided with a peaceful avenue, for instance courts of law, within which to have conflicts relating to natural resources resolved. Leaving the resolution in the hands of the Executive escalates conflicts because decision making by the Executive is more influenced by politics than reason. Examples of these include: Butamira Forest Reserve conflict, Kibaale settlers conflict, developments in Kampala's wetlands and others mentioned earlier.

### **12.6.2 Intergenerational and Intra-generational Equity:**

This is a principle in environmental law that ensures sustainable development. In simple terms, intra-generational equity requires that exploitation of natural resources must be such that, it meets the requirements of the user and others. In other words, resources may not be depleted by one group to the detriment of others. That the resources must be used sparingly if they are exhaustible or must be replenished if possible.

Inter- generational Equity requires that the present generations exploit or use natural resources in a way that will enable the next /future generations to use the same resources. "See the preamble to the Constitution of Uganda (1995).

See also MSc 3 of 2002, Arising from Constitution Petition No. 7 of 2002, *Attorney General versus Dr. James Rwanyarare & 9 others*.

No provision again is made in the law to enforce the above. The rules of *locus standi* are seen to be too limiting at present to allow it. The people as individuals, families, communities or as ethnic groups remain with no option but to scramble and exploit as much as they can now and keep the rest for their own future generations. This is a complete reversal of the above stated principles which the Constitution sets out to promote. Examples of these conflicts are:

- Over fishing in Lake Victoria;
- depletion of forest cover;
- landslides in Mbale and Sebei; and
- draining of wetlands.

### **12.6.3 The Doctrine of Public Trust:**

This is basically that the state or such other authority holds in trust natural resources for all the people. It is recognition of the fact that natural resources are not owned by individuals, but yet are used by each individual directly or indirectly. Air, light, warmth, wind, energy, the sea, even rivers and forests cannot be owned by individuals. And even in cases of resources which are

capable of being owned by individuals /privately it is not desirable to allow such ownership because of greater public interest.

This principle is set out in Art. 237(b) which provides:

*“ 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 of the common good of all citizens.”*

This provision is re-enacted in S. 45 of the Land Act. However, either because of the colonial history where the state was a predatory and survived on plunder of natural resources, the government to date still finds it difficult to act as a trustee for its people. It still looks at natural resources as a source of income and wealth and therefore has been unable to fulfill its role as a trustee.

This has increased conflict between the people and the state. When the government wants to remove or stop people from using or exploiting natural resources, it applies the doctrine as was the case in evictions from Mabira, Kibaale forest reserve, Mountain Elgon but discards the doctrine when it wants to exploit the resources it self. Such was the case of degazetting Namanve, Butamira and Bugala Forest reserve.

It is submitted that this trusteeship should be vested in other representatives of the people such as traditional / cultural leaders. It is submitted that the past conflicts in Uganda which mostly related to land would have been averted if all land in Buganda was for example vested in Kabaka. This is again illustrated by examples of Butamira Forest Reserve conflict.

#### **12.6.4 The Principle of Public Participation**

This is an important principle in environmental law that the public must participate in decision making at all levels. Again, we have to look at our colonial past and see that the colonial state that would never by its nature allow the participation of the people in decision making. They were simply subjects, not only were they considered unknowledgeable, but the policies of the colonial state were in almost all cases against the interest of the colonized people and as such they could not be involved in decision making. This colonial legacy has continued. To this date, government still finds it difficult to fully involve people in decision making.

It is submitted that the majority of conflicts especially those involving natural resources would be solved simply by encouraging public participation in decision making. For example the Proposed Hydro power Station at Bujagali, Kibaale, Namanve, Ankole- Masaka ranch restructuring scheme, fishing on Lake Victoria, and land tenure systems.

Even when the government consults the people or allows their participation, it takes decisions that are in conflict with their views and aspirations. This escalates conflicts even more.

Public participation must not be a mere formality but must be for the purpose of incorporating the views of the people in decision making. This it is submitted, would resolve many unnecessary conflicts.

### 12.6.5 Access to Information

This is another major principle of environmental law that information regarding management and use of natural resources ought to be freely accessible. If this is not so, it would be futile to apply all the other principles enumerated above. Public participation in decision making would be a mockery without access to information.

Many conflicts arise and have arisen because of mis-information or inadequate information or complete lack of information. Bujagali Hydro electric power project is the case in point. See the case of **Greenwatch vs UEDCL and the Attorney General and Zachary Olum vs Attorney General**.

### 12.6.6 The Precautionary Principle

This principle requires that decisions regarding use and management of natural resources must not be taken in haste. That decisions must only be made after all the necessary information has been received and evaluated and if found wanting, precaution must be exercised. (See S. 72 of the NES) and the case of the water hyacinth and Bujagali Hydro power project.

Decisions hastily made are not only detrimental to the environment but also encourage conflict. E.g. Butamira case and degazetting of Lake Mburo. On the other hand, decisions made after applying this principle are a sure way of resolving conflict.

### 12.6.7 Access to Justice

This is by far the most important principle in conflict resolution, that an avenue must always be available for peaceful resolution of conflicts. People resort to violence and other means because the law provides no recourse for them to resolve their conflicts.

The laws that are in place are specifically made to resolve conflicts over private property or public property in a sense that it is owned by government, as would a private individual. But the conflicts that involve natural resources in Uganda are such that no legal avenue is provided for their resolution. There is no legal avenue to resolve the dispute between the Bakiga and the Banyoro in Kibaale or between the Karamajong and the Iteso or even between the government of Uganda and Baganda over land. Expanding the traditional rules of standing would go a very long way in resolving these conflicts. *See TEAN Vs. BAT and Attorney General, see also Mtikila Vs Attorney General*. There are other impediments to access to justice such as prohibitive legal costs, lack of information and simply the fear of confronting the state. These barriers to justice promote conflict as the parties seek to resolve the issues through other means, usually political violence.

If all the above principles were to be applied as envisaged, if they were to be complied with as required, if they were to be given the necessary effect as desired, it is submitted that environmental law would be the most appropriate method of resolving conflicts and in turn enhancing sustainable development.



## CHAPTER THIRTEEN

### TOWARDS ENVIRONMENTAL ACCOUNTABILITY: Freedom of Access to Information Legislation for Uganda <sup>221</sup>

#### 13.0 Introduction

The interface between environmental sustainability and democratic governance has gained considerable attention over the recent years. This is mainly demonstrated by the renewed interest among policy researchers and practitioners trying to explore and demonstrate the nexus between governance and environmental management. What is emerging out of this discourse is that addressing the problems of governance especially in resource dependent economies is in great measure dependent on resolving problems of access, appropriation and distribution of natural resources. Promotion of equity and social justice in natural resources distribution is also central to mitigating ecological and political conflicts and building sustainable democratic societies. It is, therefore, important that there are mechanisms through which those responsible for managing public resources should be held accountable to the public interest. Freedom of access to environmental information is such one mechanism by which the public would be equipped to advocate for accountable institutions, equitable distribution of resources and transparency in public decision-making.

The right of the public to access official records and place the process of government under scrutiny is one of the defining characteristics of liberal democracy. Public access to government information is a fundamental tenet of self-government. When citizens are denied access to information about the basic workings of their government, they are also denied the ability to exercise fully their right of self-government. Informed public opinion should, therefore, be seen not as a threat to government, but as a restraint upon misgovernment. In that regard, a public right of access to information has the potential advantage of promoting efficient government, greater accountability in the conduct of public affairs, and a higher quality of decision-making. This "informed debate" argument for public access to information particularly has increasing significance in a time when governments are becoming more and more the greatest gatherer, producer, and controller of information on all aspects of life. To that extent, the existence of a strong freedom of information legislation is essential to maintaining and sometimes restoring public confidence in public institutions by subjecting the activities of those institutions to intense public scrutiny.

This proposition is particularly very important for purposes of enhancing accountability and transparency in making decisions that impact on the environment and those relating to the appropriation, management and utilization of natural resources. The contention of this paper is that Uganda needs to enact a freedom of information legislation which, *inter alia*, should secure the public right of access to environmental information as stipulated in the National Environment Act. The parameters for the right to freedom of information as well as the procedures for accessing the information, the scope of the exemptions and a review mechanism in cases of denial have not been elaborated. Without such detail, both the right of access to information

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under the constitution and the right of access to environmental information under the National Environment Act has less practical effect.

### **13.1 The Right of Access to Information: A General Perspective**

Antecedents of the putative right to government information may be traced as far back as the 18<sup>th</sup> Century. As early as 1712, the English Parliament imposed taxes on all newspapers and advertisements with the purpose of suppressing the publication of comments and criticisms objectionable to the Crown. Opponents of these taxes especially in British American colonies labeled them "taxes on knowledge." In fact, as early as 1936, it was held that "the dominant and controlling aim (of the newspaper stamp tax) was to prevent, or curtail the opportunity for, the acquisition of knowledge by the people in respect of their governmental affairs."<sup>222</sup> Commenting on the efforts by the press against this tax, the court said;

"It is idle to suppose that so many of the best men in England would for a century of time have waged stubborn and precarious warfare against these taxes if a mere matter of taxation had been involved. The aim of the struggle was not to relieve taxpayers from a burden, but establish and preserve the right of the English people to full information in respect of the doings of their government."

Since 1712, a number of developments have taken place which have greatly enhanced the legal quality of the right of access to information. Sweden enacted its access to information legislation as early as 1776. Little less than 200 years later in 1966, the United States enacted its Freedom of Information Act (FOIA). Since then, several countries have secured the right of access to information in their national constitutions and enacted relevant enabling legislation.<sup>223</sup>

Related developments took place all through the 19<sup>th</sup> Century with the implicit references to the right of access to information enshrined both in the Universal Declaration of Human Rights and the African Charter on Human and Peoples Rights.

Given these historical precedents, it may well be argued that for us to be discussing whether or not we should have an access to information legislation at the dawn of the 21<sup>st</sup> Century gives one the impression that we are still living at the ages of modern civilization. The need as well as the necessity to define the parameters and scope of this right, especially as our countries reluctantly accept the principles of open government is, therefore, an inescapable reality.

Based on the foregoing exposition, two issues need to be highlighted especially with respect to environmental accountability. First, it is within the broad context of the right of access to information that the right of access to environmental information can be articulated. The bottom line in both cases is that citizens are entitled as of right to know the workings of their government, censor it for activities that are prejudicial to the "public interest" and hold it

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<sup>222</sup> See Justice George Sutherland in *Grosjean v American Press Co., Inc.* 297 U.S. 233, 246-47 (1936)

<sup>223</sup> See for example the constitutions of the following countries; Greece, Portugal, Tanzania, Uganda, Canada, etc. The US, Netherlands, France, Denmark, Canada, among others, have access to information legislation.

accountable for any wrong doing. In that regard, environmental accountability is seen as a function of three interrelated and interdependent variables namely: access to information, citizens' participation and institutional performance and monitoring.

Second, the right of access to environmental information has developed within a global context. Its genesis can be traced from the Stockholm Declaration on the Human Environment of 1972 which first pronounced on the interrelationship between the enjoyment of human rights and the quality of the environment. Since the Stockholm Conference, the right of access to environmental information has been reiterated in various international soft law instruments including the Rio Declaration and its sister instrument, Agenda 21

The most instructive legal development in this field though is the European Union Directive on freedom of access to environmental information. By its very nature, the Directive has created a right of access to environmental information in every member state of the European Union. It establishes, in broad terms, a set of minimum standards for access to environmental information. Among other things, the purpose of the Directive is to give the public access to information on the environment held by public and quasi-public authorities and set out the basic terms on which information is to be made available.

In the light of its increasing recognition both in national legislation and international environmental instruments, it may well be argued that the right of access to environmental information is therefore gaining acceptability as a recognized norm of customary international law. This argument is validated by the recent codification of the right under the Convention on Access to Information, Public Participation in Decision-Making and Access to Justice- in Environmental.<sup>224</sup>

This Convention sets out "international minimum standards" for an access to information legislation. It is important to note that the use of "environmental information" in the Convention as contrasted to the use of "information relating to the environment" in the EU Directive 90/313/EEC may be of academic interest. The purpose of this paper, though is not to engage in a debate of whether the two phrases are of significant relevance to the subject at hand. What is clear, however, is that the Convention sets out a sufficiently broad definition of "environmental information" that is useful for purposes of developing national access to information legislation.

"Environmental information",<sup>225</sup> means any information in written, visual, aural, electronic or any other material form on:

- (j) the state of elements of the environment such as air and atmosphere, water, soil, land, landscape and natural sites, biological diversity and its components, including genetically modified organisms, and the interactions among these elements;
- (k) factors, such as substances, energy, noise and radiation, and activities or measures,

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<sup>224</sup> Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 1992.

<sup>225</sup> Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters; Article 2, Para 3. 9

including administrative measures, environmental agreements, policies, legislation, plans and programs, affecting or likely to affect the elements of the environment within the scope of subparagraph (a) above, and cost-benefit and other economic analyses and assumptions used in environmental decision-making;

- (l) the state of human health and safety, conditions of human life, cultural sites and built structures, inasmuch as they are or may be affected by the state of the elements of the environment or, through these elements, by the factors, activities or measures referred to in subparagraph (b) above.

Nevertheless, the Convention imposes one major limitation that is particularly relevant in the context of "less developed" democracies. Under article 4, paragraph 3, the Convention provides that a request for information may be refused if, *inter alia*, "the request concerns material in the course of completion or concerns internal communication of public authorities where such an exemption is provided for in national law or customary practice, taking into account the public interest served by disclosure. This is a blanket exemption that most public institutions in many countries would like to cover themselves in order to refuse access to information about their internal operations. It should be emphasized that in a situation where public institutions are the bedrocks of corruption and abuse of office, such an exemption would provide an "eternal honey moon" for many of these institutions.

The limitations, notwithstanding, and the global context within which the foregoing developments have taken place, some deductions can still be made that are particularly relevant to sustainable natural resources management and public health in country specific contexts. First, there is increasing recognition of the fact that for the public to be able to assert their right to a clean and healthy environment and discharge their corresponding duties, they must have access to relevant information and can be entitled to participate in environmental decision-making. Second, improved access to information and public participation in decision-making as important variables in enhancing the quality and the implementation of decisions, promoting greater accountability and transparency in the conduct of public affairs are increasingly being appreciated. In addition, access to information contributes to public awareness of environmental issues, give the public the opportunity to express its concerns and enable public authorities to take into account those concerns.

### **13.2 The Nature and Scope of an Access to Information Legislation**

Despite the existence of a large body of precedents both in international law and national legislation, it is important to appreciate the fact that there are no hard and fast rules for an access to information legislation. Instead, the nature and scope of such legislation should be predicated on the peculiar circumstances of each country. In some countries, it is possible to make legislation based on considerably low standards for access. This is because, in such cases, openness in the functioning of government has either developed as part of their constitutional culture, or the scope of access has been defined by the judicial process, custom and practice. The character of many African governments, however, warrants considerably stringent rules regarding exceptions and denials of access to information requests.

In essence, the right of access to information should incorporate the following ingredients,

among others, (i) right to be informed of the existence of the information; (ii) right to know with a high degree of certainty the procedures for obtaining the information; (iii) right to receive the information or notification of refusal within a reasonable time; and (iv) right to have grounds for refusal expressly stated devoid of any ambiguities and evasiveness.

Another important element is the nature of the exemptions. Both the Constitution and the National Environment Act contain very ambiguous exemptions. According to the Act, proprietary information is to be excluded under s.84. The Constitution extends this by exempting "information that is likely to prejudice the security or sovereignty of the State or interfere with the right of privacy of any other person." If these exemptions are not sufficiently defined, they are likely to be used as "safe havens" for many public agencies which would like to withhold information. In Uganda's context, a freedom of access to information legislation should provide clear guidance on what constitutes "information prejudicial to the security or sovereignty of the State."

### **13.3 The Right to Environmental Information in Uganda**

#### **13.3.1 The Context**

Uganda's economy is largely dependent on the environment in general and natural resources in particular. Agriculture which accounts for the largest foreign exchange earnings derives significantly on the diversity of different crops and their wild relatives. Wildlife based tourism, timber extraction, fish processing and other related industrial activities are emerging to give hope to a distressed population that had lost pride in the possibilities for economic prosperity. At the centre of this economic recovery, public institutions, private sector and foreign multinationals are taking center stage in the appropriation and extraction of natural resources. In this kind of environment, issues of equity and sustainability are likely to dominate the ongoing discourse on Uganda's natural resources management regimes.

The second context in which the right of access to environmental information must be understood is the nexus between access to resources and the politics of patronage. Over the years, politicians have used their positions to exploit natural resources, accumulate wealth. Thirdly, at the centre of the current policy reforms is the drive to privatize some of the environmental related activities. The conduct of environmental impact assessment, the granting of wildlife and timber concessions and the increasing flow of private foreign investment are all activities that will impact significantly on the quality and state of Uganda's environment. The various public institutions that are charged with performing some of these responsibilities are obliged to operate as commercial entities. Yet, there is always the difficulty of balancing economic interests with public interest, equity and sustainability. Consequently, the degree of openness and transparency with which public institutions will perform their statutory responsibilities, and be accountable to the public becomes a critical factor in striking that balance.

Finally, the modes of collection, storage and retrieval of information are changing very rapidly. This poses considerable difficulty in developing an access to information legislation that is responsive to changes in the information market. The challenge for such legislation, therefore, is

its ability to anticipate future demands and technological innovation. That legislation should be sufficiently pragmatic to keep pace with today's world of modems and megabytes, where monitoring, retrieval and transmission of data can take place with a precision and rapidity not commonly known in our history.

### **13.3.2 Trends in Current Law and Practice**

Since 1996, there have been commendable attempts to open up internal workings of government to more public scrutiny. In the field of environment and natural resources management, these efforts have been in the form of opening up the process of policy reforms. Uganda has witnessed increased willingness of public institutions to accept the representation of environmental NGO to participate in policy committees and sometimes on boards of statutory agencies <sup>226</sup> The challenge, however, is for civil society in Uganda, and indeed elsewhere in Africa, remains with its ability to scrutinize the activities of public institutions and ensure that they are accountable to their constituencies. Even in the absence of opportunities for such scrutiny, NGO representation is not, on its own, a sufficient mechanism for monitoring institutional performance and compliance.

Recent legal developments tend to lead to the conclusion that there is increasing recognition of the right of access to information as the basis upon which transparent and accountable governance must be founded. The right of access to information has now been secured in the Constitution as part of the Bill of Rights <sup>227</sup>. The Constitution in that regard provides as follows:

"41. (1) Every citizen has a right of access to information in the possession of the State or any other organ or agency of the State except where the release of the information is likely to prejudice the security or sovereignty of the State or interfere with the right to the privacy of any other person."

(2) Parliament shall make laws prescribing the classes of information referred to in clause (1) of this article and the procedure for obtaining access to that information"

With this Constitutional foundation, the challenge is to set in motion a process that will define the parameters, both in terms of scope and content, of the right of access to information. It is for this reason that an access to information legislation is important. The Constitution, therefore, sets a stage for a broad-based agenda for an information policy and law in Uganda. This policy brief concludes by suggesting a process that needs to be undertaken to finalize that agenda.

As earlier indicated, within the broad context of the right to information is the more subject specific right of access to environmental information. In fact, the recognition of the existence of the right of access to environmental information precedes the 1995 Constitution. As early as 1995, the National Environment Action Plan recognized that "for the environment to be managed sustainably, and to continuously anticipate new and emerging environmental changes and

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<sup>226</sup> EU Directive 90/313/EEC; June 7, 1990

<sup>227</sup> Article 41 of the Constitution.

challenges, it is imperative that timely, up-to-date and accurate environmental information be made available" <sup>228</sup> The main objective for environmental information management was stated as the collection, analysis, storage and dissemination on a continuous basis, of reliable information relating to environmental management issues including biodiversity, soil conservation, fuel wood supply and demand, and pollution control.

Interpreted broadly, the above commitments should relate to the broader issues of transparency and accountability in environmental policy and decision making. This argument may be validated by the strategy prescribed to achieve the above mentioned objective. Among other things, government is to "Provide clear legislation and guidelines on environmental information specifying what environmental information is freely available to users and what may be regarded as classified or proprietary" <sup>229</sup> Indeed, a right of access to environmental information is first stated explicitly in the National Environment Act.

The National Environment Act provides as follows -

"85. (1) Every person shall have freedom of access to any information relating to the implementation of this Act submitted to the Authority or lead agency.

(2) A person desiring the information shall apply to the Authority or a lead agency and may be granted access on the payment of prescribed fees.

(3) Freedom of access to environmental information does not extend to proprietary information which shall be treated as confidential by the Authority and any lead agency."

Other than these general provisions, both the Constitution and the National Environment Act do not give adequate guidance as to how environmental information can be accessed. The Act goes further to require any persons seeking to access information to apply to the relevant agency and the payment of "prescribed fees." It does not show the nature of the application and neither does it prescribe the fees. The presumption appears to have been that such fees could be provided for in a statutory instrument.

In Uganda, the issue of access to information has come before courts of law. In the case of *Paul K. Ssemwogerere and Zachary Olum –Vs- Attorney General Constitutional Appeal No. 1 of 2000* wherein the Supreme Court of Uganda reversed the decision of the constitutional court that had denied the appellants access to the Hansard use in as evidence in court of law. The opinion of the Supreme Court derived from judgment of **Justice Kanyeihamba JSC** as follows:-

"It is my view that, in light of the provisions of Article 41(1), the argument that a citizen needs permission of Parliament to use Hansard or allow members of Parliament to give evidence in court proceedings is unsustainable. In this case, the Speaker gave what is known in administrative law as a speaking order. He disclosed that he had consulted the

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<sup>228</sup> Republic of Uganda, 1995

<sup>229</sup> The National Environment Act; s. 86.

registers of members and used the numbers registered therein to ascertain the quorum.. A speaking order is impeachable in courts of law, especially if there is evidence that it was based on a wrong principle. Consequently, since under Article 41 (1), information in possession of the state is freely available to a citizen except where its release would be “prejudicial to the security or sovereignty of the state or interfere with the right of privacy of any other person,” I can find no constitutional or legal grounds to prevent the release and use of Hansard or stop members of Parliament from giving evidence in courts of law”.

The matter of access to information was again dealt with in the case of *Greenwatch –vs- Uganda Electricity Transmission Company and Attorney General, High Court Misc. Applic. No. 0139 of 2001* before Justice Egonda Ntende.

In this application brought under articles 50 & 41 of the Constitution the applicant sought to obtain a Power Purchase Agreement (PPA) for the respondents. The PPA was in respect of proposed hydro-electric power plant in Bujagali on the River Nile. The applicant an NGO and a company limited by guarantee requested for the government a copy of PPA. The request was rejected hence the action. At the trial Uganda Electricity Transmission Company the successor to Uganda Electricity Board was added as 2<sup>nd</sup> respondent.



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# About Greenwatch.

Greenwatch is an environmental rights advocacy organization established in 1995 with the aim of enhancing public participation in the sustainable use, management and protection of the environment and natural resources and in the enforcement of the right to a clean and healthy environment.

At Greenwatch, we advocate for the enforcement of and compliance with environmental laws and principles through training which results in increased environmental awareness. We review and analyze Environment Impact Assessments (EIAs) of development projects with a likelihood of impacting on the environment negatively; a process which aims at influencing policy making for improved environmental governance in Uganda.

We support community initiatives through dissemination of information on environmental rights and laws for effective participation in decision making; conduct research and training for the public as well as government enforcement officers on access rights: access to information, access to justice and public participation in the governance of natural resources.



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