THE HISTORY OF ENVIRONMENTAL LAW

By Kenneth Kakuru[1]

1.1 THE HISTORY OF ENVIRONMENTAL LAW

Environmental law seeks to protect human health, manage natural resources and sustain the biosphere. This is frequently done through laws that set standards for environmental planning, wildlife, mineral resources, land use and activities that can affect the air, water and soil.

1.2 Religious, cultural and historical roots

Religious traditions entail an evolving body of norms that govern most aspects of life. The Shari'ah- the body of Islamic law- mentions the environment, commanding the respect for the environment. When combined with the Islamic emphasis on cleanliness (and thus constraining pollution), the Shari'ah can be a powerful source of norms for environmental protection. African customary or traditional, tribal law frequently governs important natural resources such as water, grazing, timber and minerals, particularly pigments. Additionally, 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.

1.3 The Green revolution

The Green Revolution came as a result of unchecked industrialization. Industries developed new chemical compounds, Organic compounds used as pesticides and herbicides, bio-accumulated in fish and birds, threatening various species with extinction, inn addition to causing cancer and birth defects in humans.

1.4 The end of colonialism

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.

1.5 The English Law of Tort

The environmental law is in fact a modification of tort law and principles. In Uganda, other than the question of locus standi, the polluter pays principle, the doctrine of public trust as incorporated in the constitution and the 1998 land act. All the other principles are of environmental law and basically tort law.

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In 14th Century England remedies for wrongs 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. Where there was no writ there was no right.

1.6 TRESPASS

The term is usually used in reinforce to 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 of means of production such as machinery etc, Ownership of chattels became as important as ownership of land, as 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.

We shall argue in this paper that it has since been realized that damage to ones 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 mans natural habitat, that effects his 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.

1.7 NUISANCE

The tort of nuisance extended to cover any actions committed by any one on the 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.

There was certainly a need to balance the conflicting interests of two property owners with adjoining lands. Whereas 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 in the case of *Reed vs Smith (1914) 19 B.C.R. 139 at 140.*20 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 plaintiffs land.

But what amounts to 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. However no action 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 Mukwano Soap Factory in Kampala produces soap for the benefit of the public, employs many people and pays government taxes is no defence to an individual's suit against it in nuisance, due to fumes emitted from the said factory.

Nor is it 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 adjourning proprietors or under the sanction on an Act of Parliament23 Lack of negligence is no defence to an action in nuisance.

1.8 NEGLIGENCE

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.
The rule in Rylands Vs Fletcher ***1868 LR 3 HL 330*** 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 prime facie answerable to all damages which is the natural consequence of its escape".

1.9 NONE NATURAL USER OF LAND

Rylands 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 in my view seems to have come 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 unnatural environment and there was need to protect those using their lands naturally from those putting theirs to new use.

2.0 THE EMERGENCE OF ENVIRONMENTAL LAW IN UGANDA

The law of tort has its own limitations. It is based on personal injury or injury to property. However for protection of the environment, this question of *locus* became a very big hindrance. The law including the constitution of most countries had to be changed to address this problem and other related ones. A lot of precedents on this issue and the common law position were reviewed by ***Lugakingira* J** (in the now famous case of) *Mtikila Vs Attorney* ***General- civil case [No 5 of 1993]1 High Court of Tanzania p.5.***

2.1 THE RIGHT TO A CLEAN AND HEALTHY ENVIRONMENT

In 1991 the government of Uganda launched the National Environment Action Plan (NEAP). It intended 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. In 1994 the government endorsed the National Environment Management Policy (NEMP).

2.2 THE EVOLUTION OF ENVIRONMENTAL LAW AND POLICY

The NEMP 1994, The policy set out the objectives and key principles of environmental management and provided a broad framework for harmonization of sector and cross sect oral policy objective. It was on this policy that a comprehensive legal and institutional frame work 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.

2.3 THE CONSTITUION OF THE REPUBLIC OF UGANDA

In October 1995 a new 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 sets out a detailed Bill of rights, particularly, 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 recognized the importance of the environment and health as inseparable from all forms of human rights.

2.4 ENFORCEMENT OF ENVIRONMENTAL RIGHTS

Article 50 of the Constitution provides for the enforcement of the rights provided under Chapter IV and for the first time in history of Uganda and unlike in many other jurisdictions, the Constitution provides a right of standing for any aggrieved person. The person enforcing the right does not have to be one personally or physically affected by the violation. The framers as of the Constitution must be given great credit for this as indeed this clearly manifests the power of the people in the Constitution whereas in many jurisdictions the courts have gone to great lengths to look for the locus standi through interpretation, in Uganda it is provided.

The enforcement of environmental rights takes many forms. Providing information is the simplest, the cheapest, at times the most effective way of enforcing environmental rights. By simply reporting an oil spill, illegal dumping, or a forest fire in time would save money and the environment a great deal. If the public was sensitized to know that reporting environmental degradation is very important, a lot would be achieved at the least possible expenses and would be in the interest of developers, producers, investors or government. The information does not only have to be after the fact. The information might be also before the fact such as threatened destruction of a wetland or forest.

There must exist an entity to which this information must be delivered that is within very reasonable reach of the population. The Local Councils for example are in law in charge of environment with Local Defence Units as an enforcement arm. This would be in addition to all arms of government e.g. police, local administration police, etc should be informed and available as reporting centers for environmental problems.

Action ought to be taken upon reporting for the populations to be able to continue reporting environmental damage. If it is fire the population should be mobilized to put it off or police fire station called. If it is pollution like oil spill, immediate action needs to be taken, victims compensated, culprits arrested.

If this is not done the reporter will never report again. On the other hand if the reaction is swift and appropriate action taken that would encourage reporting.

2.5 THE PRINCIPLES OF ENVIRONMNETAL LAW

Listed below are the main principles governing environmental law;

- The Precautionary principle
- Polluter pays Principle
- User pays principle
- Public Trust Doctrine
- Public participation
- Access to Justice and Information
- Inter – Intra generational principle and Equity
- Sustainable Development

2.6 THE PRECAUTIONARY PRINCIPLE

The precautionary approach extends the principle of prevention of environmental damage to situations of scientific uncertainty

When there is **certainty** regarding the risk of harm to the environment, a regulatory measure is preventive; when there is **uncertainty**, a regulatory measure is precautionary

The precautionary approach does not dictate specific regulatory measures, but determines the time at which regulator measures must be adopted

In precautionary regulation the burden falls on the proponent of the new substance, act, or technology to demonstrate that it is not harmful

2.7 RECOGNITION BY NATIONAL COURTS

The precautionary principle has been recognized by some national courts as implicit in the national environmental policies and legislation, therefore applied independently from its status at international level and its incorporation in the national regime:

"The precautionary principle is a statement of common sense prior to the principle being spelt out" […] "where uncertainty or ignorance exists concerning the nature of environmental harm (whether this follows from policies, decisions, or activities), decisions-makers should be cautious
(Leatch v. National Parks and Wildlife Service - 1994 -Australia)

2.8 POLLUTER PAYS PRINCIPLE

National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment" (Rio Principle 16)

2.9 RATIONALE

PPP introduces economic thinking into environmental law - it deals with allocation of costs of pollution or damage to the environment

The costs of pollution or damage to the environment (or more in general degradation) have to be borne by the person responsible of such pollution or damage, regardless of whether the costs are incurred through direct regulation, taxes, permits or other mechanisms

The PPP also works as an incentive to modify behaviour towards the environment In more general terms, it means that the environmental costs of the production of particular goods or of providing given services should be reflected in the costs of such goods or services

PPP calls for the abolition of hidden subsidies for goods and services which result from the fact that the deterioration of the environment resulting from production or services is borne by the public and not reflected in the remuneration for such goods or services

3.0 USER PAYS POLICY

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3.1 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. It governs the use of property where title is presumed to be held by a given authority in trust for citizens. This doctrine is provided for under article237 of the Uganda Constitution.

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.

3.2 ACCESS TO INFORMATION

Prior to the enactment of the NES and the Constitution, there existed no inherent right of access to environmental information nor government held information/records. The Official Secrets Act, the Public Service Standing Orders and Public Service Act were the regulating access to information, which was at a fee.

The right to environmental information is a statutory right created by S.86 of the NES.
Art. 41, confers upon citizens a right of access to information held by the state or its organs subject to disclosure not being prejudicial to state security interests or an invasion of personal privacy.

Art. 41(2) provides that parliament is under a duty to prescribe a classification system and procedural aspects of access. However, to date, information access mechanisms have not need formulated.
(See the case of Greenwatch V attorney General and NEMA)

3.3 ACCESS TO JUSTICE

S. 72 of NES provides for a person to apply to court for an environmental restoration order against any person who has harmed, is harming or likely to harm the environment.

Sub section 2 provides;
"…it shall not be necessary for the plaintiff …to show that he has a right of or interest in the property in the environment or land alleged to have been harmed or in the environment or land contiguous to such environment or land…"

Art. 137(b) a person who alleges that an Act of Parliament or any law or anything done under the authority of law or any act or omission by any person or authority, is inconsistent with the Constitutional provisions, may petition the Constitutional Court for redress where appropriate.
Art. 50 of the Constitution of the Republic of Uganda

3.4 SUSTAINABLE DEVELOPMENT

According to the National Objectives and Directive Principles of the Constitution, the State is empowered to promote sustainable development and to prevent or minimize damage and destruction to land, air, and water resources. In the case of NAPE V AES Nile Power Ltd (1999), an action was brought to court seeking a completion of the EIA process by NEMA.

3.5 INTER-GENERATIONAL &EQUITY PRINCIPLE

Every generation has a responsibility to the next generation to preserve the rhythm and harmony of nature for the full enjoyment of a balanced and healthful ecology.
See the Oposa case.

3.6 PUBLIC PARTICIPATION

This is one of the key aspects of the NEAP process. This is through community awareness of;-

- environmental concerns,
- How the changing state of environment affects their livelihood,
- And how their lifestyle impact on the environment and natural resource base.
- PP is stressed under Objective XVII, which requires the state to promote, inter alia, public awareness of the need for a balanced and sustainable management of the natural resource base.