

UNIVERSITY OF THE WESTERN CAPE

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LLM DESSERTATION

**REFORM OF ENVIRONMENTAL LAWS IN BOTSWANA: THE NEED FOR AN
ENVIRONMENTAL FRAMEWORK ACT**

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DATE: 03/02/2010

DECLARATION

I, Oduetse Koboto, hereby declare that this dissertation is my own work and has not been submitted to any other university for the award of a degree.

Signed _____

Date: 28 October, 2009



Submitted with my consent

Signed

Professor T. P van Reenen

(Supervisor)

Date: 28 October, 2009

DEDICATION

This dissertation is dedicated to my mother Mrs. Agnes Moloji. The support she has always rendered in my academic life is overwhelming. I can only reward the struggle she went through to make my life a success by supporting my younger sisters in their academic endeavor.

You have been a mother and a friend.



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Mr. Oduetse Koboto

28 October, 2009

TABLE OF CONTENTS

Declaration	i
Dedication	ii
Acknowledgement	iii
Copyright	xiii
List of abbreviations	xiv
1. INTRODUCTION	1
1.1 Background of the study	2
1.2 Statement of the problem	2
1.3 Objectives of the study	4
1.3.1 Broad objectives	4
1.3.2 Specific objectives	4
1.4 Hypothesis	4
1.5 Research methods	5
1.5.1 Library research	5
1.5.2 Internet	5
1.6 Scope of the study	5
1.7 Relevance of the study	6
1.8 Arrangement of chapters	6
2. The nature and essential elements of the environmental management legislation	
2.1 Introduction	11
2.2 Principles of environmental framework legislation	11
2.3 Characteristics of environmental framework legislation	13
2.3.1 Flexibility	13
2.3.2 Policies and principles	13
2.3.3 Civil society involvement	14



2.3.4 Integrated environmental management	14
2.4. Establishment of cooperative governance	15
2.4.1 International cooperation	15
2.4.2 Regional cooperation	16
2.4.3 Intra-governmental cooperation	16
2.4.4 Cooperative agreements	17
2.5 Institutional arrangements	17
2.5.1 Environmental Affairs Council	18
2.5.2 The Environmental Ombudsman	18
2.5.3 Government departments	19
2.6 Compliance, enforcement and implementation	19
2.6.1 Compliance procedures	19
2.6.2 Conflict resolution	20
2.6.3 Criminal sanctions	20
2.6.4 Civil measures	21
2.6.5 <i>Locus standi</i>	21
3. Environmental laws in Botswana	23
3.1 Introduction	24
3.2 The need for constitutional right to environment in Botswana	25
3.3 The management of environmental laws in Botswana	27
3.3.1 The Lesetedi Commission	28
3.3.2 <i>Sesana and others v Attorney-General of Botswana</i>	29
3.3.2.1 Applicability of relevant environmental legislation	29
3.3.2.2 Policy formulation	30
3.3.2.3 Public participation	31
3.3.2.4 Conflict resolution	31
3.4 Institutional arrangements	32



3.4.1 Government departments	32
3.4.1.1 Department of Environmental Affairs	32
3.4.1.2 Department of Mining	33
3.4.2 Environmental Affairs Council	34
3.4.3 The Environmental Ombudsman	34
3.5 Conclusion	35
4. The South African National Environmental Management Act No. 107 of 1998	37
4.1 Introduction	39
4.2 The right to environment	39
4.3 NEMA principles	42
4.4 Characteristics of NEMA	43
4.4.1 Flexibility	43
4.4.2 Policies and principles	43
4.4.3 Civil society involvement	44
4.5. Establishment of cooperative governance	44
4.5.1 International cooperation	44
4.5.2 Intra-governmental cooperation	45
4.5.3 Integrated environmental management	45
4.5.4 Cooperative agreements	46
4.6 Institutional arrangements	47
4.6.1 Government departments	47
4.6.1.1 Department of Environmental Affairs and Tourism	47
4.6.1.2 National Environmental Advisory Forum	48
4.6.1.3 The Committee for Environmental Coordination	48
4.6.1.4 The Environmental Management Inspectorate	48
4.6.1.5 The Enforcement Directorate Unit	49
4.7 Compliance, enforcement and implementation	49



4.7.1 Compliance procedures	49
4.7.2 Conflict resolution	49
4.7.3 Criminal sanctions	50
4.7.4 Civil measures	50
4.7.5 <i>Locus standi</i>	51
4.8 Conclusion	51
5. The Namibian Environmental Management Act No. 7 of 2007	54
5.1 Introduction	55
5.2 The right to environment	55
5.3 Principles of environmental management legislation	58
5.4 Characteristics of environmental management legislation	58
5.4.1 Policies and principles	58
5.4.1.1 Policy for prospecting and mining in protected areas and national monuments	59
5.4.1.2 National policy and strategy for malaria control	59
5.4.1.3 Environmental assessment policy	60
5.4.1.4 National development plans	60
5.4.2 Civil society involvement	60
5.5 Establishment of cooperative governance	61
5.5.1 International cooperation	61
5.5.2 Regional cooperation	61
5.5.3 Intra-governmental cooperation	62
5.6 Institutional arrangements	63
5.6.1 Sustainable Development Advisory Council	63
5.6.2 The Environmental Commissioner	64
5.6.2.1 Environmental Officers	64
5.6.3 The Environmental Ombudsman	65
5.7 Compliance, enforcement and implementation	65

5.7.1 Compliance procedures	65
5.7.2 Conflict resolution	66
5.7.3 Criminal sanctions	66
5.7.4 Civil measures	66
5.8 Conclusion	67
6. Kenyan Environmental Management and Coordination Act No. 8 of 1999	69
6.1 Introduction	71
6.2 The right to environment	71
6.3 Principles of environmental management legislation	74
6.4 Characteristics of environmental management legislation	74
6.4.1 Flexibility	74
6.4.2 Policies and principles	75
6.4.3 Civil society involvement	75
6.5 Establishment of cooperative governance	76
6.5.1 International cooperation	76
6.5.2. Intra-governmental cooperation	76
6.6 Institutional arrangements	77
6.6.1 National Environment Council	77
6.6.2 The National Environment Management Authority	78
6.6.3 Provincial and District Environmental Committees	78
6.6.3.1 Provincial Environment Committees	78
6.6.3.2 District Environment Committee	79
6.6.4 Public Complaints Committee	79
6.6.5 National Environment Tribunal	80



6.6.6 National Environment Action Plan Committee	80
6.7 Compliance, enforcement and implementation	81
6.7.1 Compliance procedures	81
6.7.2 Conflict resolution	81
6.7.2.1 The Community of Elders	81
6.7.2.2 The Village Chiefs	82
6.7.2.3 Peace Committee	82
6.7.3 Criminal offences	82
6.7.4 Civil measures	82
6.8 Conclusion	83
7. Tanzanian Environmental Management Act No. 20 of 2004	86
7.1 Introduction	87
7.2 The right to environment	87
7.3 Principles of environmental management legislation	89
7.4 Characteristics of environmental management legislation	90
7.4.1 Flexibility	90
7.4.2 Policies and Principles	90
7.4.3 Civil society involvement	90
7.5 Establishment of cooperative governance	91
7.5.1 International cooperation	91
7.5.2 Intra-governmental cooperation	92
7.6 Institutional arrangements	92
7.6.1 National Environmental Advisory Council	92
7.6.2 National Environmental Management Council	92
7.6.3 National Environmental Standards Committee	93
7.6.4 Environmental Appeals Tribunal	93



7.6.5 The Environmental Ombudsman	94
7.7 Compliance, enforcement and implementation	94
7.7.1 Compliance procedures	94
7.7.2 Conflict resolution	95
7.7.3 Criminal sanctions	95
7.7.4 Civil measures	95
7.8 Conclusion	96
8. Comparison between the Botswana environmental management system and the Kenyan, Namibian, Tanzanian and South African environmental management systems	98
8.1 Introduction	99
8.2 The right to environment	99
8.3 Principles of environmental management legislation	101
8.4 Characteristics of environmental management legislation	102
8.4.1 Policies and principles	102
8.4.2 Civil society involvement	102
8.5 Establishment of cooperative governance	103
8.5.1 International cooperation	103
8.5.2 Regional cooperation	104
8.5.3 Intra-governmental cooperation	104
8.6 Institutional arrangements	105
8.7 Compliance, enforcement and implementation	106
8.7.1 Compliance procedures	106
8.7.2 Conflict resolution	106
8.8 Environmental challenges	107
8.8.1 Botswana	107
8.8.2 Kenya	108
8.8.3 Namibia	108



8.8.4 Tanzania	109
8.8.5 South Africa	109
8.9 Conclusion	110
9. Conclusion	
9.1 Introduction	113
9.2 Principles of the Act	113
9.3 Policy formulation	114
9.4 Institutional arrangements	115
9.4.1 Environmental Advisory Council	115
9.4.2 Committee for Environmental Coordination	115
9.4.3 District Environmental Committees	116
9.4.4 The Environmental Ombudsman	116
9.4.5 National Environmental Tribunal	117
9.5 Cooperative governance	117
9.6 Compliance procedures	118
9.7 Conflict resolution	119
10. Recommendations	120
Appendix 1	128
Bibliography	136



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List of Abbreviations

CEC: Committee for Environmental Coordination DPP: Director of Public Prosecutions

DEA: Department of Environmental Affairs

DEA&T: Department of Environmental Affairs and Tourism

DEC: District Environmental Committee

EAT: Environmental Appeals Tribunal

EC: Environmental Commissioner

ECA: Environmental Advisory Council

EFL: Environmental Framework Legislation

EIA: Environmental Impact Assessment

EMCA: Environmental Management and Coordination Act

EMIs: Environmental Management Inspectorate

EO: Environmental Officers

GDP: Gross Domestic Product

IEM: Integrated environmental management

NDP: National Development Plans

NEAC: National Environmental Advisory Committee

NEAF: National Environmental Advisory Forum

NEAPC: National Environment Action Plan Committee

NEC: National Environmental Council

NEMA: National Environmental Management Act

NEMC: National Environmental Management Council



NESC: National Environmental Standards Committee

NET: National Environment Tribunal

NGO: Non-Governmental Organisation

SADC: Southern African Development Community

SDAC: Sustainable Development Advisory Council

PCC: Public Complaints Committee

PEC: Provincial Environmental Committee

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TABLE OF CONTENTS

Chapter 1

INTRODUCTION	1
1.1 Background of the study	2
1.2 Statement of the problem	2
1.3 Objectives of the study	4
1.3.1 Broad objectives	4
1.3.2 Specific objectives	4
1.4 Hypothesis	4
1.5 Research methods	5
1.5.1 Library research	5
1.5.2 Internet	5
1.6 Scope of the study	5
1.7 Relevance of the study	6
1.8 Arrangement of chapters	6



Chapter 1

Introduction

1.1 Background of the study

It is a global concern that the environment and natural systems must be protected and conserved for the benefit of future generations.¹ This has accelerated the development of environmental law as a new legal discipline. Such development has reflected a greater environmental consciousness which suggests that the protection of the environment is increasingly an objective justified in its own terms, and not simply a means of protecting humans.²

Government has a duty to protect the environment.³ This duty is achieved through promulgation of effective environmental laws for the better achievement of the environmental objectives.⁴ Environmental laws protect the environment against degradation⁵ for sustainable use and development.⁶

Government also has a duty to enact environmental framework legislation (EFL) which guides all environmental decisions and regulates matters incidental to the environment⁷ for sustainable use and development.⁸

EFL facilitates the proper management of environmental laws. It coordinates environmental acts so that they are easily implemented. It serves as a guide under which other environmental legislative tools are interpreted.⁹ Other environmental statutes gain force from the EFL. At the core of EFL is the constitutional environmental right. The framework legislation puts into motion the constitutional right to environment by providing mechanisms for implementation of the right.

1.2 Statement of the problem

There is no EFL in Botswana. Currently, environmental matters are regulated by different pieces of legislation and implemented by different government departments. There is no coordinated management of the various environmental department sectors which fall under the portfolios of these different government departments. Although it has not come under scrutiny whether the system, through its policies, is effective or not, it remains a challenge that such policies are reformed and in fact promulgated into framework legislation.

¹ Glazewski J. *Environmental Law in South Africa* (2005) at 5.

² Rio Declaration Principle 1.

³ Glazewski op cit n1 at 5.

⁴ Sustainable use and development are the key objectives for environmental protection.

⁵ Glazewski op cit n1 at 142.

⁶ Sustainable use and development refers to the present use of the environment or natural resources which does not compromise the ability to use the same by future generations or degrade the carrying capacity of supporting ecosystems. See Section 2 of Environmental Management Act, 2004 of Tanzania.

⁷ Dugard J. *International Law: A South African Perspective* (2005) at 393.

⁸ Environmental protection, economic development and social upliftment are the key objectives of the principle of sustainable development.

⁹ Glazewski op cit n1 at 139.

This study addresses the integration of environmental governance in Botswana. The current system of environmental management has been analysed and demonstrates a need for the adoption of the right to a healthy environment into the Constitution, as well as the EFL. Further analysis shall be made in an attempt to determine how the right to environment can be protected and promoted.

Having several environmental laws can complicate environmental governance, especially if there is no legislative framework. The adoption of EFL to serve as a framework under which other environmental legislative instruments are interpreted¹⁰ can improve the management of such instruments and matters attributable to the environment. This is not only the case with environmental laws but also with other areas of the law; the constitution establishes the principal framework¹¹ in terms of which other legislation has to be interpreted.¹²

An in-depth analysis of the relevant environmental policies and regulations in Botswana has reflected the need for EFL. The duty of the state, the nature and purpose of duties in correlation with the existing constitutional challenges to put environmental laws into place has been considered. This has nevertheless not changed the environmental management system in Botswana which can be improved by the EFL.

The *Sesana and others v The Attorney-General*¹³ case has also been analysed and has shown the need for legislative framework for management of the environment. The case dealt with several pieces of environmental legislation which could not be consolidated into a more systematic structure leading to an array of confusion as to whether some of the environmental law instruments are still applicable or not.

The Lesetedi Commission¹⁴ recommended the adoption of the legislative framework for the management of land use in Botswana due to existence of several legislative instruments on the use of land.¹⁵ The application of these statutes has been problematic as there is no guidance as to how they must be managed for the achievement of protection of natural resources and principles of sustainable development.

The Commission found that there was a conflict between the role of the Minister as a policy maker and as overseer of proper land allocation. The Minister was not able to provide the requisite checks and balances or audit systems for checking his/her own actions in allocation of

¹⁰ Glazewski op cit n1 at 139.

¹¹The Attorney-General of Botswana, Dr. Athaliah Molokomme, speaking at a workshop for the Botswana Consensus on the Rule of Law and Good Governance said that the bill of rights, enshrined in the Constitution of Botswana, lays out the fundamental rights and freedoms of the individual...the constitution also provide the legal framework for the three branches of government, the executive, legislature and the judiciary, their functions as well as the boundaries of their authority. See *Botswana Daily News*, Thursday May 8 at 3.

¹² Nel J. and W. du Plessis. 'Evaluation of NEMA based on a generic framework for environmental framework Legislation.' (2001) 8 *SAJELP* at 2.

¹³*Sesana and others v The Attorney-General 2006 (2) BLR 633 (HC)*.

¹⁴The Lesetedi Commission of inquiry on state land allocation in Gaborone. 2004.

¹⁵Lesetedi Commission op cit n14 at 149.

land. The Commission then recommended for an independent, impartial and transparent system to deal with land allocations and planning permission.¹⁶

In my view, the absence of EFL is the root cause of the deficiency considered in this research.

1.3 Objectives of the study

1.3.1 Broad objectives

The broad objective of the study is to investigate how to give effect to the environmental objectives through legislation. The study proceeds to demonstrating how Botswana should adhere to the principle of sustainable use and development through the adoption of the necessary management legislation for the protection of the environment.

The study will be informed by a comparative analysis between Botswana's environmental management systems with other states in the region¹⁷ which have adopted EFL. At the end of the study, a determination will be made whether EFL is necessary or not in Botswana.

1.3.2 Specific objectives

- To demonstrate the need to incorporate the right to a healthy environment into the Constitution of Botswana.
- To demonstrate how environmental right is put into motion through environmental legislation and policies.
- To demonstrate how to achieve environmental management objectives through the adoption of EFL in Botswana.
- To demonstrate how EFL can improve the current system of the management of environmental legislation in Botswana.

1.4 Hypotheses

From the observations of the research, together with the investigations of other legal systems, the study makes the following assumptions:

- There is a general movement within the region towards the adoption of EFL.
- It is necessary to harmonise the environmental legislation between the states by bringing their domestic legislation in conformity with international environmental law.
- There is a need for the incorporation of the right to a healthy environment into the Constitution of Botswana.

¹⁶Lesetedi Commission op cit n14 at 149.

¹⁷South Africa, Kenya, Namibia and Tanzania.

- The environmental jurisprudence of Botswana can be improved through the adoption of the environmental management legislation.
- That effective environmental management and governance system in Botswana can be improved by EFL.

1.5 Research methods

In order to fulfill the objectives of the study, the following methods were used to gather information:

1.5.1 Library research

The library formed the main source of collecting information. I mainly intend to use a variety of sources such as textbooks, legislation, journals and policy documents. Decided court cases will also be used as authority to support my findings and legal opinions.

1.5.2 Internet

The internet will be used to search for any information on the environmental legislation and reform of the environmental laws and policies. Legislation which is foreign to Botswana shall also be sourced from the internet.

1.6 Scope of the study

The study commenced with analysis of the structure of EFL and its components, the purpose for which it is adopted, and its significance and contribution to the management of the environment in any given state.

A determination was made as to the importance of incorporating the environmental right into the constitution, and how the right is given effect through the promulgation of subsidiary legislation. The relationship between the constitutional right to environment and EFL will be discussed with the view to determining how such a relationship helps to achieve effective environmental management and governance.

Since there is no constitutional right to a healthy environment, and no environmental framework legislation in Botswana, the study indicates shortcomings in the system of environmental management and governance and the need for environmental law reform.

The environmental management and governance legislation is broad and contains a number of chapters dealing with various environmental aspects. This study focuses on the essential elements of EFL, its principles and the applicability of principles, and the desirability and effectiveness of compliance, enforcement and implementation procedures. The study further determines how the courts give effect to the principles of EFL and their enforceability.

Institutional arrangements which are necessary for the implementation of the Act shall also be discussed. The relationship between these institutions as characterised by cooperative governance will be looked at with the view to determining how they improve the environmental management and governance. The system of management under the framework legislation will

be briefly discussed, and that includes the Environmental Impact Assessment (EIA) and Integrated Environmental Management (IEM) legislation which are necessary for the management and governance of the framework legislation.

1.7 Relevance of the study

The study is important because there is no EFL in Botswana for the promotion of effective environmental management and governance. This shall be the first overarching environmental law research conducted with the view to propose the reform and establishment of EFL in Botswana. Such an act is proposed to serve as a general framework within which environmental management and implementation plans must be formulated. It shall serve as a guideline in which decision makers of organs of state are to base their decisions.¹⁸ The framework legislation puts into motion the constitutional right to the environment as it provides for the implementation mechanisms and institutional arrangements necessary for exercising the right in pursuit of environmental objectives.

The framework legislation defines overarching and generic principles in terms of which sectoral-specific legislation is embedded,¹⁹ as well as enhancing co-operative governance amongst fragmented line ministries²⁰ as seen in the National Environmental Management Act of South Africa (NEMA),²¹ Environmental Management Act of Namibia,²² National Environmental Management and Coordination Act of Kenya (EMCA),²³ and Environmental Management Act of Tanzania.²⁴

1.8 Arrangement of chapters

Chapter 1

Introduction

This chapter is introductory in nature. It gives the background and introduction to the study in order to understand the main objectives to be achieved. It contains a working hypothesis and literature review. The chapter demonstrates the ideal problem that initiated the need for the study as well as the research methods that inform the study. It also set out the structure that will be followed in this dissertation.

Chapter 2

The nature and essential elements of the environmental framework legislation

¹⁸Glazewski op cit n1 at 139.

¹⁹Nel & du Plessis op cit n12at 1.

²⁰Nel & du Plessis op cit n12at 2.

²¹Act 107 of 1998.

²²Act No. 7 of 2007.

²³No. 8 of 1999.

²⁴Act of 2004.

This chapter discusses the nature and essential elements of EFL²⁵ and how they promote effective environmental governance as discussed by the article of Nel and du Plessis on the evaluation of the National Environmental Management Act of South Africa.²⁶

The chapter demonstrates the need for EFL to conform to the essential elements for the achievement of principles of sustainable use and development in any given country.

The elements of framework legislation such as principles, institutional arrangements, and enforcement and compliance procedures facilitate the achievement of principle of sustainable use and development and effective environmental governance by providing the machinery for implementation of the Act.

Chapter 3

Environmental laws in Botswana

This chapter focuses on the right to a healthy environment in Botswana. It determines the Botswana constitutional principles dealing with the environment and how such provisions promote effective environmental management and governance.

The chapter demonstrates the importance of incorporating the right to a healthy environment into the Constitution of Botswana. The relationship of how EFL puts into motion the constitutional provision is demonstrated in this chapter.

The approach of the courts as to how the environmental legislation is constitutionally protected will be considered with the view to ascertain whether such approach serves justice or not to the environment.

The chapter further considers the environment management system in Botswana with the objective of determining how to promote effective cooperative environmental governance.

Chapter 4

The South African National Environmental Management Act No. 107 of 1998

This chapter gives analysis of EFL in South Africa. The chapter briefly discusses the environmental right but rather focuses on the NEMA.

The basic principles of EFL are critically analysed, as well as the institutional arrangements necessary for the implementation and management of the environmental laws.

The chapter further demonstrates how EFL improves the achievement of environmental objectives in South Africa. Decided cases are discussed in support of the advanced arguments with the view to ascertaining how the courts give effect to environmental laws.

²⁵ Such elements include the principles, characteristics, and institutional arrangements necessary for the implementation of the environmental legislation.

²⁶Nel & du Plessis op cit n12.

Chapter 5

The Namibian Environmental Management Act No. 7 of 2007

The recently adopted Environmental Management Act of Namibia is modeled from the already existing environmental legislation. The principles of the Act are critically analysed. Other essential elements are scrutinized to determine how the promulgation of this legislation has improved the management and governance of the environment in Namibia. Any defects noted are discussed with the objective of finding how such short-comings can be overcome.

Chapter 6

The Kenyan Environmental Management and Coordination Act

This chapter focuses on EMCA. The essential elements of this Act are critically analysed with the view to finding how they better the management of environmental legislation. The institutional arrangements under the Act are looked at to ascertain the effectiveness of such institutions in the management of the environmental legislation.

Chapter 7

The Tanzanian Environmental Management Act

This chapter evaluates the Environmental Management Act of Tanzania. The chapter demonstrates how the management legislation has contributed into the improvement of management of the environment in Tanzania. The effectiveness of the institutional arrangements in terms of the Act is analysed.

Chapter 8

Comparison between the Botswana environmental management system, and South African, Namibian, Kenyan and Tanzanian environmental management systems

This chapter focuses on the comparison of Botswana EFL with that of South Africa, Kenya, Namibia and Tanzania.²⁷ The similarities of their legislation, especially to the essential elements of the EFL, are discussed. Any defects or short-comings are analysed with the view to finding how the proposed EFL for Botswana can curb such defects as the model of best practice.

Chapter 9

Conclusion

This chapter encompasses the author's opinion on the research with the view to achieving the specified anticipated outcomes. A determination as to the need and significance of EFL in Botswana is critically analysed.

²⁷ See Chapter 2 infra.

Chapter 10

Recommendations

This chapter provides the recommendations of the author culminating from the short-comings noted in the research. This chapter outlines the main components of EFL by compiling a proposed legislation in the form of an Act for Botswana.



Chapter 2

The nature and essential elements of the environmental management legislation

2.1 Introduction	11
2.2 Principles of environmental framework legislation	11
2.3 Characteristics of environmental framework legislation	13
2.3.1 Flexibility	13
2.3.2 Policies and principles	13
2.3.3 Civil society involvement	14
2.3.4 Integrated environmental management	14
2.4. Establishment of cooperative governance	15
2.4.1 International cooperation	15
2.4.2 Regional cooperation	16
2.4.3 Intra-governmental cooperation	16
2.4.4 Cooperative agreements	17
2.5 Institutional arrangements	17
2.5.1 Environmental Affairs Council	18
2.5.2 The Environmental Ombudsman	18
2.5.3 Government departments	19
2.6 Compliance, enforcement and implementation	19
2.6.1 Compliance procedures	19
2.6.2 Conflict resolution	20
2.6.3 Criminal sanctions	20
2.6.4 Civil measures	21
2.6.5 <i>Locus standi</i>	21



2.1 Introduction

Some countries²⁸ have adopted EFL. This legislation defines overarching and generic principles for the enhancement of environmental cooperative governance between different spheres of government.²⁹ It also provides for the general basic norms to be used for the promulgation and amendment of new environmental legislation.³⁰

The South African EFL³¹ has been operational since 1998. The effectiveness of this framework legislation has been evaluated and recommendations made for its improvement.

The chapter is guided by the article of Nel and du Plessis³² which discusses the nature and essential elements of EFL.

This chapter discusses the principles and characteristics of the EFL. The institutional arrangements necessary for the implementation of the Act and how they facilitate the environmental co-operative governance, especially international, inter-regional and intra-governmental cooperation and civil society involvement in environmental policy formulation are discussed.

The enforcement procedures for EFL such as civil measures, compliance procedures and criminal sanctions will also be discussed.

The chapter serves as a framework by means of which other EFL in this dissertation are discussed.

2.2 Principles of environmental framework legislation

- (a) EFL must benefit the environment. The purpose of the environmental framework structures is to ensure that the environment is protected against degradation for the achievement of principle of sustainable use and development.³³ This is achieved by regulating the use of natural resources and minimizing environmental harm from human activities.

The effective regulation of the use of natural resources promotes the achievement of environmental objectives by providing improved opportunities to enhance the environmental quality.³⁴ This is achieved by promotion of effective co-operative governance and the integration of various environmental instruments relating to environmental protection.

²⁸Kenya, Namibia, South Africa and Tanzania.

²⁹Loots C. ' Making the environmental law effective' (1994) 1 SAJELP at 18.

³⁰Loots op cit n29 at 2.

³¹The National Environmental Management Act 107 of 1998.

³²Nel & du Plessis op cit n12.

³³UNEP Article 5.

³⁴Nel & du Plessis op cit n12 at 19.

- (b) EFL must provide for the guideline procedures for policy formulation and enforcement. The legislation must contain general environmental legal elements for the formulation, enforcement and implementation of the environmental policies.³⁵

The policy guidelines prescribed in the framework structure ensure that environmental policies are coordinated and consistent so that all decision makers are guided by the same principles in formulation and implementation of the environmental policy.

- (c) The framework legislation must be guided by principles of international environmental law.³⁶ The principles are aimed at protection of natural resources and must be considered when environmental legislation and environmental policies are developed.

Consideration of principles of international environmental law does not only provide for the achievement of environmental objectives, but also ensures that environmental legislation is aligned and consistent with international environmental law.

- (d) The EFL must guide the decision makers when making any decision relating to environmental protection.³⁷ All decision makers must adhere to the provisions of EFL and ensure that the prescribed procedures are complied with before making any decision. This will facilitate consistency in environmental decisions as well as certainty as to the position and status of the environmental laws.

- (e) The framework legislation must guide the interpretation, administration and implementation of the environmental legislation.³⁸ Framework legislation should provide for statutory interpretation and conflict resolution procedures which must be adopted when there are inconsistencies in environmental legislation.

- (f) The framework legislation must be easily accessible. The public must be able to access environmental information and also facilitate the responsible offices with the necessary information required for the implementation of the structure as a matter of right. Where information is withheld from the public, it must be withheld for a justifiable cause.³⁹

- (g) The framework legislation must provide for the involvement of the civil society in the making of decisions relating to environment. This ensures that the interests of all stakeholders and affected parties are taken into account as their participation affords them an opportunity to influence environmental decision making.

Civil society involvement is achieved by providing public participation in the formulation of environmental policy, environmental education and private prosecutions of environmental crimes.⁴⁰

³⁵Nel & du Plessis op cit n12 at 19.

³⁶See Chapter 2.3.5.1 infra.

³⁷Glazewski op cit n1 at 139.

³⁸Glazewski op cit n1 at 139.

³⁹Such as national security.

⁴⁰Nel & du Plessis op cit n12 at 31.

2.3 Characteristics of environmental framework legislation

2.3.1 Flexibility

EFL must contain flexible and adaptive measures which can be transformed into changing circumstances when necessary. This is achieved by providing for the formulation of environmental policies and regulations in sectoral line ministries aimed at protecting the environment.

The environmental policies and regulations can be more easily amended than an Act of Parliament. EFL should therefore promote policy considerations which can be flexible enough to be transformed by changing circumstances such as socio-economic and ecological factors.⁴¹

2.3.2 Policies and principles

The principles of EFL provides for environmental policy integration.⁴² Policy integration requires interaction, accessibility and compatibility of environmental laws aimed at the achievement of integrated form of environmental governance.⁴³

A fundamental requirement for both policy and principles of EFL is the desire to enhance sustainability.⁴⁴ The integration of environmental policy is critical for the achievement of principle of sustainability hence fragmented environmental policies⁴⁵ may lead to unexpected and unwanted environmental consequences which may occur at policy level in government.⁴⁶

It is important that policy guidelines are enacted into the framework legislation to provide administrative authorities with clear direction as to the goals which they are expected to achieve, and means of implementation, which will serve as a standard against which their actions can be evaluated.⁴⁷

The purpose of environmental policy is to inform the public on the government's objectives and how to achieve them.⁴⁸ Organs of state are therefore required to adopt measures which are necessary for the implementation of environmental policy. In order to be realisable, the policy must set out clear objectives, principles and guidelines that it intends to apply for governmental action.⁴⁹

⁴¹Nel & du Plessis op cit n12 at 4.

⁴²See Chapter 2.2 *supra*.

⁴³Louis J. Kotze. *A legal Framework for Integrated Environmental Governance in South Africa and North-West Province*. (2006) at Chapter 2.5.2.

⁴⁴Nel & du Plessis op cit n12 at 6.

⁴⁵ Fragmentation refers to the disjointed governance structures along separate, autonomous line functioning organs of state that operate at national, provincial and local spheres of government. See Kotze op cit n43 at Chapter 2.3.1.

⁴⁶Kotze op cit n43 at Chapter 2.3.1.

⁴⁷Loots op cit n29 at 24.

⁴⁸Loots C 'The effect of the Constitution on Environmental Management' (1997) 4 *SAJELP* at 230.

⁴⁹Loots op cit n48 at 230.

Both policy statements and principles serve as a framework against which defined actions are to be considered.⁵⁰ The integration of various environmental policy considerations and principles of environmental framework legislation is an aspect that should be considered in the endeavor to establish a holistic form of environmental governance.

2.3.3 Civil society involvement

The government should invoke greater public participation in making decisions relating to the environment.⁵¹ Public participation should be promoted at the planning and development phases of policy formulation and environmental law making.

The participation and active involvement of all interested parties⁵² ensures that environmental instruments are enacted in the best interest of the public and the desired outcome is achieved.⁵³

It therefore ensures that open, transparent and representative processes are followed,⁵⁴ which have been adopted in the interest of the public through their participation.⁵⁵

2.3.4 Integrated environmental management

EFL must provide for integrated environmental management (IEM) as a useful foundation for the integration of environmental governance efforts. IEM⁵⁶ should guide the activities which might impact on the environment through governance, with the involvement of civil society and relevant stakeholders to achieve the desired objective.⁵⁷

IEM primarily includes the inter-relationship between different spheres of government and environmental media such as air, land and water.⁵⁸ The necessity of integrating the various environmental media is echoed by the inter-related nature of the environmental factors.

IEM is therefore aimed at addressing pollutants in an integrated way taking into account the tolerable constraints of the environment⁵⁹ within the carrying capacity of natural resources as well as the prescribed environmental standards.

The principles of EFL should therefore provide for IEM to promote cooperative environmental governance between different spheres of government in order to achieve the environmental objectives.

⁵⁰Nel & du Plessis op cit n12 at 6.

⁵¹Glawzeski op cit n1 at 117.

⁵²Public and non-governmental organisations (NGO).

⁵³M Kidd. *Environmental law*. (2008) at 34.

⁵⁴Infra 2.4.1.

⁵⁵Kidd M op cit n53 at 8.

⁵⁶IEM refers to the management of the activities of people to ensure achievement of the principle of sustainability and the utilisation of natural resources provided by all environmental media within the carrying capacities whilst promoting economic growth. *See* Kotze op cit n43 at Chapter 2.6.1.

⁵⁷The ultimate objective of IEM is the achievement of the principle of sustainable use and development.

⁵⁸Kotze op cit n43 at Chapter 2.6.1.

⁵⁹Kotze op cit n43 at Chapter 2.6.1.

2.4 Establishment of co-operative governance

2.4.1 International cooperation

International cooperation refers to the obligation between governments at an international level to share information regarding potential environmental damage.⁶⁰ This obligation emanates from the Stockholm Declaration⁶¹ which reflects a general political commitment to international cooperation in matters concerning the environment.⁶² It is also echoed by the Rio Declaration⁶³ which provides for states and people to cooperate in good faith, in the fulfillment of the embodied principles, for the development of international law in the field of sustainable development.⁶⁴

International law does not allow states to conduct or permit activities within their territories, or in common spaces, without regard to the rights of other states, or for the protection of the environment.⁶⁵ It is the duty of every state engaging in activities which are likely to adversely impact on the environment of another, to timeously inform such other state, so that mitigation measures, as well as an assessment as to extent of the damage likely to be caused, are undertaken.⁶⁶

The nature and extent of this obligation is even invoked in international disputes⁶⁷ and has been translated into specific commitments through techniques designed to ensure information sharing and participation in decision making.⁶⁸

The existence of international treaties on the conservation and utilisation of natural resources⁶⁹ signals the need to recognise international dimensions that should be included in the analysis of the macro-organisational arrangements of environmental governance.⁷⁰

EFL should ensure public participation in negotiations dealing with the writing of conventions and international environmental legislative proposals.⁷¹ The framework legislation should also ensure that mechanisms and competencies to implement international treaties and conventions are adopted.

⁶⁰This is provided by the principle of international cooperation.

⁶¹Of 1972.

⁶²Principle 24.

⁶³Rio Declaration on Environment and Development of 1992.

⁶⁴Principle 27.

⁶⁵Birmie P.W and A.E Boyle. *International Law and the Environment*. (2002) at 104.

⁶⁶Principle 8.

⁶⁷In *Gabcikovo-Nagymaros Project* case the court held enforced the principle of international cooperation and held that Slovakia had not cooperated in good faith in the implementation of principles affecting transboundary resources. See also *Case concerning Kasikili/Sedudu Island (Botswana/Namibia)*.

⁶⁸Sands P. *Principles of International Environmental Law* (2003) at 250.

⁶⁹World Summit on Sustainable Development of 2002 is one of the treaties on the use of natural resources. These treaties have a direct impact on the management of environmental affairs at national level e.g. the ratification of the convention on Biological Diversity which provided for the development of national biodiversity policy and strategy in South Africa. See Strydom H. A. and N. D. King. *Environmental Management in South Africa*. (2009) at 81.

⁷⁰Strydom & King op cit n69 at 80.

⁷¹Nel & du Plessis op cit n12 at 8.

2.4.2 Regional cooperation

The Declaration and Treaty of the Southern African Development Community (SADC)⁷² promotes regional cooperation amongst member states by establishing protocols which may be necessary for their cooperation in various fields of governance.⁷³

SADC environmental treaties are aimed at promoting the equitable use and sustainable development of natural resources. The member states which are signatories to the SADC treaties are required to give effect to the treaties within national processes by adopting measures which are necessary for their implementation.⁷⁴

The member states have the obligation to ensure that their national processes and procedures of environmental management and governance promote regional cooperation necessary for the achievement of the objectives of the treaties and protocols.⁷⁵ In promoting regional cooperation, member states must be guided by principles of international law such as the principle of cooperation, precautionary principles and the preventative principle.⁷⁶

EFL facilitates for the achievement of effective coordination and governance efforts by promoting regional cooperation necessary for the implementation and enforcement of environmental objectives. This ensures that environmental legislation within the region corresponds to national boundaries, and environmental and economic issues are integrated regionally for the achievement of the principle of sustainable development.⁷⁷

2.4.3 Intra-governmental cooperation

This entails the creation of cooperative structures between spheres of the same government of any given state. The government department whose actions are likely to affect the environment should commit themselves to minimise environmental harm.⁷⁸

The environmental factors are multi-faceted and often fall within the jurisdiction of various spheres and organs of any given state.⁷⁹ These organs of state should be involved in the planning processes and decision making relating to the environment, particularly their cooperation and participation in the planning and development of environmental policy.

EFL should provide for coordination of all planning authorities in the development process. Effective planning and development of environmental policy can be achieved through

⁷²The Declaration and Treaty of SADC of 1992.

⁷³Art 22.

⁷⁴Art 22.

⁷⁵SADC treaty op cit n72 article 22.

⁷⁶Dugard op cit n7 at 394.

⁷⁷Nel & du Plessis op cit n12 at 9.

⁷⁸Glazewski op cit n1 at 108.

⁷⁹Glazewski op cit n1 at 108.

cooperation of all organs of state ranging from national and provincial government to local government.⁸⁰

Nel and du Plessis propose for the establishment of Planning Committees whose membership is comprised of representatives from all organs of state and representatives from NGOs. The committees must be tasked with the responsibility of national environmental policy planning and development as well as the promotion of cooperative environmental governance.⁸¹

The cross-sectoral representation in the proposed Planning Committees ensures that environmental information is disseminated to all stakeholders active in environmental governance.⁸² The sharing of information facilitates transparent and well coordinated management of environmental legislation as other structures of government are able to make informed decisions and contribution in policy formulation relating to the environmental issues.

2.4.4 Cooperative agreements

Cooperative environmental governance may be effectively achieved and promoted by environmental management cooperative agreements entered into by various organs of state having jurisdiction over the matter which is affected by the agreement.⁸³

The purpose of cooperative agreements is to adopt a collective cooperative and participative approach in environmental management.⁸⁴ They serve as a framework for future cooperation and specify the parties to the agreements' shared objectives, such as roles and responsibilities, sharing of information, harmonisation of decision making and mutual support.⁸⁵

EFL should promote cooperative agreements at all levels of environmental governance necessary to give effect to the principles of cooperative governance contained in the framework legislation. Such cooperation should be extended to NGOs and the public as interested parties in environmental management and governance, for purposes of promoting compliance with the principles of the Act.

2.5 Institutional arrangements

The effective implementation of environmental legislation depends on appropriate institutional arrangements which are designed to apply environmental policy for sustainable development as a collective undertaking.⁸⁶ These institutions focus on the national policy formulation and the

⁸⁰Kotze L. and S. De La Harpe. 'The good, the bad and the ugly: Using good and cooperative governance to improve environmental governance of South African World Heritage Sites: A case study of the Vredefort Dome'. 2008 (2) PER at 40.

⁸¹Nel & du Plessis op cit n12 at 10–11.

⁸²Nel & du Plessis op cit n12 at 11.

⁸³Glawzeski op cit n1 at 158.

⁸⁴Glawzeski op cit n1 at 159.

⁸⁵Bosman C. L. Kotze and W. du Plessis. 'The failure of the Constitution to ensure integrated environmental management from a co-operative governance perspective'. (2004) 19 SAPR at 420.

⁸⁶Nel & du Plessis op cit n12 at 10.

promotion and facilitation of coordination and cooperation on environmental management issues.⁸⁷

Different institutional options should be considered before strategic decisions are made as to the type of institution necessary for an environmental governance system.⁸⁸

The following institutions are necessary for the administration and implementation of environmental management legislation:

2.5.1 Environmental Advisory Council

There should be an Environmental Advisory Council (ECA) to perform the functions of state administration. The ECA should be composed of members whose experiences reflect various fields of environmental management in the public and private sector.⁸⁹

ECA should be tasked with informing the relevant authorities on the application of environmental principles and advising on any matter concerning the environmental management and governance.

ECA should also review and advise on any environmental standards, guidelines and regulations relevant to the administration of the framework legislation. The ECA should deal with national policy formulation and realization of environmental objectives as well as promotion and facilitation of coordination and cooperation of intra-governmental structures.⁹⁰

2.5.2 Environmental Ombudsman

Environmental management and governance is broad and therefore environmental service is also diverse in nature. It is therefore necessary to establish a central government institution with high political status and sufficient government authority⁹¹ such as the Environmental Ombudsman.

The Office of the Ombudsman is an extra ministerial body, and in discharging its functions is not subject to the direction or control of any other person or authority, and its proceedings cannot be questioned in any court of law.⁹² Reports from the Office of the Ombudsman are filed to the President and eventually to parliament.⁹³

The essential characteristics of the Ombudsman Office are that it must be impartial and independent. The Environmental Ombudsman's operations must be independent from the

⁸⁷Paterson A and L. J Kotze. *Environmental Compliance and Enforcement in South Africa. Legal Perspectives.* (2009) at 78.

⁸⁸Paterson & Kotze op cit n87 at 78.

⁸⁹Glazewski op cit n1 at 142.

⁹⁰See s 40 of Tanzania Environmental Management Act of 2004.

⁹¹Strydom & King op cit n69 at 79.

⁹²<http://www.eisa.org.za/WEP/comagency.htm> (accessed on 26 September 2009 at 09.40)

⁹³<http://www.eisa.org.za/WEP/comagency.htm> op cit n92.

government and agencies it is mandated to investigate.⁹⁴ It is important that the independence of the office be clearly demonstrated in the statutory basis on which it is established.

The Environment Ombudsman should monitor compliance with environmental policy and be able to act decisively when conflict arises between powerful interest groups. The Ombudsman acts as a mediator between the government and citizenry and could initiate judicial review of both environmental legislation and administrative actions.⁹⁵

2.5.3 Government departments

The government has a constitutional mandate to conduct its business in a way that is consistent with the principle of sustainable development, and to integrate environmental issues into its planning process.⁹⁶ Environmental management should be integrated at all levels or spheres of government ranging from policy planning to operational levels of organisations.⁹⁷

The government is responsible for implementing environmental policies, plans and programmes at national level as well as ensuring that environmental management is integrated and compliant with the principles of EFL.

Various government departments manage different environmental management instruments relevant to their ministerial portfolios. These departments should be tasked with the administration and enforcement of environmental sectoral specific legislation.

These traditional government departments⁹⁸ as institutional arrangements are subject to political control and are therefore the least autonomous of the available institutional types.⁹⁹

EFL must promote cooperative governance by developing procedures aimed at promoting the integration and coordination of environmental functions exercised by various government departments.

2.6 Compliance, enforcement and implementation

2.6.1 Compliance procedures

EFL should provide a clear and compliance procedure which can be understood by all stakeholders. The procedure should be fair, reasonable and achievable in conception, in order to guide the enforcement and implementation of environmental instruments.¹⁰⁰

⁹⁴<http://www.eisa.org.za/WEP/comagency.htm> op cit n92.

⁹⁵Van Reenen T.P 'Constitutional protection of the environment: Fundamental (Human) right or principle of state policy' (1997) 4 SAJELP at 289.

⁹⁶Couzens E. and M. Dent. 'Finding NEMA: The National Environmental Management Act, the De Hoop Dam, conflict resolution and alternative dispute resolution in environmental disputes'. (2006) 3 PER at 22.

⁹⁷Strydom & King op cit n69 at 17.

⁹⁸Various governments departments and their roles in environmental management and governance shall be discussed in Chapter 4.5 *infra*.

⁹⁹Strydom & King op cit n69 at 78.

¹⁰⁰.De Ville J.R. *Judicial Review of Administration Action in South Africa*. (2003) at 40.

The principles of EFL must provide compliance procedure as a guiding principle for enforcement and implementation which should be adhered to by decision makers and affected parties. Failure to comply with the provisions of the Act should attract prescribed sanctions.

The institutions under the framework legislation must have the power to enforce the prescribed sanctions.¹⁰¹ Failure to empower such institutions renders the statute redundant as it will be unenforceable.¹⁰² Environmental officers (EO) must be able to issue compliance and abatement notices and directives¹⁰³ setting out the nature of the contravention with the Act, as well as the extent of possible sanctions.

2.6.2 Conflict resolution

Not all the environmental disputes can be resolved by the courts.¹⁰⁴ The parties may choose to refer the dispute to alternative dispute resolution mechanisms which may include arbitration, negotiation and mediation.

A conflict may originate between government departments as a result of conflicting legislation. EFL should therefore provide for conflict resolution procedures between the organs of state. If any legislation is in conflict with EFL, then the latter should prevail.¹⁰⁵ Conflict resolution mechanisms must be defined and applicable to NGOs as well.

International conflict resolution procedures and mechanisms are available to assist in the settlement of international environmental disputes.¹⁰⁶ The United Nations Charter contains the traditional mechanisms of conflict resolution *inter alia* negotiations, mediation, conciliation and arbitration.¹⁰⁷

2.6.3 Criminal sanctions

EFL should expressly provide for the offences under the Act.¹⁰⁸ The punishment must take into account the nature and extent of the environmental damage, especially the irreparable nature of environmental harm.¹⁰⁹

If punishment is a fine, it should be a significant amount to deter potential offenders from contravening the provisions of the Act. This would discourage non-compliance by imposing costs on those who fail to comply with prescribed environmental standards.¹¹⁰

¹⁰¹This will ensure that there is conformity by detecting violations of the law.

¹⁰²Paterson & Kotze op cit n87 at 53.

¹⁰³Paterson & Kotze op cit n87 at 55.

¹⁰⁴Richard Macrory. *Regulations, Enforcement and Governance in Environmental Law*. (2008) at 45.

¹⁰⁵Nel & du Plessis op cit n12 at 12.

¹⁰⁶The United Nations Charter of 1945 available at <http://www.un.org/en/documents/charter/> (accessed on 28 September 2009 at 10.21)

¹⁰⁷Article 33.

¹⁰⁸Paterson & Kotze op cit n87 at 53.

¹⁰⁹Kidd M. 'Environmental Crime – Time for a Rethink in South Africa' (1998) 5(2) *SAJELP* 181 at 193.

¹¹⁰Kidd op cit n109 at 194.

In determining the amount to be imposed, the court should consider the seriousness of the violation, the economic benefit resulting from the violation, as well as any history of such violations.

Furthermore, the courts should consider any good-faith efforts to comply with the applicable requirements, the economic impact of the penalty on the violator, and such other matters as justice may require.¹¹¹

2.6.4 Civil measures

Civil sanctions such as interdict, damages and delictual measures are replacing a significant part of the criminal law in critical areas of law enforcement because they are cheap, easy and quicker to impose than criminal sanctions.¹¹² They are not constrained by criminal procedure and therefore imposing them is more efficient in combating environmental crimes.¹¹³

Interdicts allows for proactive intervention by stopping the development of any proposed activity which is harmful to the environment. It is quicker to resolve the matter through interdicts than criminal sanctions.¹¹⁴ Although interdicts are mainly provisional sentences, they however ensure that compliance and enforcement procedures are followed.

Civil sanctions are awarded by the courts. They are easier to impose because they do not require stringent standard of proof as in criminal matters.¹¹⁵ The standard of proof is on a balance of probabilities other than proof beyond reasonable doubt required in criminal sanctions. They are also useful where the violator did not have criminal *mens rea*¹¹⁶ but procedural oversight.

Delictual measures allows for the victims of harm caused by any environmental activity to recover damages from violators.¹¹⁷ Delictual measures may also be used in addition to criminal sanctions or any other enforcement measures.

It is therefore imperative for EFL to provide for civil measures as possible sanctions against anybody who fails to comply with the provisions of environmental legislation.¹¹⁸

2.6.5 *Locus standi*

Locus standi regulates one's competence to invoke the jurisdiction of the court in enforcing non-compliance with environmental legislation. For the parties to be able to approach the court for compliance, enforcement and implementation of environmental legislation, they must have the necessary standing in law.

¹¹¹Kidd M. 'Alternatives to the Criminal Sanction.' (2002) 9 SAJELP at 43.

¹¹²Kidd op cit n111 at 43.

¹¹³Kidd op cit n111 at 38.

¹¹⁴Kidd op cit n111 at 42.

¹¹⁵Kidd op cit n111 at 44.

¹¹⁶The mental element of environmental crime is difficult to prove and may render criminal sanctions ineffective.

See also Glazewski op cit n1 at 119.

¹¹⁷Kidd op cit n111 at 46.

¹¹⁸Loots op cit n29 at 34.

EFL should provide the rules of *locus standi* as a necessary and inherent measure of enforcing compliance with environmental legislation.

The public and public organisations as interested and affected parties in environmental crimes should be authorised to utilize judicial remedies available to enforce administrative authorities to comply with their obligations.¹¹⁹



¹¹⁹ Loots op cit n29 at 27.

CHAPTER 3

Environmental laws in Botswana	23
3.1 Introduction	24
3.2 The need for constitutional right to environment in Botswana	25
3.3 The management of environmental laws in Botswana	27
3.3.1 The Lesetedi Commission	28
3.3.2 <i>Sesana and others v Attorney-General of Botswana</i>	29
3.3.2.1 Applicability of relevant environmental legislation	29
3.3.2.2 Policy formulation	30
3.3.2.3 Public participation	31
3.3.2.4 Conflict resolution	31
3.4 Institutional arrangements	32
3.4.1 Government departments	32
3.4.1.1 Department of Environmental Affairs	32
3.4.1.2 Department of Mining	33
3.4.2 Environmental Affairs Council	34
3.4.3 The Environmental Ombudsman	34
3.5 Conclusion	35



3.1 Introduction

Botswana, formerly the British Protectorate of Bechuanaland, was declared a British Protectorate in March 1885.¹²⁰ After the discovery of gold in 1867, the Transvaal government, which was a Boer republic, was opposed to the British colony and sought to annex parts of Bechuanaland despite the fact that Britain forbade annexation.¹²¹

The origin of environmental laws in Botswana can be traced back to the founding of the Bechuanaland Protectorate.¹²² In 1891, the law of the Cape Colony was introduced into the Protectorate of Bechuanaland and applied to Europeans and British subjects only. Roman-Dutch law as influenced by English law is the common law of Botswana. This common law is subsisting side by side with the legislation, judicial decisions and customary law¹²³ as a source of law.¹²⁴

At independence, Botswana inherited the colonial environmental management system which was unsystematic and disorganized¹²⁵ and it did not modify the system to provide for a more integrated approach to achieve effective environmental governance.¹²⁶

The Constitution of Botswana was drafted by graduates from British schools and consequently modeled against the colonial governance.¹²⁷ The Constitution however remains the supreme law of the land and any legislation inconsistent with it is invalid.¹²⁸

The environmental management system in Botswana is therefore not integrated and does not promote cooperative environmental governance necessary for the achievement of principle of sustainable development.

This chapter briefly investigates the Constitutional environmental protection in Botswana and how the present environmental management system facilitates for the achievement of environmental principles.

Furthermore, this chapter discusses the relationship between the constitution and the environment with the view to defining how EFL furthers the constitutional commitment to environmental protection.

¹²⁰After urging by Khama III, a chief of the Tswana nation for protection, a protectorate was then established. See Lubabalo. *Botswana's Legal System and Legal Research* (2006) at 1.

¹²¹<http://www.nyulawglobal.org/globalex/Botswana.htm> (accessed on 17 August 2009 at 12.00).

¹²²<http://www.nyulawglobal.org/globalex/Botswana.htm> (accessed on 17 August 2009 at 12.00).

¹²³The common law in force in the Cape of Good Hope (now South Africa) was the Roman-Dutch law as received from Holland and developed by the Colony's superior courts.

¹²⁴Customary law is only applied to tribesmen of Botswana.

¹²⁵<http://www.nyulawglobal.org/globalex/Botswana.htm> (accessed on 17 August 2009 at 12.00).

¹²⁶<http://www.emeraldinsight.com> (accessed on 17 August 2009 at 12.00).

¹²⁷<http://www.cato.org/pubs/journal> (accessed on 17 August 2009 at 11.50).

¹²⁸<http://www.cato.org/pubs/journal> (accessed on 17 August 2009 at 11.50).

¹²⁸See the Constitution of Botswana Chapter 1.

The leading case of *Sesana and others*¹²⁹ dealt with the formulation and implementation of environmental policy. This case will also be discussed, outlining the relevant considerations necessary for this research.

The Lesetedi Commission¹³⁰ addressed land issues. The commission recommended a framework structure for regulation of land issues. The commission will be briefly discussed with the view to incorporating its recommendations into the proposed framework legislation that will also affect land use as a natural resource.

The chapter is aimed at proposing the adoption of EFL in Botswana for the integration, management and implementation of environmental instruments.

3.2 The need for constitutional right to environment in Botswana

The Constitution of the Republic of Botswana¹³¹ does not make provision for a right to a healthy environment. The Constitution should include the right to a healthy environment as a fundamental human right¹³² which requires necessary measures to be put in place to facilitate for the enjoyment of the right. Such measures will ensure that environmental considerations are accorded respect and recognition in the country.¹³³ In modern constitutional dispensation, the Constitution embodies the fundamental rights.¹³⁴ It is the supreme law of the land and all laws of the state are tested against it.¹³⁵

Currently, protection to the environment in Botswana is incidental to other fundamental rights in the constitution.¹³⁶ This raises a question as to the recognition of the importance of the environmental protection and management in Botswana, particularly to the achievement of the principle of sustainable use and development of natural resources.

There is therefore a need to incorporate the right to environment as a fundamental human right into the constitution of Botswana in order to accord it more protection and enforcement. The

¹²⁹Infra 3.3.2.

¹³⁰Infra 3.3.1.

¹³¹Chapter 1 of 1966.

¹³²Rautenbach, I.M. and E.F.J.Malherbe. *Constitutional law of South Africa* (1999) at 322.

¹³³*Director: Mineral Development, Gauteng Region and Sasol Mining Pty Ltd v Save the Vaal Environment and others* 1999 (2) SA 709 (SCA) at 719.

¹³⁴The enforceability of the environmental right was echoed by Weeramantry J who opined that the protection of the environment is a vital part of contemporary human right doctrine. It is a *sine qua non* for other rights such as the right to health and right to life. See *Gabcikovo-Nagymaros Project* case at 24.

¹³⁵*Director: Mineral Development, Gauteng Region and Sasol Mining Pty Ltd v Save the Vaal Environment and others* 1999 (2) SA 709 (SCA) at 751. See also *Sesana and others v Attorney-General* 2006 (2) BLR at page 751.

¹³⁶In *Sesana and others v Attorney-General*, the court used the right to freedom of movement to give effect to the various environmental legislation. Section 14(3) states that:

‘Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision for the imposition of restrictions that are reasonably required in the interest of defense, public safety, public order, public morality or public health or the imposition of restrictions on the acquisition or use by any person of land or other property in Botswana and except so far as that provision or, as the case may be, the thing done under the authority thereof, is shown not to be reasonably justifiable in a democratic society.’

need for constitutional amendment to include the right to environment was lamented by the Attorney-General of Botswana¹³⁷ when advocating for constitutional review. Her views were also conceded by Dingake J. who also observed that:

‘there is rule of law in Botswana but many improvements can be done to improve access to justice in the country...there is need for the civil society to be rights conscious and that societal values need to be embedded in the constitution.’¹³⁸

The advantage of inclusion of the right to a healthy environment in the constitution is that the right is a distributional, conflict-resolving mechanism, as it elevates the environmental right to the same level as other fundamental rights and freedoms.¹³⁹ It brings the protection of environment directly within the ambit of the interpretation of the contents of other fundamental rights.¹⁴⁰ It also result in a shift in emphasis in that these rights and freedoms may only be limited in terms of the law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society.¹⁴¹

The Constitution reflects a right-based approach to allow all law and administrative conduct to recognise and promote individual rights and freedoms as fundamental human rights including environmental right.¹⁴²

Constitutional entrenchment of right to a healthy environment in the form of a human right serves as a basic condition for human existence which must be protected.¹⁴³ The failure to protect the environment results in degradation of natural resources which may threaten not only the health, livelihoods and lives of humans, but our continued existence which is dependent on the environmental media.¹⁴⁴ The creation of a constitutional right to the environment promotes an integrated approach to environmental management and governance.¹⁴⁵

The right to a healthy environment should not stand in isolation. The state must enact legislation that sets into motion the environmental constitutional provisions. The government has a duty to adopt appropriate laws and utilize these laws to regulate the effects of human activities on the environment for proper governance and management.¹⁴⁶ Proper governance and administration

¹³⁷Dr. Athalia Molokomme observed that:

‘Botswana has made strides in upholding democratic principles but there are a need for a constitutional review to enhance the protection of fundamental human rights.’

See *Botswana Daily News*, Thursday May 8, 2008 No. 86 at 1.

¹³⁸Daily news op cit n132 at 24.

¹³⁹Van Reenen op cit n95 at 281.

¹⁴⁰Van Reenen op cit n95 at 281.

¹⁴¹S 36 of the Constitution of South Africa provides that the limitation of a constitutional right should be based on human dignity, equality and freedom and should also take into account all relevant factors that may render the limitation justifiable. See also Strydom & King op cit n69 at 224.

¹⁴²Rautenbach & Malherbe op cit n132 at 224.

¹⁴³Feris L. *Constitutional Environmental Right: An underutilized resource* (2007) at 7 available at <http://www.saifac.org.za/docs> (accessed on 8 September 2009 at 13.04).

¹⁴⁴Feris op cit n143 at 7.

¹⁴⁵Feris op cit n143 at 7.

¹⁴⁶Kotze & De La Harpe op cit n80 at 6.

requires a sound integrated legal framework which mandates sustainable environmental governance efforts.¹⁴⁷

EFL facilitates cooperative environmental governance by establishing principles for decision making.¹⁴⁸ It provides for the establishment of institutions for promotion of cooperative governance,¹⁴⁹ and procedures for coordinating environmental functions by organs of state as well as administration mechanisms to champion the environmental cause.¹⁵⁰

Such legislation serves as a framework under which other sectoral environmental legislation is embedded¹⁵¹ and helps in the implementation of the right to a healthy environment entrenched in the constitution.

The framework legislation ensures that environmental legislation is enforceable through the creation of enforcement mechanisms. The mechanisms are fashioned to monitor cooperative governance, issue compliance orders through prescribed procedures, and arrest and punish offenders.¹⁵²

The Botswana government should include the right to a healthy environment in the Constitution and further adopt EFL to advance the commitment to the promotion of environmental protection and management.

3.3 The management of environmental laws in Botswana

Various environmental legislation in Botswana deals with specific environmental areas.¹⁵³ The management of these instruments is the responsibility of the ministry or department tasked with their administration. Each ministry administers the objectives of environmental legislation relevant to its ministerial portfolio independently of other departments, which may lead to fragmented and disjointed environmental decision making.¹⁵⁴

Even though the system ensures that the intended outcome of legislation is achieved by providing specialised monitoring process, the system is not well organized and coordinated to facilitate effective environmental management and governance efforts. It may however be relevant to sensitive, vulnerable or highly dynamic ecosystems which require specific attention

¹⁴⁷Environmental governance is defined as the management process executed by institutions and individuals in the public and private sector to holistically regulate human activities in the total environment at international, regional, national and local levels, by means of formal and informal institutions, processes and mechanisms embedded in and mandated by law for the promotion of present and future interest human beings hold in the environment. See Kotze & De La Harpe op cit n80 at 6.

¹⁴⁸See the long title of NEMA.

¹⁴⁹As discussed in 2.3.4.

¹⁵⁰Strydom & King op cit n69 at 21.

¹⁵¹Nel & du Plessis op cit n12 at 4.

¹⁵²See Chapter 2.4 *supra*.

¹⁵³The so-called sectoral specific environmental legislation.

¹⁵⁴Strydom & King op cit n69 at 30.

in management and planning procedures,¹⁵⁵ and specific departments may adopt the necessary mechanisms of enforcement and implementation of the concerned legislation.

The environmental management system in Botswana is fragmented, discontinuous and issue specific. There is no integrated environmental instrument which has its primary objective as regulating environmental governance and management in an integrated and streamlined manner, and these results in disjointed environmental decision making. There is no coordinating body which ensures that all legislation is complied with.

Botswana should adopt an IEM system which will facilitate and promote effective environmental governance.¹⁵⁶ IEM approach ensures that environmental attributes are considered in the decision making which may have a significant effect on the environment.¹⁵⁷ This is achieved by the use of environmental management practices best suited to ensuring that particular activities are pursued in accordance with the principles of environmental management.¹⁵⁸

The focus of environmental management is to manage the behavior of humans and the performance of organisations in line with environmental principles for the protection of the environment.¹⁵⁹ This is promoted by civil society involvement in environmental policy formulation, and alignment with environmental legislation across all various spheres of government. The approach will ensure that not only government is involved in environmental management but also all relevant stakeholders active in environmental matters.¹⁶⁰

The effective environmental management and governance in Botswana can be achieved by the promulgation of EFL. The framework legislation provides for a systematic and organized management system through integrated, orderly and progressive dispensation of environmental issues.

EFL contains principles which guide the decision makers in making decisions relating to the environment. The Act also promotes cooperative governance by providing procedures for coordination of environmental functions exercised by all organs of state.¹⁶¹ The institutions created under the Act also facilitate for the achievement of effective environmental governance by carrying out various functions relating to environmental management and governance.

3.3.1 The Lesetedi Commission

The Lesetedi Commission¹⁶² was appointed to investigate the complaints for maladministration of land allocations in Gaborone. Relevant to this study, the commission was to:

¹⁵⁵Kidd op cit n53 at 34. See also Section 2(4) of NEMA.

¹⁵⁶Strydom & King op cit n69 at 28.

¹⁵⁷Nel J. and W. du Plessis. 'Unpacking integrated environmental management – A step closer to effective co-operative governance'. (2004) 19 SAPR at 182.

¹⁵⁸Strydom & King op cit n69 at 33.

¹⁵⁹Strydom & King op cit n69 at 30.

¹⁶⁰Strydom & King op cit n69 at 28.

¹⁶¹Nel & du Plessis op cit n157 at 184.

¹⁶²Lesetedi Commission op cit n14 at 147.

- (1) establish whether the Minister of Lands and Housing has powers to allocate State land and the circumstances under which he can do so, and
- (2) investigate steps followed in certain land allocations in Gaborone and report whether the right procedures were followed.

The Commission found that there was no transparency in land allocation and that the prescribed procedures for land allocation were not followed.¹⁶³

The Commission recommended the adoption of a national framework structure for land allocation and ancillary matters to guide decision makers when addressing matters of environmental interest. Such framework should provide parameters under which a decision maker can act. It should also provide for policy control and checks and balances through independent, impartial and transparent procedures.¹⁶⁴

The Commission also recommended the involvement of civil society in land policy formulation. It recommended that the responsibility for land allocation and administration should be placed on an independent body of professionals of integrity from government and private sector who will be accountable for their actions.¹⁶⁵

3.3.2 *Sesana and others v Attorney-General of Botswana*

The applicants in this case belonged to a tribe called the Basarwa. They are the indigenous people of the Kalahari Desert, who built their settlements before the area was declared the Central Kalahari Game Reserve in 1961.¹⁶⁶ The applicants lived, hunted, gathered wood and kept small stock in the reserve. The government provided basic services to the applicants in the reserve. However, they were prohibited from hunting after the area was declared a game reserve.

In 2000, the government relocated the applicants to settlements outside the reserve where they were again provided with the essential amenities that they had enjoyed in the game reserve. The applicants applied to the Court for an order declaring the actions of government to terminate essential services such as the supply of water unlawful and unconstitutional.

The Court considered several environmental instruments together with the constitutional provision relied upon by the applicants. Relevant to this research, the Court made considerations relating to the application of environmental legislation, principles of policy formulation, the importance of public participation, and conflict resolution procedures.

3.3.2.1 Applicability of relevant environmental legislation

¹⁶³Lesetedi Commission op cit n14 at 148.

¹⁶⁴Lesetedi Commission op cit n14 at 149.

¹⁶⁵Lesetedi Commission op cit n14 at 149.

¹⁶⁶The Central Kalahari Game Reserve was declared a protected area in terms of section 5(1) of the High Commissioner's Notice No. 33 of 1961.

The decision to relocate the applicants was taken in terms of the regulations adopted under the Wildlife Conservation and National Parks Act.¹⁶⁷ These regulations¹⁶⁸ are aimed at controlling movements of human beings into the game reserve, which has been declared a protected area. The regulations are however not generally applicable as the empowering legislation does not apply to all the game reserves and national parks in the country.¹⁶⁹

The Protected Places and Areas Act¹⁷⁰ was an appropriate legislation to be used as it is generally applicable and contains relevant provisions that put into motion the constitutional right to freedom of movement, as well as regulation of entry into the protected areas through permit and exemption systems.¹⁷¹

The failure to use relevant environmental legislation leads to fragmentation and inconsistencies in environmental decision making. This causes uncertainties to the decision makers who are required to enforce and implement environmental legislation, as to the status and applicability of the concerned instruments.¹⁷² The uncertainty about the status of the law culminates in disjointed and fragmented decision making which renders the environmental management and governance efforts futile.

The principles of the framework legislation are applicable to all organs of state and provide a guideline upon which environmental legislation is embedded.¹⁷³ The development of any environmental laws should comply with the provisions of EFL which binds all decision makers in making decisions relating to the environment.

3.3.2.2 Policy formulation

The Court held that the government policies were confusing, unreasonable and unrealisable.¹⁷⁴ The policy on 'total preservation of life' was contrary to the policy of 'encourage but not force' which were all aimed at encouraging the relocation of the Basarwa from the game reserve.¹⁷⁵ The government applied an irrelevant policy to the circumstances which could have been addressed otherwise.¹⁷⁶

EFL provides for the guidelines to be used in the formulation of environmental legislation and environmental policy aimed at giving effect to the provisions of the Act.¹⁷⁷ The policy guidelines bind all decision makers in making any policy decision relating to the environment.

¹⁶⁷Cap 65:02.

¹⁶⁸National Park Regulations of 2000.

¹⁶⁹S 47 of the regulations does not apply to other game reserves such as Gaborone Game Reserve, Maun Game Reserve, Francistown Game Reserve, Mannyelanong Game Reserve, Nnywane Game Reserve and forest reserves in terms of the Forest Act.

¹⁷⁰Cap 22:01.

¹⁷¹S 4 (2).

¹⁷²See emphasis of Dow J. at 711.

¹⁷³Glazewski op cit n1 at 139.

¹⁷⁴At 711.

¹⁷⁵Sesana op cit n13 at 711.

¹⁷⁶Sesana op cit n13 at 746.

¹⁷⁷Glazewski op cit n1 at 139.

EFL promotes integrated and coordinated environmental policy by providing for public participation and cooperative governance in the development of environmental policy.¹⁷⁸ Integrated and coordinated policy establishes a joint policy decision making for all the various sectors of environmental governance.

The environmental policy must be clear and ascertainable so that decision makers understand what they are expected to do and how to achieve the objectives of the policy. Clarity and certainty is essential as vague provisions render the policy unenforceable.¹⁷⁹

3.3.2.3 Public participation

The Court concluded that government failed to consult the applicants on formulation of environmental policy on 'encourage but not force' which significantly affected their well-being. The Court held that the public had the right to be consulted in the formulation and application of policies, and consultation does not mean informing, but affording an opportunity to have the view of the public taken into account in decision making.¹⁸⁰

The involvement of civil society in the development of environmental policy is inherently significant to effective environmental management and governance efforts. Public participation in decision making ensures transparency and accountability in decision making, which is necessary for the achievement of principle of sustainability.

The participation of members of the public and NGOs in environmental decision making ensures that the public is aware of their obligations under the policy and that their interests are considered.

3.3.2.4 Conflict resolution

The declaration of protected places and areas considered in this case fell within the ambit of Protected Places and Areas Act¹⁸¹ and the Wildlife Conservation and National Parks Act.¹⁸² The former regulates movements of human beings into places declared protected areas whilst the latter also regulates entry into the game reserves as protected places. The two legislations contain different procedures for granting access to the protected areas which are incompatible.

The case demonstrates the need for environmental framework legislation upon which environmental policies are formulated. The framework legislation will provide for the guiding principles and conflict resolution procedures to be used in environmental disputes. The legislation also facilitates for achievement of effective environmental governance by establishing institutions necessary for the promotion of cooperative governance as well as the involvement of the public in environmental decision making.

¹⁷⁸Kotze op cit n43 at Chapter 2.5.2.

¹⁷⁹Loots op cit n48 at 230.

¹⁸⁰Sesana op cit n13 at 676.

¹⁸¹Cap 22:01.

¹⁸²Cap 65:02.

Conflict resolution is one of the essential elements of EFL necessary for enforcement and implementation. The conflict resolution procedures facilitate for effective enforcement and compliance by providing measures and guidelines to be adopted in environmental disputes.

EFL must provide for the resolution of conflict emanating from conflicting legislation. Failure to provide conflict resolution measure renders environmental governance efforts futile.

3.4 Institutional arrangements

3.4.1 Government departments

The Botswana government is divided into two separate but interdependent spheres namely the national and local government. The Constitution of Botswana identifies which sphere of government is competent to make and administer laws on various functional environmental areas. Some of these functional areas fall within the concurrent competencies and the constitution does not provide for the conflict resolution mechanisms regarding conflict of legally entrenched powers. The following departments play a significant role in environmental management and governance in Botswana:

3.4.1.1 Department of Environmental Affairs

The Department of Environmental Affairs (DEA) falls under the Ministry of Wildlife, Environment and Tourism.¹⁸³ Its primary duty is to pursue policies and measures which increase the effective use and management of natural resources, so that beneficial interactions are optimised and harmful environmental side-effects are minimised.¹⁸⁴

The inter-relationship of DEA with other sectoral ministries lies in the management of EIA Act.¹⁸⁵ The legislation places an obligation on the proponent for any development which is likely to impact on the environment to carry out environmental impact assessment.¹⁸⁶

All environmental legislation deals with the management and conduct of business that affects the natural resource. It is conceivable that before implementing an activity under environmental legislation, authorisation for implementation should be obtained from DEA, which is the lead agent for environmental management and governance¹⁸⁷.

Environmental management and governance can be made effective through cooperation between various spheres and organs of government.¹⁸⁸ EFL should place the role of facilitating

¹⁸³The Ministry has other two departments viz: the Department of Forestry and the Department of Wildlife and National Parks which are also mandated with the management and governance of environmental statutes such as Forest act and National Wildlife Conservation and National Parks Act respectively.

¹⁸⁴<http://www.envirobotswana.gov.bw> (accessed on 9 September 2009 at 14.10)

¹⁸⁵Act No. 6 of 2005.

¹⁸⁶S 4 of the Environmental Impact Assessment Act, 2005 of Botswana.

¹⁸⁷See Wetland Policy and Strategy of Botswana. <http://www.envirobotswana.gov.bw/> (accessed on 9 September 2009 at 14.36).

¹⁸⁸Nel & du Plessis op cit n157 at 184.

cooperative governance with DEA as the central point which will promote cooperative governance and monitor compliance and enforcement of environmental instruments.

3.4.1.2 Department of Mining

The mandate of the Department of Mining¹⁸⁹ is to protect mineral resources by regulating activities for extraction of minerals. The Department plays a major role in the conservation and protection of natural resources as the extraction of minerals does not only concern minerals but may affect the greater environment.¹⁹⁰

The department is tasked with issuing mining licences.¹⁹¹ These licences are subject to conditions of compliance with environmental requirements.¹⁹² The breach of the mining licence conditions may lead to the revocation of the licence, as well as penalties for non-compliance as may be determined by the competent authority.¹⁹³

Some of the environmental instruments under the administration and management of Department of Mining are:

- Mines, Quarries, Works and Machinery Act¹⁹⁴ which is generally aimed at working conditions but includes sections on slimes dams, fuel and oil spills and effluent water.
- Mines and Mineral Act¹⁹⁵ prohibits wasteful mining and processing. It regulates the extraction of materials such as sand.
- Atmospheric Pollution (Prevention)¹⁹⁶ provides for the prevention of pollution of the atmosphere by the carrying out of industrial processes and for matters incidental thereto.

This governance system is fragmented and may lead to confusion in the implementation of environmental laws. Confusion may arise where matters relating to a single activity are governed by more than one line function, for example, the application for authorisation for mining activity

¹⁸⁹This Department falls under the Ministry of Minerals, Water and Energy. The Department is also tasked with the administration and management of Water Act Cap 52:03, Boreholes Act Cap 22:02 and Precious Stones Act Cap 32:01 which are all incidental to the natural resources. See <http://www.envirobotswana.gov.bw/envleg.html> (accessed on 9 September 2009 at 17.30)

¹⁹⁰Extraction of minerals may affect environmentally sensitive factors such as wetlands, aquatic plants and animals.

¹⁹¹The mining licenses include the licenses for the extraction of precious stones, river sand, pit sand and gravel. Of most importance is the extraction of river sand which is potentially irreparably harmful to river basins and wetlands as well as aquatic life around rivers. The extraction of river sand may seem of little importance but it has a great impact on the environment as it may permanently damage environments, and harm species and habitats which may never be rehabilitated.

¹⁹²The objective of the Department of Mining is to provide efficient administrative services for mineral exploration. This is achieved by a motivated workforce, and developing and implementing equitable, cost-effective and environmentally sustainable policies, programmes and legislation. See http://www.commonwealth-of-nations.org/Botswana/Minerals/The_Ministry_of_Minerals%60_Energy_and_Water_Resource/welcome (accessed on 9 September 2009 at 17.03).

¹⁹³S 8 of the Mining Act of Botswana Cap 64:03.

¹⁹⁴CAP.44:02 of 1978.

¹⁹⁵CAP.66:01 of 1977.

¹⁹⁶Cap.65:03 of 1971.

requires a mining permit, as well as water permits which must be obtained from the Department of Water Affairs under the Water Act.¹⁹⁷ It also requires environmental impact assessment authorisation to be obtained under the Environment Impact Assessment Act from the Department of Environmental Affairs.¹⁹⁸

3.4.2 Environmental Advisory Council

EAC determines any environmental matter referred to it in relation to the environmental protection and management. The EAC reviews environmental standards, guidelines and regulations which are necessary for the achievement of the environmental objectives.¹⁹⁹

The membership of the EAC is drawn from the directors of various government departments and therefore it is broadly represented in terms of sectoral arrangements and skills. The effectiveness of the EAC depends on the competencies of members as well as the government support for the required machinery to implement the activities of the EAC.

There is no EAC to offer technical advice on environmental considerations in Botswana. Currently environmental matters are administered by various government departments as illustrated above,²⁰⁰ leading to fragmented environmental governance and decision making. These fragmented structures result in disjointed decision processes that lead to uncoordinated and duplicated environmental governance.²⁰¹

EFL must provide for the establishment of the EAC in order to ensure the optimum achievement of the environmental legislative instruments.

3.4.3 Environmental Ombudsman

EFL should provide for the establishment of the Environmental Ombudsman as one of the enforcement and compliance agencies, which may independently take action against any transgressor including the state. The Office of Ombudsman should be independent and not subject to political influence which may compromise the quality of the decision taken.²⁰²

In Botswana, the Office of Ombudsman does exist, and its role is to investigate maladministration actions of organs of government.²⁰³ The Office of Ombudsman is a public office and has the power and authority to hear complaints from any member of the public who has sustained injustice as a result of maladministration in connection with the action taken.²⁰⁴

¹⁹⁷S 5 of the Water Act of Botswana Cap.34:01.

¹⁹⁸S 14 of the EIA Act of Botswana.

¹⁹⁹Glazewski op cit n1 at 142.

²⁰⁰Chapter 3.5.1 *supra*.

²⁰¹Strydom & King op cit n69 at 18.

²⁰²<http://www.eisa.org.za/WEP/comagency.htm> op cit n92.

²⁰³See preamble of Ombudsman Act of Botswana Chapter 02:12.

²⁰⁴S 3 of Ombudsman Act of Botswana.

The duties of the Ombudsman of Botswana should be extended to expressly include the investigation of complaints concerning the use of natural resources, degradation and destruction of ecosystems, as well as, the failure to protect the environment.²⁰⁵

3.5 Conclusion

The current system of environmental management in Botswana does not provide for integration and cooperative environmental governance which is facilitated by EFL. Furthermore, the system does not facilitate for effective environmental management and governance as it is fragmented.²⁰⁶

Fragmented governance structures result in fragmented governance processes that culminate in disorganised policies.²⁰⁷ The relevant government departments tasked with the management of environmental legislation often focus on one environmental process leading to duplication and overlap of governance efforts,²⁰⁸ for example, the Department of Mining is tasked with issuance of mining licences whilst DEA is also responsible for authorising the mining activities.²⁰⁹ These departments focus in authorisation process without having sufficient resources to conduct post-authorisation leading to delay in decision making.

These problems could be overcome by the adoption of EFL which would provide principles, institutions for management and implementation as well as enforcement mechanisms necessary for the protection and promotion of environmental cooperative governance. The incorporation of the environmental right into the constitution of Botswana will also ensure that environmental principles and objectives are respected.

The failure of the Constitution of Botswana to provide for the environmental right creates a lacuna in the commitment of protection, management and governance of environmental instruments, for the achievement of principles of sustainable use and development.

The constitutional provisions, especially the fundamental rights, are accorded greater protection as their limitation is only allowed in terms of law of general application, and within the limits set for the limitation of the other rights.²¹⁰ The limitation of a constitutional right should be based on human dignity, equality and freedom, and should also take into account all relevant factors that may render the limitation justifiable.²¹¹

²⁰⁵See Art 91(c) of the Constitution of Namibia Act of 1990.

²⁰⁶It is fragmented as various environmental instruments are administered and managed by individual departments who are not obliged, at least statutorily, to consult with other relevant departments, leading to disjointed legislation emanating from separate policy processes.

²⁰⁷See Chengeta Z., J. Jamare and N. Chishakwe *Assessment of the Status of Transboundary Natural Resources Management Activities in Botswana*. IUCN Botswana, TBNRM project (2003) at 4.

²⁰⁸Kotze op cit n43 at Chapter 2.3.2.

²⁰⁹See http://www.commonwealth-of-nations.org/Botswana/Minerals/The_Ministry_of_Minerals%60_Energy_and_Water_Resourc/welcome (accessed on 9 September 2009 at 17.03).

²¹⁰S 36 of the Constitution of South Africa Act 106 of 1996.

²¹¹S 36(1) of the Constitution of South Africa Act 106 of 1996.

The constitutional protection to the environment places an obligation on government to put into place measures necessary for the implementation and enforcement of the right within reasonable legislative and other measures.²¹² This will ensure that the constitutional right to the environment is realisable by providing an integrated approach in environmental management and cooperative governance.

The incorporation of the environmental right into the constitution requires the promulgation of legislation that sets into motion the constitutional provision. EFL is one of the significant and relevant environmental instruments required for the realization of the constitutional environmental right.

The absence of the environmental framework structure has led the government of Botswana into formulating policies which are unreasonable, confusing and unrealisable.²¹³ The policy making, coordinating and monitoring functions of environmental management and governance have to be provided at the level of central government, especially DEA as the lead government environmental agency.

EFL alone is not enough to provide for integrated environmental protection, management and governance. The framework legislation must be supported by appropriate, well directed policies and programmes, which have to be implemented by the Executive Authority. The said policies must be reasonable both in conception and implementation.²¹⁴

Despite the recommendations by the Lesetedi Commission,²¹⁵ EFL has not been adopted. The commission provided guidelines for the structure which could be used to guide decision makers.

The guidelines and principles of EFL could be useful to the courts in interpreting environmental instruments. The court in *Sesana and others*²¹⁶ also had difficulty in determining the inappropriate environmental legislation due to the existence of various environmental instruments dealing with one environmental factor. The incorporation of the environmental right into the constitution and adoption of the environmental framework legislation can better give effect to the environmental objectives through management and enforcement.

²¹²Kotze L. J. and A. R. Paterson. *Role of Judiciary in Environmental Governance: Comparative Perspective*. (2009) at 561.

²¹³The emphasis made by Dow J. in *Sesana and others case*. See Chapter 3.3.2 *supra*.

²¹⁴Government of the Republic of South Africa and others v Grotboom and other 2000 (11) BCLR 1169 (CC) at 62 per Yacoob J. at para. 69B-D.

²¹⁵See Chapter 3.3.1 *supra*.

²¹⁶See Chapter 3.3.2 *supra*.

CHAPTER 4

The South African National Environmental Management Act No. 107 of 1998	37
4.1 Introduction	39
4.2 The right to environment	39
4.3 NEMA principles	42
4.4 Characteristics of NEMA	43
4.4.1 Flexibility	43
4.4.2 Policies and principles	43
4.4.3 Civil society involvement	44
4.5. Establishment of cooperative governance	44
4.5.1 International cooperation	44
4.5.2 Intra-governmental cooperation	45
4.5.3 Integrated environmental management	45
4.5.4 Cooperative agreements	46
4.6 Institutional arrangements	47
4.6.1 Government departments	47
4.6.1.1 Department of Environmental Affairs and Tourism	47
4.6.1.2 National Environmental Advisory Forum	48
4.6.1.3 The Committee for Environmental Coordination	48
4.6.1.4 The Environmental Management Inspectorate	48
4.6.1.5 The Enforcement Directorate Unit	49
4.7 Compliance, enforcement and implementation	49
4.7.1 Compliance procedures	49
4.7.2 Conflict resolution	49
4.7.3 Criminal sanctions	50
4.7.4 Civil measures	50



4.7.5 <i>Locus standi</i>	51
4.8 Conclusion	51



4.1 Introduction

This chapter investigates the effectiveness of environmental management in South Africa. The investigation starts with an analysis of the Constitution and how it affords protection to environmental laws. It briefly discusses the constitutional environmental right therein.

The chapter analyses the environmental management legislation of South Africa, focusing on the National Environmental Management Act (NEMA)²¹⁷. The basic principles of the environmental management legislation will be analysed, as well as the institutional arrangements necessary for the implementation and management of the environmental laws.

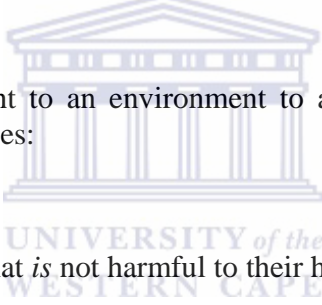
The chapter further demonstrates how the environmental management legislation helped to better achieve environmental objectives in South Africa. In addition decided cases will also be discussed in support of the advanced arguments with the view to establishing how the courts give effect to environmental laws.

This chapter discusses the essential elements of NEMA against those of the framework legislation discussed in Chapter 2 above. The analysis is aimed at determining whether NEMA complies with the essential elements of environmental framework legislation.

4.2 The right to environment

South Africa has elevated the right to an environment to a fundamental human right.²¹⁸ The Constitution of South Africa provides:

“Everyone has the right-

- 
- (a) to an environment that *is* not harmful to their health or well-being; and
 - (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that-
 - (i) prevent pollution and ecological degradation;
 - (ii) promote conservation; and
 - (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.”²¹⁹

The incorporation of the environmental right in the Bill of Rights enables citizens to assert the right at the highest possible constitutional level.²²⁰ In *BP Southern Africa (Pty) Ltd v MEC for*

²¹⁷Act 107 of 1998.

²¹⁸Glazewski op cit n1 at 67.

²¹⁹S 24 of the Constitution of South Africa which came into operation on 4 February 1997.

²²⁰Kotze & Paterson op cit n212 at 562.

*Agriculture, Conservation, Environment & Land Affairs*²²¹ the Court noted that the elevation of the right to an environment to a fundamental human right leads to the goal of attaining a protected environment by an integrated approach taking into account socio-economic factors and environmental principles.²²²

The inclusion of the right to an environment also enhances the nature and scope of legal remedies available to citizens who seek to enforce the environmental right.²²³ The citizens are able to approach the courts on the basis of a breach of the right.

The Bill of Rights applies to all law, and binds the legislature, executive, judiciary and all organs of state.²²⁴ The Constitution, therefore, compels the judiciary, when applying a provision in the Bill of Rights, to develop the common law and to give effect to the right²²⁵ by promoting the spirit, purport and objects of the Bill of Rights,²²⁶ which includes the environmental right.

The right has been recognised by the courts and declared as enforceable as any other fundamental human right entrenched in the Constitution. This was confirmed in *Minister of Health and Welfare v. Woodcarb (Pty) Ltd and another*.²²⁷ In this case the respondent established a sawmill to incinerate sawdust generated in the milling process in a burner which produced a significant amount of smoke.

The respondent's neighbours complained about the air pollution emanating from the sawmill, and the competent authorities' investigations revealed that the respondent was in breach of its permit conditions. An interdict was sought to stop the milling process.

In granting the interdict, the Court observed that the generation of smoke was an infringement of the rights of the applicants to an environment which is not detrimental to their health and well-being.²²⁸

In promoting the realization of the environmental right, the state has a duty to take reasonable legislative measures which are necessary to give effect to the right. The measures include prescribing guidelines for decision making to protect the environment. The Court in *Government of the Republic of South Africa and others v Grotboom*²²⁹ held that:

²²¹2004 (5) SA 124 (W).

²²²At 144B.

²²³The available remedies include the declaration that the law and regulations inconsistent with the right are invalid. See Kotze & Paterson op cit n212 at 562 footnote 28.

²²⁴S 8(1) of the Constitution of South Africa.

²²⁵S 8(3).

²²⁶S 39(2).

²²⁷1996 (3) SA 155 (NPD). Even though this case was decided under s 29 of the Interim Constitution of South Africa Act 200 of 1993, the environmental right in that section remains identical to s 24 of the Final Constitution. See also *Government of the Republic of South Africa and others v. Grotboom* where the Constitutional Court also held that the constitutional right to an environment is on a par with other fundamental rights.

²²⁸At 164F. See also *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation and Land Affairs* 2004 (5) SA 124 (W) at 143.

²²⁹2001 (1) SA 46 (CC).

“The State is required to take reasonable legislative and other measures. Legislative measures by themselves are not likely to constitute constitutional compliance. Mere legislation is not enough. The State is obliged to act to achieve the intended results, and the legislative measures will invariably have to be supported by appropriate, well-directed policies and programmes implemented by the Executive Authority. These policies must be reasonable both in conception and their implementation.”²³⁰

The environmental right is, however, not absolute. The right can be limited in terms of a law of general application subject to the requirements of the limitation clause as entrenched in the Constitution.²³¹

If the limitation is justifiable in terms of the limitation clause, then such limitation would not be deemed to be an unfair deprivation of the constitutional right. Apart from the provisions of the Constitution and the requirements of the limitation clause, there is no law that may limit any right entrenched in the Bill of Rights.²³²

The inclusion of the environmental right in the Constitution contributes to the economic efficiency of environmental protection by establishing broad-based participation in environmental decision-making.²³³ This compels the legislature to consider the interest of future generations in formulating environmental policies aimed at the protection, management and governance of natural resources.

In giving effect to the environmental right, the environmental authorities are required to adopt the necessary measures for the realisation of the right by taking into account all environmental considerations for appropriate recognition, protection and respect of the right.²³⁴ In *Director: Mineral Development, Gauteng Region and Sasol Mining (Pty) Ltd v Save the Vaal Environment and others*,²³⁵ the Court held that the inclusion of the environmental right in the Constitution requires environmental considerations to be accorded appropriate recognition and respect in the administration of the country.

²³⁰ At para 69B-D.

²³¹ Section 36(1) provides:

“The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-

(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.”

²³² S 36(2).

²³³ See *Nel & du Plessis op cit* n12 at 21; See also *Van Reenen op cit* n95 at 281–282.

²³⁴ Such considerations include the socio-economic issues involved in the proposed activity that are likely to adversely affect the environment. See *Fuel Retailers Association of SA (Pty) Ltd v Director-General Environmental Management Mpumalanga and others*. 2007 (10) BCLR 1059 (CC).

²³⁵ 1999 (2) SA 709 (SCA) at 719.

One of the most important measures necessary for the implementation of the environmental right is the adoption of NEMA,²³⁶ which sets the constitutional environmental provision into motion.

NEMA contains a number of principles which apply to the actions of all organs of state that may affect²³⁷ the environment throughout the Republic of South Africa.²³⁸ These principles promote cooperative governance and also provide for institutions and enforcement mechanisms necessary for the implementation of the Act. NEMA is aimed at giving effect to the constitutional environmental right at a framework level.²³⁹

4.3 NEMA principles

The first two principles²⁴⁰ provide that environmental management should place people and their needs at the forefront of its concern, and must be socially, environmentally and economically sustainable.²⁴¹ The enforceability of these principles was confirmed in *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment & Land Affairs*²⁴² where the Court considered various provisions of NEMA including these principles, and held that DEA&T had to have due regard to the effects of the proposed activities on the environment, as well as socio-economic conditions.²⁴³

The others principles provide for the guidelines to be used by organs of state and environmental decision makers when formulating policies, as well as in the interpretation, administration and implementation of environmental legislation.²⁴⁴

The courts also recognise the NEMA principles. In *MEC for Agriculture, Conservation, Environment & Land Affairs v Sasol Oil (Pty) Ltd*²⁴⁵, it was observed that the interpretation of environmental protection and management law must be guided by NEMA principles.²⁴⁶ In this case, the Supreme Court of Appeal differed from the Constitutional Court,²⁴⁷ which had held that NEMA principles do not control the manner in which the state uses its property, even though the use can significantly affect the environment.²⁴⁸

Generally, the NEMA principles serve as a framework within which environmental management plans and implementation plans must be formulated. In *Minister of Public Works and Others v*

²³⁶ Act 107 of 1996.

²³⁷ See *Kyalami Ridge Environmental Association and Another 2001 (3) SA 1151 (CC)* where the Court stated that the principles apply to activities that may 'significantly' affect the environment.

²³⁸ S 2.

²³⁹ Kidd op cit n53 at 32.

²⁴⁰ S 2(1).

²⁴¹ Kidd op cit n53 at 33.

²⁴² 2004 (5) SA 124 (W) at 146I.

²⁴³ At 151B.

²⁴⁴ Kidd op cit n53 at 33.

²⁴⁵ 2006 (5) SA 483 (SCA).

²⁴⁶ At 515.

²⁴⁷ *Kyalami Supra* at 1169.

²⁴⁸ *Kyalami Supra* at 1169.

Kyalami Ridge Environmental Association and others, the Court echoed that the principles of NEMA are directed to the formulation of environmental policies by relevant organs of state.²⁴⁹

The purpose of NEMA principles is, however, to guide, and not to fetter, the decision maker. The decision maker is only obliged to take the principles into account and apply them in relevant circumstances. This was demonstrated in *Bato Star Fishing Pty (Ltd) v Minister of Environmental Affairs and Tourism and others*²⁵⁰ where the Court observed that the principles of NEMA place an obligation on the decision maker to have regard to the factors mentioned in Section 2, with particular regard to the circumstances of each case.²⁵¹

4.4 Characteristics of NEMA

4.4.1 Flexibility

A flexible environmental framework is one that addresses issues, and responds to changes in socio-economic and ecological factors.²⁵² NEMA principles provide for the formulation of environmental policy to be considerate to the social, economic and environmental impacts of any proposed activity.²⁵³

It also empowers the competent authority to adopt regulations necessary to further the objectives of the Act.²⁵⁴ The regulations are specific to the environmental considerations and administered by a specific sectoral legal arrangement.

4.4.2 Policies and principles

The principles of NEMA are also directed at guiding decision makers in the formulation of environmental management plans and implementation plans which are policy considerations.²⁵⁵ In formulating environmental policy, decision makers are to be guided by NEMA principles in order to ensure that the policies are implementable and realisable.²⁵⁶

In *MEC for Agriculture, Conservation, Environment & Land Affairs v Sasol Oil (Pty) Ltd*²⁵⁷ the Court confirmed the application of policy and principles in our jurisdiction by observing that the adoption of policy guidelines by a state organ to assist decision makers in the exercise of their discretionary powers has long been accepted as legally permissible and eminently sensible.²⁵⁸

The Court in *Government of the Republic of South Africa and others v Grotboom*²⁵⁹ recognised the significance of policy formulation in the implementation and enforcement of the objectives

²⁴⁹At 1172.

²⁵⁰2004 (4) SA 490 CC.

²⁵¹Glazewski op cit n1 at 140.

²⁵²Nel & du Plessis op cit n12 at 4.

²⁵³S 2(4)(I).

²⁵⁴S 24.

²⁵⁵See *Kyalami Supra* at 1169.

²⁵⁶See *BP Southern Africa (Pty) Ltd supra* at 146I.

²⁵⁷2006 (5) SA 483 (SCA).

²⁵⁸At 19.

²⁵⁹2001 (1) SA 46 (CC).

of the environmental framework legislation as one of the measures necessary for environmental governance.²⁶⁰

NEMA principles promote the participation of all interested and affected parties in policy formulation and environmental governance.²⁶¹ This ensures that environmental policy takes into account the interests of the people by allowing for broad-based participation. It also provides for harmonisation of policies, and intergovernmental coordination of legislation and actions relating to the environment.²⁶²

4.4.3 Civil society involvement

Public participation in environmental decision making is an important enforcement measure necessary for the implementation of environmental laws. Effective protection of the environment is best achieved by including all persons willing to participate in the enforcement mechanisms to do so.²⁶³

The principles of NEMA recognise the need for broad-based public participation in environmental decision making. They provide for the participation of all interested and affected parties in environmental governance,²⁶⁴ as well as knowledge and skills sharing in the formulation of environmental policy.²⁶⁵

The National Environmental Advisory Forum²⁶⁶ is also comprised of members from the private sector with the necessary expertise and skills to enable it to carry out its functions.²⁶⁷

4.5 Establishment of cooperative governance

4.5.1 International cooperation

International cooperation is one of the principles of NEMA.²⁶⁸ It recognises the discharge of global and international responsibilities in the national interest.²⁶⁹ It also requires the submission of reports, budgets, policies and management and implementation plans that reflect a commitment to the objectives of Agenda 21.²⁷⁰ This principle is also incorporated in the management of environmental instruments.²⁷¹

²⁶⁰At 69D.

²⁶¹S 2(4)(f).

²⁶²S 2(4)(l).

²⁶³Loots op cit n29 at 34.

²⁶⁴S 2(4)(f).

²⁶⁵S 2(4)(l).

²⁶⁶Infra 4.5.

²⁶⁷Kidd op cit n53 at 36.

²⁶⁸Inter-regional cooperation is recognised under this principle and in a similar manner. Thus, regional cooperation will not be discussed further.

²⁶⁹S 2(4)(n).

²⁷⁰S 26.

²⁷¹S 35.

International cooperation is a constitutional obligation as it provides that legislation must establish structures for the promotion of intergovernmental relations.²⁷² NEMA, by recognizing international cooperation in its principles, is a fulfillment of a constitutional legislative obligation, as principles are to guide decision makers and to be taken into account in the formulation of environmental policy.

International cooperation is echoed by the Inter-governmental Relations Framework Act²⁷³ which provides for various spheres of government and all organs of state to facilitate coordination in the implementation of policy and legislation.²⁷⁴

4.5.2 Intra-governmental cooperation

One of the main features of NEMA is the attempt to provide for cooperative governance between different spheres of government.²⁷⁵ NEMA gives effect to the constitutional provisions on cooperative governance in an environmental context. As a framework act, it must conform to the forms of public administration and governance which are based on constitutional imperatives of cooperative governance.²⁷⁶

Chapter 1 contains principles which form the foundation of all activities undertaken in terms of NEMA. These principles apply throughout South Africa to the actions, or governance efforts, of all spheres of government.²⁷⁷ The principles further require environmental management or governance to be integrated, by acknowledging that environmental elements are inter-related and require cross sectoral collective undertakings.²⁷⁸

Chapter 3 of NEMA places an obligation on various governmental departments to submit, for approval, their environmental management plans and implementation plans²⁷⁹ for the promotion of cooperative environmental governance.²⁸⁰ The plans must harmonise environmental policies of various government departments that exercise functions that may affect the environment.²⁸¹

Chapter 2 of NEMA provides for the institutions which are necessary for the promotion and achievement of environmental cooperative governance.²⁸² The following chapter investigates the effectiveness of the institutions under NEMA, with a view to determining whether they promote the achievement of the purpose for which they were established.

4.5.3 Integrated environmental management

²⁷²S 41(2)(a).

²⁷³No. 13 of 2005. The Act is not relevant for this research and shall not be discussed in further detail.

²⁷⁴S 3.

²⁷⁵Nel & du Plessis op cit n12 at 35. See also the preamble of NEMA.

²⁷⁶Strydom & King op cit n69 at 21.

²⁷⁷S 2(1).

²⁷⁸S 2.

²⁷⁹S 13.

²⁸⁰S 14.

²⁸¹S 2(4)(l) and s 12.

²⁸²See Chapter 4.5 infra.

IEM is defined as the alignment of fragmented and disjointed environmental governance efforts by numerous organs of state that operate in different spheres of government.²⁸³ It is aimed at promoting cooperative governance for the better achievement of the principle of sustainability. This is achieved by incorporating a wide range of environmental issues that affect both environmental management and governance as a collective effort for the effective protection of the environment.²⁸⁴

Sustainability is achieved by the integrated use of environmental governance tools and implementation strategies which are aimed at elevating the environmental benefit through the use of command and control, fiscal and civil-based instruments.²⁸⁵

NEMA recognised the importance of IEM by providing for the promotion of IEM and governance as objectives of the Act.²⁸⁶ The inclusion of the IEM obligation places a duty on the decision makers to consider the integrated use of the environment for sustainable use and development.²⁸⁷

4.5.4 Cooperative agreements

Cooperative agreements entered into by various organs of state having jurisdiction over the matter which is affected by the agreements facilitate the achievement of effective environmental management by promoting cooperation in environmental decision making.²⁸⁸

Environmental cooperative agreements specify the shared objectives, and set the framework for future cooperation of various government departments in making decisions relating to the protection of the environment.

NEMA provides for the conclusion of environmental management cooperative agreements which must contain an undertaking by the person or community concerned to improve the standards laid down by law for the protection of the environment.²⁸⁹

Environmental cooperation agreements under NEMA are aimed at promoting a collective cooperative and participative approach in environmental management and governance.²⁹⁰ The roles and responsibilities affected by the agreement include the sharing of information, the harmonisation of decision making, and the mutual support which is necessary for effective environmental governance.

²⁸³Strydom & King op cit n69 at 30.

²⁸⁴Strydom & King op cit n69 at 30.

²⁸⁵Paterson & Kotze op cit n87 at 52.

²⁸⁶S 2(4) (b). The objectives of IEM are expressed in detail in Chapter 5 of NEMA. Section 23(1) provides that the purpose of this Chapter is to promote the application of appropriate environmental management tools in order to ensure the IEM of activities.

²⁸⁷See also NEMA preamble.

²⁸⁸Bosman, Kotze & du Plessis op cit n85 at 420.

²⁸⁹S 35(3).

²⁹⁰Bosman, Kotze & du Plessis op cit n85 at 420.

NEMA also provides for the incorporation, in the agreement, of enforcement measures for non-compliance with the provisions of the environmental cooperation agreements,²⁹¹ as a matter of mutual understanding aimed at implementing the objectives of the agreement.

4.6 Institutional arrangements

The NEMA Amendment Act,²⁹² which is not yet operational at the time of writing this thesis, provides for the establishment of environmental forums or advisory committees in order to facilitate the achievement of specialised environmental management and governance. The duties and composition of such institutions are to be determined by the Minister of Environmental Affairs and Tourism, in consultation with the Minister of Finance.²⁹³

Currently, the institutions which have been established by NEMA to champion the environmental cause which are still operational until the amended Act becomes operational, are discussed below.

4.6.1 Government departments

The environment recognised by the Constitution, as comprising a concurrent national and provincial responsibility, cuts across all the spheres of government.²⁹⁴ The legislation governing these functions may also be either concurrent in application or may assign duties and responsibilities to one sphere of government.²⁹⁵

Due to the inter-relatedness of the environmental factors, various government departments are tasked with the management and administration of environmental instruments relevant to their ministerial portfolios, for example the Department of Water Affairs and Forestry is mandated to deal with water security; the Department of Agriculture deals with the conservation of agricultural resources; and the Department of Minerals and Energy deals with sustainable use and management of mineral and energy resources.

For the purpose of this research, only the role of the Department of Environmental Affairs and Tourism (DEA&T) in the administration, management and enforcement of environmental legislative instruments will be discussed.

4.6.1.1 Department of Environmental Affairs and Tourism

The DEA&T, as the lead governmental agent for environmental management,²⁹⁶ has various committees and divisions which are tasked with the monitoring of compliance and enforcement of specific legislative instruments.

²⁹¹S 35(3)(d).

²⁹²No. 14 of 2009.

²⁹³S 6.

²⁹⁴See Schedule 4 of the Constitution of South Africa (s 44(1) (a) (ii)).

²⁹⁵Kotze & Paterson op cit n212 at 564.

²⁹⁶Strydom & King op cit n69 at 18.

Relevant to this research are institutions created under NEMA and aimed at ensuring effective environmental management and governance as objectives of the Act.²⁹⁷ The following are environmental institutions under DEA&T created by NEMA.

4.6.1.2 National Environmental Advisory Forum

The Act provides for the establishment of the National Environmental Advisory Forum (NEAF).²⁹⁸ It is a body which is representative of all relevant stakeholders in environmental governance as its membership is largely drawn from the private sector.²⁹⁹

The NEAF is tasked with informing the Minister of Environmental Affairs and Tourism on the application of NEMA principles, and advising on matters concerning the environmental management and governance.³⁰⁰ The NEAF also recommends appropriate methods of monitoring compliance with the principles.³⁰¹

4.6.1.3 The Committee for Environmental Coordination

The Committee for Environmental Coordination (CEC) consists of civil servants from various departments.³⁰² Its objectives are to promote integration and coordination of environmental functions by organs of state,³⁰³ and the achievement of environmental management and implementation plans.³⁰⁴

The CEC is the primary institution responsible for the achievement of cooperative environmental governance under NEMA.³⁰⁵ It is responsible for scrutinizing, reporting on, and making recommendations regarding, functions between organs of state.³⁰⁶

4.6.1.4 The Environmental Management Inspectorates

The Environmental Management Inspectorate (EMI) is a network of environmental enforcement officials from different government departments (national, provincial and municipal).

The EMI is established under Chapter 7 of NEMA and is comprised of officials employed by DEA&T, officials employed by provincial environment departments or other provincial organs of state, municipal officials, and officials employed by other organs of state.³⁰⁷

²⁹⁷ See generally the preamble of NEMA.

²⁹⁸ S 3.

²⁹⁹ S 6.

³⁰⁰ S 5.

³⁰¹ S 3(2)(II).

³⁰² S 8.

³⁰³ S 9.

³⁰⁴ S 10.

³⁰⁵ S 7.

³⁰⁶ Strydom & King op cit n69 at 22.

³⁰⁷ <http://emi.deat.gov.za/login/index.aspx?ReturnUrl=%2findex.aspx> (accessed on 14 September 2009 at 16.49).

EMIs are also empowered to enforce any authorisations issued under their mandated legislation, including permits, licences and EIA authorisations.³⁰⁸

The NEMA Amendment Act has increased the powers of the EMIs to conduct routine inspections in monitoring compliance with environmental legislation. Such inspections may be conducted on any premises including business and residential premises, vehicles, vessels, aircrafts, pack-animals, containers, bags and boxes.³⁰⁹

4.6.1.5 The Enforcement Directorate Unit

The DEA&T also has the Enforcement Directorate Unit which is tasked with implementation and enforcement of pollution and waste management legislation.³¹⁰ Even though the Directorate is not formed under NEMA, it is involved in the investigation of environmental offences.³¹¹

4.7 Compliance, enforcement and implementation

4.7.1 Compliance procedures

The measures which are used to facilitate environmental compliance and enforcement are administrative and criminal measures. Administrative measures facilitate compliance through directives, abatement notices and compliance notices. Criminal measures compel compliance by prescribing criminal offences and sanctions.³¹²

The institutional arrangements under NEMA are fashioned to monitor compliance with the Act.³¹³ NEMA also provides for the EMI whose duties include management of environmental enforcement and compliance.³¹⁴

4.7.2 Conflict resolution

Conflict resolution mechanisms are inherent to environmental framework legislation as tools for resolving environmental disputes. The most beneficial use of the environment must be achieved in the public interest, and potential conflicts of interest between organs of state as well as the public should be resolved through conflict resolution procedures.³¹⁵

Chapter 4 of NEMA deals with conflict management and fair decision-making. The Act prescribes conciliation, mediation and arbitration as possible conflict resolution mechanisms in environmental issues.³¹⁶

³⁰⁸<http://emi.deat.gov.za/login/index.aspx?ReturnUrl=%2findex.aspx> (accessed on 14 September 2009 at 16.49).

³⁰⁹S 19.

³¹⁰<http://www.environment.gov.za> (Accessed on 14 September 2009 at 16.32).

³¹¹Paterson & Kotze op cit n87 at 89.

³¹²Paterson & Kotze op cit n87 at 6.

³¹³See Chapter 4.5 *supra*.

³¹⁴Chapter 7 part 2 of NEMA.

³¹⁵S 2(4)(m).

³¹⁶Ss 17–20.

4.7.3 Criminal sanctions

NEMA contains various criminal offence provisions for non-compliance.³¹⁷ The criminal sanctions alone, however, are not sufficient to enforce compliance as the damage caused to the environment is often greater than the possible criminal sanctions. The benefits of non-compliance also often outweigh the criminal sanctions which are provided by the Act.

NEMA grants the court discretion to consider the seriousness of the violation, the economic benefit resulting from the violation, as well as any history of such violations, when determining appropriate sentence.³¹⁸

Section 34 of NEMA further provides for the criminal liability of business entities. The business entity shall be criminally responsible for the environmental crimes committed by its agent during the course of their business. If found guilty, the offender is liable to a fine not exceeding R5 million or imprisonment for a term not exceeding six years for first offenders, and a fine of up to R10 million or ten years imprisonment for recidivists.³¹⁹

There is, however, no general environmental offence and this hampers the enforcement of the Act where provisions do not stipulate an offence for non-compliance.³²⁰ Due to the nature of environmental offences, their prosecution is coupled with commercial³²¹ and common law³²² offences which make them difficult to prosecute.

The incorporation of the presumption of guilt in Section 34 may render the provision invalid for unconstitutionality. The Constitution provides for the presumption of innocence.³²³ The presumption contained in Section 34 is contrary to the Constitution and, in my opinion, invalid for unconstitutionality.

4.7.4 Civil measures

Civil measures such as interdicts, damages and other delictual measures are necessary, and sometimes more effective than criminal sanctions.³²⁴ These measures are enforceable in South Africa as NEMA enables members of the public to approach the Court in the environmental interest to secure any of the civil measures as appropriate relief.³²⁵

Interdicts have the effect of stopping the development of any proposed activity which is harmful to the environment.³²⁶ Interdicts are quicker to enforce than criminal sanctions and can be obtained by anyone who is affected by the development or acting in the public interest. In

³¹⁷S 31N of NEMA Amendment Act 46 of 2003 and Section 24F of NEMA Amendment Act 8 of 2004.

³¹⁸S 34.

³¹⁹S 1 of NEMA Amendment Act No. 14 of 2009.

³²⁰Paterson & Kotze op cit n87 at 53.

³²¹Example money laundering and tax evasion.

³²²Example fraud and malicious damage to property.

³²³S 35(3) (h) of the Constitution of South Africa.

³²⁴Kidd op cit n111 at 43.

³²⁵S 32 of NEMA.

³²⁶Kidd op cit n111 at 42.

Hichange Investments (Pty) Ltd v Cape Produce Company (Pty) Ltd t/a Peltz Produce and 4 others,³²⁷ the Court granted an interdict stopping the activities of the respondent, and ordered environmental authorities to investigate, evaluate, and assess the impact of gases emitted from the respondent tannery before authorisation to continue with the activities of the company was given.³²⁸

Damages and other delictual measure are also very important as compliance and enforcement measures of environmental legislation. The measures are less cumbersome in procedure than criminal sanctions as they require a less stringent standard of proof than criminal sanctions which require proof beyond a reasonable doubt. Civil measures may be obtained in addition to the criminal sanctions.³²⁹

4.7.5 *Locus standi*

A person who approaches the court to enforce compliance with environmental legislation should have sufficient *locus standi*. The legal standing requirement to enforce compliance with environmental legislation is recognised under the Constitution of South Africa. The requirements are echoed by NEMA which grants *locus standi* to anyone seeking relief in respect of an alleged breach of environmental legislation.³³⁰

NEMA allows members of the public and non-governmental organisations (NGO) to approach the court in the interest of the public to enforce compliance with environmental legislation even though they may not be directly and personally affected by the alleged breach.³³¹ This was confirmed in *Minister of Health and Welfare v Woodcarb (Pty) Ltd*³³² where it was decided that the environmental right is available to all persons, including the owner of the adjacent property who was not affected by the alleged breach, because it is in public interest to seek appropriate relief.

4.8 Conclusion

Generally, South Africa's environmental jurisprudence gives effective protection to the environment. It must be acknowledged that the environmental management field is evolving,, and therefore it is difficult to legislate in minute detail on environmental issues.

There exists a constitutional right to the environment which gives it greater protection and recognition.³³³ The inclusion of the environmental right in the Constitution introduced the notion of inter-generational equity, which has broadened the legal basis for individuals to enforce the environmental right.³³⁴

³²⁷2004 (2) SA 393(ECD).

³²⁸At 420I.

³²⁹Paterson & Kotze op cit n87 at 378.

³³⁰S 32(1).

³³¹Kidd op cit n53 at 226.

³³²19996 (3) SA 155 (N).

³³³See Chapter 4.2 above.

³³⁴See generally Van Reenen op cit n95 at 280.

In *Grotboom supra*, the Court confirmed and enforced the environmental right.³³⁵ This has not only placed a duty on the state and individuals to observe the right, but has also elevated the environmental right to a status of higher degree in the implementation of environmental instruments aimed at achieving sustainable use and development of natural resources.

The adoption of NEMA has also converted the constitutional environmental right to a more concrete reality by giving effect to the imperative of cooperative governance through management institutions, governance and enforcement mechanisms necessary for the implementation of the Act.³³⁶ This has established a strategic approach to environmental management and strengthened coordination between relevant role players.³³⁷

Environmental management and governance in South Africa are still challenged by the fragmentation of governing efforts and the poorly understood distinction between an organ of state and a sphere of government³³⁸ as governing institutions.³³⁹ Such distinction will define clear roles for each organ or sphere of state in environmental governance, especially in the concurrence competencies of policy formulation and implementation.³⁴⁰

Although NEMA provides for cooperative governance, there is need for the establishment or empowerment of a single department as a lead agent on environmental governance.³⁴¹ This will ensure that the diverse environmental factors are integrated and coordinated, with the focus of the department on management and compliance with environmental instruments.

Cooperative governance can contribute to the establishment of more sustainable environmental management by bringing on board all the relevant stakeholders and interested parties in the governance efforts, which should address some of the environmental challenges in South Africa.³⁴²

NEMA also complies with the essential elements of framework legislation.³⁴³ It contains principles in terms of which other environmental legislation is embedded and formulated. It further provides for the necessary institutions for the management and implementation of the principles, as well as for compliance and enforcement procedures.

³³⁵ See Chapter 4.2 above.

³³⁶ See Glazewski op cit n1 at 137.

³³⁷ Strydom & King op cit n69 at 31.

³³⁸ A 'sphere of government' refers to the governing structure whilst an 'organ of government' refers to a particular administrative body within a sphere of government. See <http://www.thepresidency.gov.za/docs/pcsa/planning/nsdp/glossary.pdf> (accessed on 15 September 2009 at 15.20)

³³⁹ Strydom & King op cit n69 at 33.

³⁴⁰ Clear definition of roles may also help in resolving conflicts between government departments where one department decides to investigate an environmental incident in order to negate or reduce another department's authority.

³⁴¹ DEA&T is seen as a lead agent because NEMA defines 'Minister' as the Minister of Environmental Affairs and Tourism. This does not, however, exclude the role of other ministries tasked with the administration of an environmental legislative instrument.

³⁴² Strydom & King op cit n69 at 30.

³⁴³ As discussed in Chapter 2 of the thesis.

There is no Environmental Ombudsman under NEMA to assume the role of environmental public protector.³⁴⁴ An Environmental Ombudsman's office is necessary as a compliance and enforcement agency that acts in the interest of the public in matters relating to environmental protection. There is, therefore, no institution outside government that can effectively investigate state actions and ensure that the state complies with environmental legislation. The institutions under the Act fall within the structures of government and their independence is significantly compromised, particularly as regards enforcing compliance on the part of other government institutions.

NEMA provides for the formulation of management plans and implementation plans within one year of its enactment,³⁴⁵ and every four years thereafter.³⁴⁶ An Ombudsman could ensure that such obligation is fulfilled.



³⁴⁴Some writers, such as Nel & Du Plessis and Van Reenen, have recommended the establishment of an Environmental Ombudsman.

³⁴⁵The Minister has since extended the period for submission from 1998 to 2008. This amounts to an amendment of the Act, legislative power that the Minister cannot exercise unilaterally.

³⁴⁶Kidd op cit n53 at 36.

Chapter 5

The Namibian Environmental Management Act No. 7 of 2007	54
5.1 Introduction	55
5.2 The right to environment	55
5.3 Principles of environmental management legislation	58
5.4 Characteristics of environmental management legislation	58
5.4.1 Policies and principles	58
5.4.1.1 Policy for prospecting and mining in protected areas and national monuments	59
5.4.1.2 National policy and strategy for malaria control	59
5.4.1.3 Environmental assessment policy	60
5.4.1.4 National development plans	60
5.4.2 Civil society involvement	60
5.5 Establishment of cooperative governance	61
5.5.1 International cooperation	61
5.5.2 Regional cooperation	61
5.5.3 Intra-governmental cooperation	62
5.6 Institutional arrangements	63
5.6.1 Sustainable Development Advisory Council	63
5.6.2 The Environmental Commissioner	64
5.6.2.1 Environmental Officers	64
5.6.3 The Environmental Ombudsman	65
5.7 Compliance, enforcement and implementation	65
5.7.1 Compliance procedures	65
5.7.2 Conflict resolution	66
5.7.3 Criminal sanctions	66
5.7.4 Civil measures	66
5.8 Conclusion	67



5.1 Introduction

This chapter investigates the EFL of Namibia. The country, which is geographically located on the south-west coast of the Southern African region, is adjacent to the sea, and therefore rich in marine living resources and related natural resources.³⁴⁷

The chapter starts with an investigation of the constitutional provisions affording protection to the environment. The right to environment is at the centre of giving effect to other environmental considerations which are necessary for the implementation of the constitutional objectives.

The Environmental Management Act of Namibia,³⁴⁸ as framework legislation, is analysed with a view to establishing whether it sufficiently contains the essential elements of framework legislation, particularly as regards the achievement of the implementation of the constitutional environmental clauses and principles of sustainable use and development.

The essential elements of environmental framework legislation include the principles which form the foundation of the Act. These principles will be criticised in an attempt to determine whether they comprehensively provide for the effective management and governance of environmental legislative instruments.³⁴⁹

The Act is characterised by policy formulation and the promotion of cooperative governance. This chapter will analyse the Environmental Management Act, to determine if such characteristics contribute to the effective management of the legislative instruments aimed at achieving the environmental objectives.

The chapter briefly discusses the regional environmental instruments applicable to Namibia, and which are aimed at promoting cooperative governance as a constitutional obligation incorporated in the Act.

Furthermore the chapter scrutinizes the effectiveness of the institutions created in terms of the Act with a view to determining whether such institutions facilitate effective environmental governance. The enforceability of the compliance procedures established by these institutions will also help in the appreciation of the environmental governance efforts.

Any shortcomings noted in the analysis will be discussed in the conclusion, which will also incorporate all the recommendations culminating from this research.

5.2 The right to environment

The Constitution is the supreme law of Namibia³⁵⁰ and any legislation inconsistent therewith is invalid.³⁵¹ The Constitution lays the foundation for all policies and legislation in Namibia and contains two environmental clauses. The first clause is Article 95(1) which provides:

³⁴⁷ www.namibiatradedirectory.com/.../about_namibia_p1to3.pdf (accessed on 15 September 2009 at 15.30)

³⁴⁸ Act No. 7 of 2007 which is not yet operational at least at the writing of this thesis.

³⁴⁹ As discussed in Chapter 2 of the thesis.

³⁵⁰ Act of 1990.

‘The state shall actively promote and maintain the welfare of the people by adopting, *inter alia*, policies aimed at the following:

- (1) maintenance of ecosystems, essential ecological processes and biological diversity of Namibia and utilisation of living natural resources on a sustainable basis for the benefit of all Namibians, both present and future; in particular, the Government shall provide measures against the dumping or recycling of foreign nuclear and toxic waste on Namibian territory.’

The second clause is Article 91(c) which is aimed at protection of the environment by the Ombudsman of Namibia whose duties include:

“the duty to investigate complaints concerning the over utilisation of living natural resources, the irrational exploitation of non-renewable resources, the degradation and destruction of ecosystem and failure to protect the beauty and character of Namibia.”³⁵²

These provisions, which provide for the protection of the welfare of the people and the utilisation of natural resources for sustainable use and development, are supported by Article 100.³⁵³ The article vests ownership of natural resources in the state unless such natural resources are legally owned otherwise.³⁵⁴ It also supports the environmental clauses by strengthening the responsibility of the state over natural resources and prevents them from being owned by private individuals or companies.³⁵⁵

A number of environmental considerations can be deduced from Article 95(1):

1. The protection of the welfare of the people: the state has a constitutional obligation to protect the environment for the promotion of the welfare of its citizens. The people therefore require a healthy environment for their sustainability.³⁵⁶
2. The utilisation of natural resources: The unregulated use of natural resources poses a threat to the environment as they are likely to become depleted. . This will not only adversely affect the natural resources but also the natural habitat which is supported by those natural resources.
3. Sustainable use and development³⁵⁷: The use of natural resources and other environmental components should be conserved for future use. There must be equitable use of environmental resources to promote the integrity of ecological systems.³⁵⁸

³⁵¹ See preamble of the Constitution. See also Article 1(6) which states that the Constitution shall be the supreme law of Namibia.

³⁵² See 5.2.2 *infra*.

³⁵³ Of the Constitution of Namibia.

³⁵⁴ Article 100 states that land, water and natural resources below and above the surface of the land and in the continental shelf and within the territorial waters and the exclusive economic zone of Namibia shall belong to the State if they are not otherwise lawfully owned.

³⁵⁵ Manfred O. Hinz and Oliver C. Ruppel. *Biodiversity and the Ancestors: Challenges to Customary and Environmental Law. Case Studies from Namibia* (2008) at 77.

³⁵⁶ <http://www.namibian.com.na> (accessed on 16 September 2009 at 09.38)

4. The adoption of mitigation measures: The provision places a duty on government to adopt measures necessary for the mitigation of adverse effects on the environment. This entails the consideration of alternative means which are necessary for the achievement of the proposed development, taking into account environmental biological and physical factors.³⁵⁹

The above environmental clauses are not contained in the Bill of Rights but in the Directive Principles of State Policy.³⁶⁰ These principles form the objectives of state goals and contain guidelines for governmental action for the prevention of future social problems.³⁶¹

The principles merely authorise the state to legislate in a specific area³⁶² and do not place a mandatory obligation on the state to comply with these provisions. Furthermore, the principles only place a duty on government to consider a specific legislative area, and therefore they are not enforceable.³⁶³ In other words, the state has a duty to maintain or protect the environment for the benefit of all Namibians, and may put legislation in place that adheres to the provisions of Article 95(1) of the Constitution, but not to enforce the environmental clause.³⁶⁴

One of the advantages of inclusion of the environmental right into the Bill of Rights is that it elevates that right to the same level as other fundamental rights, making it recognisable and enforceable.³⁶⁵ The Directive Principles of State Policy are not enforceable and, therefore, limit the extent to which interested parties may enforce the environmental constitutional obligation.

This provision has not been invoked by the courts but has played a significant role in the development of Namibia's environmental law and policy. The Environmental Management Act which sets in motion the provisions of the environmental clause, as well as the adoption of several policies³⁶⁶ to champion the environmental cause, has since been adopted.

The Environmental Management Act is aimed at promotion of sustainable management of the environment, and the use of natural resources, by establishing principles for decision making on matters affecting the environment.³⁶⁷

The Act establishes the Sustainable Development Advisory Council (SDAC), provides for the appointment of the Environmental Commissioner (EC) and Environmental Officers (EO),³⁶⁸ and

³⁵⁷'Sustainable development' entails that the development has to be socially, environmentally and economically sustainable.

³⁵⁸Glazewski op cit n1 at 141.

³⁵⁹Glazewski op cit n1 at 142.

³⁶⁰Chapter 11 of Namibian Constitution.

³⁶¹See Van Reenen op cit n95 at 273.

³⁶²Van Reenen op cit n95 at 273.

³⁶³Kotze & Paterson op cit n212 at 513.

³⁶⁴<http://www.namibian.com.na> (accessed on 16 September 2009 at 09.48).

³⁶⁵As discussed in Chapter 4.2 of the thesis.

³⁶⁶See Chapter 5.4.1 *infra*.

³⁶⁷See long title of the Act.

³⁶⁸See Chapter 5.5 *infra*.

also provides for the process of assessment and control of activities which may have significant effects on the environment.³⁶⁹

5.3 Principles of environmental management legislation

A number of principles form the foundation of the Act. The principles are aimed at guiding the implementation of the Act and any other law relating to the protection of the environment.³⁷⁰ For instance, if the Department of Mining makes a decision to issue a mining licence for the exploration of minerals in an environmentally sensitive area, it must consider the principles of section 3 of the Act.

The principles also serve as guidelines for any organ of state when making any decision relating to the protection of the environment.³⁷¹ The competent authorities are, therefore, bound to consider the principles of the Act before making any decision that is likely to adversely affect the environment.

The principles further serve as the general framework within which environmental plans must be formulated.³⁷² These principles should guide the decision makers in policy formulation as well as in the adoption of any other legislative instrument incidental to the environment.

The other principles contained in the Act facilitate the promotion of effective environmental management.³⁷³ The principles provide for sustainable and equitable use of natural resources,³⁷⁴ public participation in the formulation of environmental policies,³⁷⁵ as well the enforcement of, and compliance measures such as the polluter pays principle,³⁷⁶ the precautionary principle³⁷⁷ the sustainable development principle,³⁷⁸ and the preventative principle.³⁷⁹

5.4 Characteristics of environmental management legislation

5.4.1 Policies and principles

The principles of the Act serve as the general framework within which environmental plans must be formulated, and provide guidelines for any organ of state when making any decision relating to the protection of the environment, including the formulation of environmental policy.³⁸⁰

³⁶⁹See long title of the Act.

³⁷⁰S 3(1)(a).

³⁷¹S 3(1)(c).

³⁷²S 3(1)(b).

³⁷³S 3(2).

³⁷⁴S 3(2)(d).

³⁷⁵S 3(2)(c).

³⁷⁶S 3(2)(j).

³⁷⁷S 3(2)(h).

³⁷⁸S 3(2)(f).

³⁷⁹S 3(2)(i).

³⁸⁰S 3(1).

Unlike an act of parliament, a policy has less binding power, and, therefore, a policy will not effectively place an obligation on government to adhere to environmental factors, but it provides for the guidelines to be used by decision makers in implementing environmental legislative tools.³⁸¹

The Directorate of Environmental Affairs has conducted a series of Environmental Legislation Programmes which have resulted in legislative proposals. Some of the proposals include the incorporation of the policies that preceded the Act.³⁸² The proposals have not been incorporated into legislation and therefore do not have any legal status.

Many of these environmental policies were founded on the constitutional environmental clauses and are now to become part of the Environmental Management Act of Namibia.³⁸³ The following subsections will only investigate policies relevant to the protection of the environment and natural resources.

5.4.1.1 Policy for prospecting and mining in protected areas and national monuments³⁸⁴

This policy recognises that mineral exploitation can result in significant adverse environmental damage, including habitat destruction and loss of biodiversity, and these impacts will threaten the growth of the tourism industry.³⁸⁵

This policy and the environmental assessment policy³⁸⁶ establish a procedure that asks for an environmental assessment, and it does appear to be common practice to require an environmental assessment to accompany any application for a mining licence under the policy.³⁸⁷

5.4.1.2 National policy and strategy for malaria control³⁸⁸

This policy contributes to the maintenance of biodiversity. It recommends personal protection against malaria through the use of low-impact repellents which are considered to be more environmentally friendly than other repellants such as mosquito nets.³⁸⁹

The purpose of this policy is to ensure the provision of prompt, effective and safe treatment against malaria, to minimise the development of resistance to, and reduce transmission of, malaria. The policy is consistent with malaria control approaches which aim at reducing morbidity, mortality, social and economic losses, and environmental damage.³⁹⁰

³⁸¹<http://www.namibian.com.na> (accessed on 16 September 2009 at 10.05).

³⁸²<http://www.met.gov.na/legislation.htm> (accessed on 16 September 2009 at 10.37).

³⁸³<http://www.met.gov.na/legislation.htm> (accessed on 16 September 2009 at 10.37).

³⁸⁴ Of 1999.

³⁸⁵<http://www.namibian.com.na> (accessed on 16 September 2009 at 09.57).

³⁸⁶ See Chapter 5.4.1.3 infra.

³⁸⁷ Policy for Prospecting and Mining in Protected Areas and National Monuments. See details of the policy on <http://www.namibian.com.na> (accessed on 16 September 2009 at 09.57).

³⁸⁸ Of 1995.

³⁸⁹<http://www.rollbackmalaria.org> (accessed on 16 September 2009 at 10.10).

³⁹⁰<http://www.genderismyagenda.com> (accessed on 16 September 2009 at 10.26).

5.4.1.3 Environmental assessment policy³⁹¹

This policy places a duty on government to prioritize the maintenance of ecosystems and related ecological processes, and to maintain maximum biological diversity. The policy recognises the importance of environmental assessment in integrated environmental governance.³⁹²

The policy has to a large extent given support to the provisions of the Environmental Management Act, by placing an obligation for the conduct of environmental assessment on any proposed activity before authorisation for such development is given.³⁹³

5.4.1.4 National Development Plans

The objectives of the National Development Plans (NDP) of Namibia are *inter alia* to enhance environmental and ecological sustainability. NDPs further provide as their key goal the productive utilisation of natural resources and environmental conservation. Such environmental concerns include water, land, sea, natural resources, biodiversity and ecosystems.³⁹⁴

The NDPs are aimed at facilitating the productive utilisation of natural resources and environmental conservation through accelerated economic growth programmes. NDPs recognise that, with the country's scarce and fragile natural resource base, the risk of over-exploitation is considerable, and that sustained growth is highly dependent on sound management of these resources.

The NDPs recognise that environmental conservation is to be achieved by re-investing benefits into natural resources by diversifying the economy away from resource intensive activities, and by increasing productivity per unit of natural resource input.

5.4.2 Civil society involvement

The Environmental Management Act provides for broad-based public representation in policy formulation and decision making that concerns the environment. The principles for environmental management provide for the participation of all interested and affected parties in decision making.³⁹⁵

The Act further facilitates the involvement of the public in the composition of the SDAC³⁹⁶ who shall represent the interest of the public.³⁹⁷ The state is also represented by the persons appointed by the Minister responsible for environment.³⁹⁸

³⁹¹Of 1994.

³⁹²Hinz & Ruppel op cit n355 at Chapter 4.2.2.

³⁹³See s 27 of the Act.

³⁹⁴<http://www.npc.gov.na/> (accessed on 15 September 2009 at 19.36).

³⁹⁵S 3(2)(c).

³⁹⁶See Chapter 5.5 infra.

³⁹⁷S 8(1)(b).

³⁹⁸S 8(1)(a).

In an attempt to promote the interests of the environment, the Act provides that the persons appointed to the SDAC should have the necessary skills and experience relevant to the environmental cause.³⁹⁹

5.5 Establishment of cooperative governance

5.5.1 International cooperation

The international agreements clause in the Act is aimed at giving effect to the constitutional provision⁴⁰⁰ on the applicability of international law in Namibia. These international agreements are binding on the state if signed and ratified. An instrument will not bind the state only if it is inconsistent with the Constitution.⁴⁰¹

Namibia is party to various international human rights,⁴⁰² environmental treaties, conventions, and protocols, and is, therefore, obliged to conform to their objectives and comply with their obligations.⁴⁰³

The Act recognises the environmental international agreements and provides for the adoption of measures necessary for the implementation of the international agreements⁴⁰⁴ which are aimed at promoting international cooperation in environmental governance.

The obligations under international agreements are to be given effect in Namibia through domestication of such agreements.⁴⁰⁵ Public education⁴⁰⁶ and participation⁴⁰⁷ in the domestication of international agreements should be promoted by disseminating information relating to international environmental instruments.⁴⁰⁸

5.5.2 Regional cooperation

Namibia is a member of SADC and has been a member since its establishment, and is therefore bound by the SADC agreements to the extent that such agreements are applicable.⁴⁰⁹

³⁹⁹S 8(3).

⁴⁰⁰S 144 provides:

‘unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia.’

⁴⁰¹S144.

⁴⁰²As far as can be established, Namibia has formally recognised the African Charter in accordance with Art 143 read with Art 63(2) (d) of the Constitution. The provisions of the Charter have, therefore, become binding on Namibia, and form part of Namibian law in accordance with Arts 143 and 144 of the Constitution.

⁴⁰³Hinz & Ruppel op cit n355 at Chapter 4.2.2.

⁴⁰⁴S 48.

⁴⁰⁵S 48(g).

⁴⁰⁶S 48(e).

⁴⁰⁷S 48(f).

⁴⁰⁸S 48(d).

⁴⁰⁹Hinz & Ruppel op cit n355 at Chapter 3.

The declaration and treaty of the SADC facilitates for the member states to conclude protocols as may be necessary in each area of cooperation.⁴¹⁰

The country is therefore a signatory to a number of SADC environmental treaties which are aimed at promotion of equitable use and sustainable development of natural resources. The state has an obligation to ensure that these treaties are implemented within its national processes and procedures of environmental management and governance for promotion of regional cooperation.

The Protocol on Wildlife Conservation and Law Enforcement⁴¹¹ forms the basic platform for regional cooperation and integration in wildlife management. It identifies aspects that guide regional cooperation and integration of wildlife management through the enforcement of laws governing natural resources.

The Protocol on Forestry which seeks to achieve effective protection of the environment and safeguarding the interests of future generation,⁴¹² Protocol for the Protection of Biodiversity,⁴¹³ Protocol on Fisheries,⁴¹⁴ and Protocol on Shared Watercourse Systems⁴¹⁵ all place an obligation on the state to equitably use the natural resources for the benefit of the present and future generation.

The Act recognises the processes and procedures for regional cooperation in a similar way to international agreements.⁴¹⁶

5.5.3 Intra-governmental cooperation

The principles of environmental management in the Act does not provide for intra-governmental cooperative governance. In fact, all the principles contained in the Act do not make reference to promotion of cooperative governance at all levels.⁴¹⁷ It may be that the objective of the Act is not to promote environmental management but sustainable use of natural resources.⁴¹⁸

⁴¹⁰Art 22 of the Declaration of Treaty of SADC of 1992.

⁴¹¹Arts 1 and 6 of SADC Protocol on Wildlife Conservation and Law Enforcement of 2003.

⁴¹² Art 3(c) of Protocol on Forestry of 2002.

⁴¹³Of 2000 and came into operation in 2003. It is an international treaty governing the movements of living modified organisms resulting from modern biotechnology from one country to another. It was adopted as a supplementary agreement to the Convention on Biological Diversity. www.greenpeace.org/international/.../biosafety-protocol (accessed on 17 September 2009 at 09.20).

⁴¹⁴Of 2001. The treaty enjoins member states to cooperate in all areas necessary to foster regional development and integration. It is also aimed at providing joint cooperative and integrative actions at a regional level to optimise the sustainable use of the living aquatic resources of the region for the continued benefit of the people of the region. See www.iss.co.za/AF/RegOrg/unity_to.../protocols/fisheries.pdf (accessed on 17 September 2009 at 09.30).

⁴¹⁵Of 1995 which facilitates for the sharing of water, efficient conservation and utilisation of shared water course systems within the SADC region. The utilisation of the resources of the water course systems shall include agricultural, domestic, industrial and navigational uses. Full text of the treaty available at www.cawater-info.net/library/eng/1/sadc.pdf (accessed on 17 September 2009 at 09.49).

⁴¹⁶S 48.

⁴¹⁷See generally s 3 which contains the principles.

⁴¹⁸See the long title of the Act.

Intra-governmental cooperation is the duty of the SDAC which promotes cooperation and coordination between organs of state, NGOs, community based organisations, the private sector, and funding agencies, on environmental issues relating to sustainable development.⁴¹⁹

Intra-governmental cooperation entails the involvement and cooperation of different government departments in the championing of environmental causes. This is due to the complexity of the environmental issues which cannot be addressed by a single institution.⁴²⁰ Effective implementation of environmental legislation depends on the existence of appropriate institutional arrangements and their cooperation.

The Act designates the minister as the Minister of Environmental Affairs and Tourism.⁴²¹ The SDAC is tasked with advising the Minister on issues relating to the environment.⁴²² Due to the nature of intra-governmental cooperation, promotion of cooperative governance by the SDAC is unachievable as the SDAC does not have any jurisdiction over other ministerial portfolios.

5.6 Institutional arrangements

5.6.1 Sustainable Development Advisory Council

The Act provides for the establishment of the Sustainable Development Advisory Council (SDAC) whose duties are primarily to promote cooperation and coordination between organs of state, NGOs, community based organisations, the private sector and funding agencies, on environmental issues relating to sustainable development.⁴²³

The SDAC is the advisory body to the Minister on the development of policy and strategy for the management, protection, and use of the environment.⁴²⁴ It is tasked with the duty to adopt appropriate methods of monitoring compliance with the principles of the Act.⁴²⁵ Furthermore, SDAC advises the Minister on the need for, and initiation or amendment of legislation, on matters relating to the environment.⁴²⁶

SDAC is characterised by broad cross-sectoral representation which facilitates greater awareness and appreciation of environmental issues.⁴²⁷ The representation spectrum allows for the interest of the public to be taken into account through their participation in the conduct of business of the SDAC.⁴²⁸

⁴¹⁹S 7(a).

⁴²⁰See Nel & Du Plessis op cit n12 at 10.

⁴²¹See definitions under s 2.

⁴²²S 7.

⁴²³S 7(a).

⁴²⁴S 7(b)(1).

⁴²⁵S 7(b)(iii).

⁴²⁶S 7(b)(iv).

⁴²⁷S 8(1)(b).

⁴²⁸The Act provides that members must have the necessary knowledge and experience in matters relating to the functions of the SDAC.

The Act does not provide for the guidelines or mechanisms to be adopted by the SDAC in promoting cooperative governance. This duty may be unachievable as cooperative governance involves the participation and cooperation of other ministerial sectors which are not bound by the Act.

The mandate of the SDAC in terms of the Act is advise the Minister on matters relating to the environment.⁴²⁹ This duty is not extended to other ministries and, as such, falls outside the mandate of the SDAC to solicit for cooperation from other ministries.

5.6.2 The Environmental Commissioner

The Act provides for the establishment of the Environmental Commissioner (EC) whose objective is the implementation of general and specific policy directives of the Minister.⁴³⁰

The EC can be seen as the primary decision maker in terms of the Act in matters relating to protection of the environment. The EC makes a determination as to whether an activity requires environmental assessment or not, and issues clearance certificates.⁴³¹

The EC is better placed to promote cooperative environmental governance than SDAC as his or her roles include advising other organs of state on the development of environmental management plans and environmental policy formulation.⁴³²

The EC's office is administrative and its secretariat is largely drawn from the staff of the Ministry of Environmental Affairs and Tourism.⁴³³ It not an autonomous institution and it is subject to political interference, which may compromise its independence, particularly in issuing clearance certificates for government projects.

5.6.3 Environmental Officers

The Act provides for the appointment of Environmental Officers (EO).⁴³⁴ Their duty is to monitor and enforce compliance with the letter of the Act⁴³⁵ through conducting inspections in any premises on reasonable suspicion of contravention of provisions of the Act.⁴³⁶

The appointment of EOs is drawn from government employees in different line ministerial functions and they are designated to monitor and enforce compliance with environmental instruments in organisations within such ministries.⁴³⁷

⁴²⁹ S 7(b)(iv).

⁴³⁰ S 17(1).

⁴³¹ S 17(2)(C).

⁴³² S 17(2)(a).

⁴³³ S 16(3).

⁴³⁴ S 18(1).

⁴³⁵ S 20.

⁴³⁶ S 19.

⁴³⁷ S 19(2).

Their appointment is a temporal arrangement and may be withdrawn by the Minister at any time⁴³⁸ and such withdrawal shall not have any labour consequences as EOs are already in the government employ. However the Act empowers the Minister to appoint a person outside the organ of state as an EO.

5.6.4 The Environmental Ombudsman

The Ombudsman protects the public in, *inter alia*, matters concerning violations of fundamental rights and freedoms, abuse of power, unfair, harsh, insensitive or discourteous treatment, manifest injustice, or corruption by an official in the employ of any organ of government.⁴³⁹

The key mandate areas and powers of the Ombudsman include the protection, promotion and enhancement of respect for human rights and the environment in Namibia.⁴⁴⁰ The Ombudsman also deals with issues pertaining to the over-utilisation of living natural resources, the irrational exploitation of non-renewable resources, the degradation and destruction of ecosystems, and failure to protect the beauty and character of Namibia.⁴⁴¹

In dealing with this mandate, the Ombudsman has to investigate complaints received and provide suitable relief as stipulated in the Ombudsman Act.⁴⁴²

5.7 Compliance, enforcement and implementation

5.7.1 Compliance procedures

The principal objective of an environmental compliance system is to secure conformity with the law by taking action that prevents potential offenders without the necessity to detect, process or penalize violators.⁴⁴³

The Act entrusts the duty to monitor compliance with provisions of the Act to EC and EO.⁴⁴⁴ EC are further mandated to monitor and enforce compliance with environmental management plans which have been submitted to the Minister by various organs of state.⁴⁴⁵

EC are empowered to issue notices on organs of state concerned if they are satisfied that an environmental implementation plan is not substantially complied with.⁴⁴⁶ Such notice informs

⁴³⁸S 18(4).

⁴³⁹<http://www.eisa.org.za/WEP/comagency.htm> op cit n97.

⁴⁴⁰Oliver C. Ruppel. *Third-generation human rights and the protection of the environment in Namibia*. Available at <http://www.kas.de/upload/auslandshomepages/namibia/HumanRights/ruppel1.pdf> (accessed on 16 September 2009 at 18.11).

⁴⁴¹<http://www.nyulawglobal.org/globalex/Namibia.htm> (accessed on 16 September 2009 at 10.42).

⁴⁴²Act of 1990. The remedies to be invoked by the Ombudsman are listed under s 5 and s 10 of the Act.

⁴⁴³Kidd op cit n111 at 22.

⁴⁴⁴S 20 and 26.

⁴⁴⁵Each organ of state is required to submit environmental management plans for any activities which may affect the protection of the environment to the Minister for approval.

⁴⁴⁶S 26(3).

the concerned department on appropriate and specified steps which are considered necessary to remedy non-compliance.⁴⁴⁷

EO are also empowered to issue compliance orders to any organ of state forcing that organ of state to comply with environmental legislation.⁴⁴⁸ The compliance orders are however not enforceable as the aggrieved party is required to give justifiable excuse as to the non-compliance with the orders.⁴⁴⁹

The compliance procedure is cumbersome as it requires EO to possess search warrants before entering any premises for inspection.⁴⁵⁰ The warrants are to be issued by magistrate courts or high courts with sufficient reasons given to satisfy the court on reasonable suspicion of non-compliance.⁴⁵¹

5.7.2 Conflict resolution

The Act does not provide for any measures of conflict resolution. The principles of the Act, as well as the principles of management, do not contain any conflict resolution related mechanisms, which is an inherently important feature of EFL.⁴⁵²

The EFL should make provisions for conflict resolution between organs of state as well as between the state and public.⁴⁵³ Environmental legislation should further define mechanisms for conflict resolution in cases of conflict between legislations.

5.7.3 Criminal sanctions

The non-compliance with the provisions of the Act is largely characterised by criminal sanctions with appeal processes vested in the High Court of Namibia, and subject to the rules of criminal procedure.⁴⁵⁴

The Act contains criminal sanctions for non-compliance with compliance orders issued by EO.⁴⁵⁵ Failure to furnish EO with information necessary for their investigations is also punishable by imprisonment.⁴⁵⁶ There are also criminal sanctions for failing to comply with the rules and objectives of clearance certificates, which are also extended to corporate bodies.⁴⁵⁷

5.7.4 Civil measures

⁴⁴⁷S 26(3)(b).

⁴⁴⁸S 20(2).

⁴⁴⁹S 20(8).

⁴⁵⁰Only under exceptional circumstances are EOs allowed to enter premises for inspection without a warrant. What should be seen as exception is however not defined in the Act.

⁴⁵¹S 19(5).

⁴⁵²See Chapter 2 of the thesis.

⁴⁵³See Nel & Du Plessis op cit n12 at 12.

⁴⁵⁴S 51.

⁴⁵⁵S 20(8).

⁴⁵⁶S 22(1)(c).

⁴⁵⁷S 44.

The Act does not provide for civil sanctions such as damages and delictual measures, as possible sanctions for non-compliance with environmental legislation. This leaves criminal sanctions⁴⁵⁸ as the only remedial mechanisms for non-compliance with the provisions of the Act.

Civil measures replace a significant part of criminal law in critical areas of environmental law enforcement. They are not constrained by criminal procedure and imposing them is cheaper and efficient than criminal sanctions.⁴⁵⁹

5.8 Conclusion

The above analysis has demonstrated a need to overhaul the environmental management system of Namibia. The system is lacking in many aspects attributable to environmental management and governance, despite the existence of an environmental framework legislation which should facilitate promotion and effective management and governance efforts.

The Constitution of Namibia does not provide for the right to environment in the Bill of Rights, but only environmental clauses in the directive principles of state policy. There is therefore no obligation on government to facilitate necessary measures required for the exercise and enjoyment of benefits attributable to the environmental right.⁴⁶⁰

The measures which are required for implementation of the environmental right are not only necessary for the exercise of the right, but also for the protection of the environment and for sustainable use and development. For the interest of the Namibian people, and the international community, the environmental right should be elevated in the Constitution which will oblige everyone to respect and promote the objects of the right.⁴⁶¹

The Environmental Management Act of Namibia is relatively new and has not been tested over time.⁴⁶² The Act as a framework law for environmental matters in Namibia has not received judicial scrutiny as to the enforceability of its provisions, to determine if it complies and satisfies the essential elements of framework legislation.

The Act contains very few principles for the promotion of environmental management and governance efforts. The principles form the basis upon which decisions are embedded, as they are to be taken into account before any decision relating to the environment is made. It is therefore necessary for the principles to be comprehensive to provide for the most essential components of environmental governance.

The principles of the Act fall short of provisions relating to promotion of cooperative environmental governance; they do not provide for the consideration of any conflict resolution measures and procedures which are inherent in the settlement of environmental disputes; and there is no principle aimed at giving effect to international environmental law instruments.

⁴⁵⁸See Chapter 5.6.4 *infra*.

⁴⁵⁹See Chapter 2.5.2 the thesis. See also Kidd *op cit* n111 at 43.

⁴⁶⁰The contrast between the Bill of Rights and directives principles of state policy have already been discussed under Chapter 5.2 *supra*.

⁴⁶¹See Chapter 5.2 *supra*. See also Chapter 4.2 of the thesis.

⁴⁶²The Act was passed in 2007.

Largely, the Act requires a modification of principles to incorporate other provisions which are necessary for the promotion of effective environmental management for sustainable use and benefit of the environment.

The investigations of policy and principles of the Act have not reflected any environmental policy which has been adopted under the Act. The influence of the provisions of the Act is therefore unsettled. The efforts which have been identified with regard to the environmental policies which preceded the Act show a commitment of formulating environmental policy within the framework of the Act, particularly as it allows for broad based participation.

The Environmental Management Act does not sufficiently promote cooperative environmental governance and management. International and regional cooperation is recognised and promoted as a constitutional obligation which has been incorporated into the Act.⁴⁶³ The Act does not provide for national cooperation which is paramount to environmental management and governance. Without the cooperation of all organs of state, environmental governance efforts are futile.

The institutions under the Act are reasonably or fairly sufficient to champion the environmental cause. It is however necessary to grant the institutions with necessary power for effective implementation of their legislative functions. Cooperation between these structures and other government departments should be promoted in order to achieve the environmental objectives. It is therefore necessary for the Act to place the lead role of promotion of cooperative governance on one government department which will have the capacity to execute such mandate.

The effectiveness of compliance procedures depends on the enforceability mechanisms under the Act.⁴⁶⁴ The Act only provides for the criminal measures but does not recognise the importance of conflict resolution mechanisms relevant to the environmental disputes.

Environmental contravention is not always criminal in nature, and failure to incorporate civil measures such as interdicts, civil liability and alternative dispute resolution procedures as mechanisms for conflict resolution defeats the governance efforts of the environmental framework legislation.⁴⁶⁵

⁴⁶³Section 144 of Namibia Constitution places a duty on all legislation to recognise international agreements.

⁴⁶⁴See Chapter 4.7 of the thesis.

⁴⁶⁵See generally Kidd op cit n111 at 23.

Chapter 6

Kenyan Environmental Management and Coordination Act No. 8 of 1999	69
6.1 Introduction	71
6.2 The right to environment	71
6.3 Principles of environmental management legislation	74
6.4 Characteristics of environmental management legislation	74
6.4.1 Flexibility	74
6.4.2 Policies and principles	75
6.4.3 Civil society involvement	75
6.5 Establishment of cooperative governance	76
6.5.1 International cooperation	76
6.5.2. Intra-governmental cooperation	76
6.6 Institutional arrangements	77
6.6.1 National Environment Council	77
6.6.2 The National Environment Management Authority	78
6.6.3 Provincial and District Environmental Committees	78
6.6.3.1 Provincial Environment Committees	78
6.6.3.2 District Environment Committee	79
6.6.4 Public Complaints Committee	79
6.6.5 National Environment Tribunal	80
6.6.6 National Environment Action Plan Committee	80
6.7 Compliance, enforcement and implementation	81
6.7.1 Compliance procedures	81



6.7.2 Conflict resolution	81
6.7.2.1 The Community of Elders	81
6.7.2.2 The Village Chiefs	82
6.7.2.3 Peace Committee	82
6.7.3 Criminal offences	82
6.7.4 Civil measures	82
6.8 Conclusion	83



6.1 Introduction

Kenya is situated on the East African highlands. Its population largely depends on land for subsistence and economic activities.⁴⁶⁶ Environmental protection is a key factor to a country dependent on land for subsistence, as environmental degradation may have adverse effect on the well-being of individuals and the country as a whole.⁴⁶⁷

As a developing country with a growing population, the importance of economic development and environmental protection cannot be over-emphasised, because of its contribution to the country's Gross Domestic Product (GDP).

This chapter investigates the environmental management system in Kenya with the object of defining overarching environmental considerations for the achievement of environmental protection principles.

The chapter starts with the analysis of the constitutional provisions affording protection to the environment. Paramount to the Constitution is the right to an environment and how such right is given effect through subsidiary legislation.

EMCA will be discussed as a framework legislation giving effect to the environment constitutional provisions, as well as for the promotion of sustainable development.

The principles and characteristics of the Act will be analysed with the view to determining if the Act contains essential elements of EFL, and how such elements contribute to the effective environmental management and governance.

The chapter discusses the institutions created under the Act to facilitate effective environmental governance through the promotion of cooperative governance and other means. The effectiveness of such institutions shall also be demonstrated by the approach of the judiciary in giving effect to their decisions.

Furthermore, enforcement mechanisms and compliance procedures necessary for the implementation of the environmental legislative tools, as one of the elements of framework legislation, will be considered. The effectiveness of such procedures is discussed as one of the objects of deterrent law.

Recommendations for the improvement and promotion of effective environmental management and governance in Kenya will be incorporated in the conclusion.

6.2 The right to environment

⁴⁶⁶Kotze & Paterson op cit n212 at 453.

⁴⁶⁷Kotze & Paterson op cit n212 at 453.

The Constitution of Kenya⁴⁶⁸ does not provide for the right to environment nor environmental provisions. It protects fundamental rights and freedoms which are relevant in accessing justice in environmental matters.⁴⁶⁹ The Constitution places emphasis on the right to life, and academic writers argue that the right to life encompasses the right to a clean and healthy environment.⁴⁷⁰

The judiciary also confirmed the position that right to life encompasses the right to a healthy environment. In *Charles Lekuyen Nairobi and others v The Attorney-General and others*⁴⁷¹ it was concluded that the right to life includes a clean and healthy environment which guarantees the full enjoyment of natural resources.

The current constitutional review process underway in Kenya is expected to provide for the right to environment and promote public participation in environmental decision making.⁴⁷² The Draft Constitution provides explicit environmental clauses, including the right to a healthy environment and free information about the environment,⁴⁷³ and public participation in environmental decision making.⁴⁷⁴

The Draft Constitution⁴⁷⁵ also includes the right to access to courts⁴⁷⁶ which facilitates for access to justice through other non-state systems such as the Community of Elders and other local community institutions which are constitutionally recognised for environmental compliance and management.⁴⁷⁷

Currently there is no constitutional protection to the environment in Kenya. The right to a clean environment is however entrenched in EMCA.⁴⁷⁸

The above provision imposes an obligation on every person to protect and manage the environment.⁴⁷⁹ The difficulty with the exercise of the right is that it is entrenched in a subsidiary

⁴⁶⁸Act No. 2 of 1974.

⁴⁶⁹Such rights include freedom of speech, assembly, the right to life and the right to protection of the law which appear in Chapter V of the Constitution.

⁴⁷⁰Wamukoya G. M. and F.D.P. Situma. *Environmental Management in Kenya: a guide to Environmental Management and Coordination Act*. (2000) available at http://www.kenyalaw.org/environment/content/search_cases_index.php?SearchTerm2=kenya (accessed on 19 September 2009 at 10.21).

⁴⁷¹HCK Nairobi (Nairobi Law Courts) Petition No. 466 of 2006 (Eklr) 2007.

⁴⁷²Kamau E.C. 'Environmental law and self management by industries in Kenya' (2005) 17 *Journal of Environmental Law* at 240.

⁴⁷³Art 67(a) & (c).

⁴⁷⁴Art 51(4).

⁴⁷⁵Of 2004.

⁴⁷⁶It provides that 'any person has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court, or where appropriate another independent tribunal or forum.'

⁴⁷⁷See Chapter 6.5 infra.

⁴⁷⁸Section 3(1) provides:

'every person in Kenya is entitled to a clean and healthy environment and has the duty to safe-guard and enhance the environment.'

⁴⁷⁹S 3.

legislation and not in the constitution. It is not a fundamental human right and cannot be enforced in a similar manner as the rights in the Bill of Rights.

EMCA provides for any person to bring an action to the High Court to enforce the right to a clean and healthy environment.⁴⁸⁰ Redress may be heard from the court, if the right has been violated, or is likely to be violated; and in determining the dispute, the court must be guided by the principles of sustainable development, including public participation in development of policies, plans, and processes for environmental management.⁴⁸¹

EMCA creates an overall and all-embracing agency for environmental management as opposed to previous acts that set up sectoral agencies, which often leads to fragmented environmental governance.⁴⁸² It is a framework Act that establishes appropriate legal and institutional mechanisms for the management of the environment.⁴⁸³ It provides for improved legal and administrative coordination of the diverse sectoral initiatives in order to improve the national capacity for the management of the environment.⁴⁸⁴

Kubo⁴⁸⁵ argues that the Act affects business operations by delaying projects because of many licences which are required to be obtained, unlike before the promulgation of the Act. Such licences include the: environmental impact assessment licence; effluent discharge licence; excess noise permit; effluent discharge permit; emission licence; and disposal site permit for a geothermal development.⁴⁸⁶

The sentiments of Kubo⁴⁸⁷ are unfounded as he argues for the compromise of the environmental objectives to maximise financial benefits. The approach he suggests does not promote the protection of the environment for the benefit of the present and future generation, which is the primary objective for environmental protection.

The required licences, although they may delay the projects, inform the competent authorities and the general public as to the likelihoods of environmental damage, and if not carried out, might result in irreparable degradation.

⁴⁸⁰S 3(3).

⁴⁸¹S 3(3) See also Mbote P. 'Towards greater access to justice in environmental disputes in Kenya: Opportunities for intervention.' (2005) at 4 available at <http://www.ielrc.org/content/w0501.pdf> (accessed on 19 September 2009 at 10.21).

⁴⁸²See Kotze & Paterson op cit n212 at 458.

⁴⁸³http://www.nema.go.ke/index2.php?option=com_content&do_pdf=1&id=44 (accessed on 19 September 2009 at 10.30).

⁴⁸⁴See preamble of EMCA.

⁴⁸⁵Kubo M. 'Environmental management at Olkaria geothermal project, Kenya' International Geothermal Conference, Reykjavik, Sept. 2003 available at <http://www.unugtp.is/Apps/WebObjects/Orkustofnun.woa/swdocument/1892/13+Kubo+IGC+2003.pdf> (accessed on 19 September 2009 at 09.40).

⁴⁸⁶At page 79.

⁴⁸⁷Kubo op cit n485.

Environmental degradation has implications for the well-being of individuals and the country as a whole.⁴⁸⁸ The Act is intended to ensure that our activities do not compromise the capacity of the resource base to meet the needs of present generation, as well as those of future generations.⁴⁸⁹

6.3 Principles of environmental management legislation

The principles of EMCA provide for the environmental right, *locus standi*, and a guideline to be used by the courts in determining environmental disputes. The principles provide that the court should be guided by international environmental principles,⁴⁹⁰ such as polluter pays principle, and the precautionary principle.⁴⁹¹

The Act does not make any reference as to whether the administrators or decision makers are to be guided by the principles in making decision relating to environmental protection, management, and governance.

The Act does not incorporate any principle relating to the exercise of administrative powers under the Act. The relationship between the principles and formulation of environmental policies as well as other environmental legislation is not echoed by the principles which are the foundation of environmental decision making.⁴⁹²

The principles of EMCA do not provide for promotion of cooperative environmental governance. There is no mention of the involvement and participation of sectoral line ministries in giving effect to environmental legislation for the achievement of effective environmental management, protection and governance.⁴⁹³

6.4 Characteristics of environmental management legislation

6.4.1 Flexibility

Flexibility of EFL is characterised by the ability to be transformed into changing circumstances, especially with regard to policy formulation and participation of the public in environmental matters.⁴⁹⁴

EMCA allows for public participation in policy formulation as one of the guiding principles, which should be used by the courts in determining environmental disputes.⁴⁹⁵ It also allows for the Minister to co-opt members of the public into EMCA institutions on need basis.⁴⁹⁶

⁴⁸⁸Kotze & Paterson op cit n212 at 453.

⁴⁸⁹<http://www.environment.go.ke/index.php?option=com> (accessed on 2 September 2009 at 10.14).

⁴⁹⁰S 3(5)(e) & (7).

⁴⁹¹The Act does not recognise the preventative principle as one of the key principles for environmental protection.

⁴⁹²See generally s 3 of the Act.

⁴⁹³See generally s 3ff of the Act.

⁴⁹⁴See Chapter 2.3.1 of the thesis.

The courts are also to consider the cultural and social principles traditionally applied by any community in Kenya for the management of the environment or natural resources, in so far as the same are consistent with any written law.⁴⁹⁷

The flexibility of EMCA, however, can be further improved by adoption of principles which allow for formulation of environmental policies and legislation to be embedded under the Act.

6.4.2 Policies and principles

The principles of EMCA do not apply to environmental policy formulation.⁴⁹⁸ The decision makers and competent authority in developing environmental policies are therefore not bound by the principles of EMCA.

In addition, it is not clear whether the administrators are also bound to consider the principles of the Act as the Act expressly provides for the courts to be guided by the principles of the Act in determining environmental disputes.

EMCA provides for the revision of sectoral laws to conform to provisions of the Act.⁴⁹⁹ As a result, a number of statutes⁵⁰⁰ have been revised with the objective of aligning them with the provision of EMCA. It is expected that all sectoral legislation will be revised and amended to ensure that it is consistent with the provisions of EMCA.⁵⁰¹ It is however necessary that the principles of EMCA provide for policy formulation, and should guide the decision makers in making any decision relating to the environment which falls short of the principles of the Act. The principles must apply to all the decision makers including organs of state.⁵⁰²

6.4.3 Civil society involvement

EMCA provides for extensive broad-based public representation in policy formulation as well as environmental management and governance.⁵⁰³ The membership of the institutions created under EMCA includes cross sectoral representation in affiliation and conception.⁵⁰⁴

⁴⁹⁵S 3(5)(a).

⁴⁹⁶S 4(1)(h).

⁴⁹⁷S 3(5)(b).

⁴⁹⁸The Act does not provide for environmental policy formulation.

⁴⁹⁹S 148 state that: 'Any written law, in force immediately before the coming into force of this Act, relating to the management of environment shall have effect subject to modification as may be necessary to give effect to this Act, and where the provisions of any such law conflict with any provisions of this Act the provision of this Act shall prevail.'

⁵⁰⁰Such statutes include Water Act 8 of 2002; Forest Act 7 of 2005; and Energy Act 12 of 2006.

⁵⁰¹Kotze & Paterson op cit n212 at 454.

⁵⁰²See Chapter 4.4.2 of the thesis.

⁵⁰³S 5(a).

⁵⁰⁴S 4(5).

All the relevant stakeholders are represented in the membership of all the institutions. Both the government and the private sector, including the general public and academic institutions, are represented in the policy framework and environmental management.⁵⁰⁵

The principle of public participation requires that the public should have appropriate access to information concerning the environment, and should be given an opportunity to participate in decision making processes.⁵⁰⁶ In addition, it requires that the public should be given effective access to judicial and administrative proceedings. Accordingly, the public must have access to information so as to initiate judicial reviews of environmental decision making when not satisfied with the decisions made.⁵⁰⁷

6.5 Establishment of cooperative governance

6.5.1 International cooperation

EMCA provides for the promotion of international cooperation in environmental governance. It provides that where Kenya is a party to an international environmental instrument, legislative initiatives which are aimed at giving effect to such instruments should be proposed in order to enable Kenya to carry out its obligation under the international instrument.⁵⁰⁸

The courts, in determining environmental disputes, are to be guided by the principle of international cooperation in management of environmental resources shared by two or more states.⁵⁰⁹ The same obligation and governance efforts apply to regional cooperation in environmental governance.⁵¹⁰

The promotion of international cooperation should also be incorporated in the principles, so that they are also considered, not only in formulation of environmental legislation where such treaties are involved, but also to guide the environmental policy, in an attempt to harmonise environmental legislation with international environmental law.

6.5.2 Intra-governmental cooperation

The achievement of intra-governmental cooperation depends on the effectiveness and cooperation of the institutions created for environmental management and governance.⁵¹¹ EMCA places the responsibility of promotion of cooperative environmental governance on the National

⁵⁰⁵See Chapter 6.5 infra.

⁵⁰⁶S 3.

⁵⁰⁷Akech J.M. Land, the environment and the courts in Kenya. (2006) at 14 available at www.kenyalaw.org/environment/.../download.php?...Env (accessed on 30 September 2009 at 13.32).

⁵⁰⁸S 124(a).

⁵⁰⁹S 3(5(c)).

⁵¹⁰Regional cooperation will therefore not be discussed as it is recognised by the same provision applying similarly to international cooperation.

⁵¹¹See Chapter 6.5 infra.

Environmental Council (NEC).⁵¹² The Act provides that the NEC shall promote cooperation among public departments, local authorities, private sector, non-governmental organizations and such other organisations engaged in environmental protection programmes.⁵¹³

The principles of EMCA do not provide for the promotion of intra-governmental cooperation as one of the principles underlying effective environmental governance. The success of environmental governance is dependent on the cooperation of all organs of government placed with legislative responsibility on various environmental instruments.⁵¹⁴

Failure of intra-governmental cooperation renders the environmental governance efforts futile, and results in fragmented environmental governance.⁵¹⁵

The achievement of promotion of cooperative governance, which is the responsibility of NEC, is farfetched as it is comprised by the members outside government, who may not be able influence cooperation from other sectoral line ministries. Cooperation of government departments is better placed within government subject to the same procedures of protocol and administration.

6.6 Institutional arrangements

A number of institutions are established under EMCA for the promotion of cooperative governance and achievement of principle of sustainable development.⁵¹⁶ The following institutions facilitate effective environmental management and governance efforts in Kenya.

6.6.1 National Environment Council

The National Environment Council (NEC) is responsible for policy formulation and direction on environmental matters in Kenya.⁵¹⁷ The NEC sets national goals and objectives and determines policies and priorities for the protection of the environment.⁵¹⁸ It promotes cooperation among public departments, local authorities, private sector, NGOs and such other organisations engaged in environmental protection programmes.⁵¹⁹

It is comprised of two members from the public universities, two members from specialised research institutions, three members from the business community, and two members from the NGOs active in environmental matters.⁵²⁰ The NEC is chaired by the minister responsible for

⁵¹²S 4.

⁵¹³S 4(5)(c).

⁵¹⁴Nel & du Plessis op cit n157 at 192.

⁵¹⁵Strydom & King op cit n69 at 33.

⁵¹⁶See Chapter 6.4.4.2 *supra*.

⁵¹⁷S 4.

⁵¹⁸S 4(5)(b).

⁵¹⁹S 4(5)(c).

⁵²⁰S 4(1).

environment matters. The NEC regulates its own procedure and is empowered to invite any person to participate in the deliberations, but such person shall not be entitled to vote.⁵²¹

The civil society involvement in the membership of the NEC ensures that the interests of all stakeholders are taken into account in policy formulation, and that the necessary skill and expertise are involved in the development of environmental policy.⁵²²

6.6.2 The National Environment Management Authority

The National Environmental Management Authority is a principal instrument of government in the implementation of all policies relating to the environment.⁵²³ The core functions of the Authority include the coordination of various environmental management activities being undertaken by lead agencies.⁵²⁴

The Authority promotes the integration of environmental considerations into development policies, plans, programmes, and projects, with a view to ensuring proper management and rational utilisation of environmental resources on sustainable yield basis, for the improvement of the quality of human life in Kenya.⁵²⁵ It takes stock of the natural resources in Kenya and their utilisation and conservation, and establishes and reviews land use guidelines.⁵²⁶

The Authority is also tasked with dealing with issues of EIA and ensures that the necessary authorisation is obtained before development of any listed project.⁵²⁷ The membership of the Authority comprises seven members who are not public servants.⁵²⁸

The decisions of the Authority are binding and enforceable. In *Waweru v Republic*⁵²⁹, the court ordered that its judgment be served on the Authority and that the Authority must make appropriate restoration orders as requested in the applicant's prayer.

6.6.3 Provincial and District Environmental Committees

6.6.3.1 Provincial Environment Committees

The Provincial Environmental Committee (PEC) is responsible for the proper management and governance of environmental instruments within its province.⁵³⁰ The PEC is comprised of

⁵²¹S 4(6)(5).

⁵²²Aketch op cit n507 at 21.

⁵²³<http://www.environment.go.ke/index.php?option=com> (accessed on 21 September 2009 at 10.10).

⁵²⁴S 9.

⁵²⁵S 9(2)(a).

⁵²⁶See also <http://taxonomy.icipe.org/kenyan-institutions> (accessed on 21 September 2009 at 10.02).

⁵²⁷S 9(2)(1).

⁵²⁸S 10.

⁵²⁹HCK Nairobi, Misc. Civil Appl. No. 118 of 2004, 2 March 2006, KLR (Environment and Land) at 687.

⁵³⁰S 30.

members from the local authority within the province;⁵³¹ representative of farmers or pastoralists; representative of NGOs involved in environmental management programmes and a representative of every regional development authority in the province.⁵³²

6.6.3.2 District Environment Committee

The District Environmental Committee (DEC) is responsible for environmental governance at a district level.⁵³³ Its membership include a representative of each local authority within the district; representative of farmers, women, youth, and pastoralists; representative of NGOs involved in environmental management programmes in the district; and a representative of the business community in the district.⁵³⁴

The Kenyan judiciary does not give due regard to the decisions of the DEC, thereby reducing its efficacy. In *Gathoni v Republic*,⁵³⁵ the Court ruled that failing to obey an order of the DEC is not an offence under the Penal Code.⁵³⁶

6.6.4 Public Complaints Committee

The Public Complaints Committee (PCC) is responsible for investigating complaints relating to environmental damage and degradation.⁵³⁷ The role of the PCC in environmental management and governance is to investigate and report the findings to the NEC.⁵³⁸

The membership of the PCC is comprised of a representative from the Law Society of Kenya, the NGO sector, and the business community.⁵³⁹

Since the role of the PCC is only to investigate and report to the NEC, it lacks the necessary authority to ensure that its recommendations are formally implemented.⁵⁴⁰ Some of the challenges facing the PCC are the lack of understanding of EMCA and the abdication of duty by sectoral lead agencies.⁵⁴¹

⁵³¹Members of the local authority include representatives of the ministries of agriculture, economic planning and development, education, energy, environment, finance, fisheries, foreign affairs, health, industry, law or law enforcement, local government, natural resources, public administration, public works, research and technology, tourism, and water resources.

⁵³²S 29(2).

⁵³³S 30.

⁵³⁴S 29(3).

⁵³⁵Criminal Appeal No. 297 of 2004 reported in (2006) KLR (Environment and Land) at 697.

⁵³⁶S 131 of the Penal Code Cap 63 of 1930 provides for the offence of disobedience of a lawful order.

⁵³⁷S 32.

⁵³⁸S 31.

⁵³⁹S 31(1).

⁵⁴⁰Aketch op cit n507 at 21.

⁵⁴¹Kotze & Paterson op cit n212 at 460.

The decisions of this PCC are legally binding and enforceable. This was confirmed in *Charles Lekuyen Nairobi and others v The Attorney-General and others*,⁵⁴² where the court ordered the government to implement the recommendations of the PCC emanating from the investigations carried out regarding the use of experts in quantifying environmental damage to determine the appropriate monetary compensation.

6.6.5 National Environment Tribunal

EMCA provides for the establishment of the National Environment Tribunal (NET) which specialises in the settlement of environmental disputes.⁵⁴³ NET has the power to hear appeals from administrative decision taken by organs responsible for enforcing environmental standards, including the National Environment Management Authority.⁵⁴⁴ The appeals may be against the refusal to issue licences and the rejection of the EIA statement.⁵⁴⁵

NET work is dependent on the decisions of the National Environment Management Authority and therefore has a limited jurisdiction, which hampers its effectiveness. If the Authority is inactive, NET has no work to do. Effective enforcement of environmental matters can be achieved by giving NET original jurisdiction on environmental disputes.⁵⁴⁶ It should also be afforded power to enforce its orders rather than being required to ask for enforcement through the formal courts.

EMCA is also silent on the enforcement status of NET's orders, and it is unclear whether the judiciary may enforce them or not. NET however provides for specialised, expeditious and cheaper justice than ordinary courts of law. This has increased the use of the Tribunal to challenge the decisions of the National Environment Management Authority.⁵⁴⁷

6.6.6 National Environment Action Plan Committee

The EMCA provides for the establishment of the National Environment Action Plan Committee (NEAPC) which is responsible for preparing the national environment action plans.⁵⁴⁸ The environmental action plans are to be prepared at provincial and district level, containing information on the analysis of the natural resources of Kenya and any change in their distribution and quantity.⁵⁴⁹

⁵⁴² *Charles Lekuyen Nairobi supra* at 66.

⁵⁴³ S 125.

⁵⁴⁴ S 129.

⁵⁴⁵ S 126(2).

⁵⁴⁶ Mbote op cit n481 at 5.

⁵⁴⁷ Kotze & Paterson op cit n212 at 565.

⁵⁴⁸ S 37.

⁵⁴⁹ S 38.

Its members include members from the public universities, specialised research institutions, members from the business community and members from the NGOs active in environmental matters.⁵⁵⁰

6.7 Compliance, enforcement and implementation

6.7.1 Compliance procedures

EMCA facilitates the prescribed institutions with the necessary power to execute their functions. These institutions, which are purely administrative, are empowered to make decisions which are enforceable and legally binding.⁵⁵¹

The position with regard to the compliance procedures of EMCA institutions has been confirmed by the courts, which gave effect to the decision of these institutions, such as issuing interdicts, compliance orders and restoration to remedy the situation.⁵⁵²

6.7.2 Conflict resolution

EMCA provides that the courts, in determining environmental disputes, should be guided by the cultural and social principles traditionally applied by any community in Kenya for the management of the environment or natural resource.⁵⁵³ The Act therefore recognises traditional conflict resolution procedures applicable in Kenya, to the extent that such procedures remain relevant and consistent with the law.

The traditional conflict resolutions in Kenya are dominated other than the courts by Community of Elders, Village Chiefs, Peace Committees, and PEC and DEC.⁵⁵⁴ These institutions are however not provided for under the EMCA, but only recognised as the principles which are traditionally applied within the Kenyan communities.

6.7.2.1 The Community of Elders

The Community of Elders⁵⁵⁵ is one of the most utilised conflict resolution institutions in Kenya. Kenyan lives are linked to environmental resources, and therefore most of the cases dealt by the elders concern the environment.⁵⁵⁶

The Elders manage the natural resources such as water extraction and boreholes, and allocate society with water entitlements. Those who are aggrieved by the decision of Elders have the right to appeal to the Chief and the formal courts.⁵⁵⁷

⁵⁵⁰S 37.

⁵⁵¹Mbote op cit n481 at 4.

⁵⁵²See Chapter 6.5.2 *supra*.

⁵⁵³Section 3(5)(b).

⁵⁵⁴Kotze & Paterson op cit n212 at 466.

⁵⁵⁵Called the *Wazee*.

⁵⁵⁶Kotze & Paterson op cit n212 at 465.

6.7.2.2 The Village Chiefs

The Chief is the most powerful member of the society, and his role is primarily to settle disputes within the community. His duties are multi-faceted and include the resolution of environmental disputes.⁵⁵⁸ The decisions of the Chief are binding and legally enforceable as any other court order.

6.7.2.3 Peace Committees

The Peace Committees are tasked with resolving disputes related to livestock and pasture land. They are comprised of elders and other member of the community, and their mandate extends to the settlement of environmental disputes.⁵⁵⁹

6.7.3 Criminal offences

The EMCA makes provision for both substantive and administrative environmental offences. It makes provision for offences relating to inspection, EIA, records, and offences relating to hazardous wastes, materials, chemicals and radioactive substances.⁵⁶⁰

It also makes provision for offences relating to environmental restoration orders, easements, conservation orders, and offences by bodies corporate, partnerships, principles and employees which are all punishable by imprisonment or fine or both.⁵⁶¹

Criminal penalties contained in EMCA do not require persons degrading the environment to pay for damages caused by their actions. In addition, these penalties are invariably paltry and do not act as a sufficient deterrent against environmental crimes.⁵⁶²

6.7.4 Civil measures

EMCA does not provide for civil liability as possible sanctions for non-compliance with environmental management legislation. The Act only contains criminal offences and punishments such as imprisonment and fines. The objectives of civil measures as an alternative to enforcement mechanisms for environmental compliance are not recognised in the Act.

The effect of failure to incorporate civil measures denies the environment and Kenyan community the benefit of civil measures in combating environmental crimes. This is more particular to the fact that non-compliance with environmental legislation is often coupled with financial benefits to the transgressors.

⁵⁵⁷Kotze & Paterson op cit n212 at 466.

⁵⁵⁸Kotze & Paterson op cit n212 at 467.

⁵⁵⁹Kotze & Paterson op cit n212 at 466.

⁵⁶⁰S 37ff.

⁵⁶¹S 143ff.

⁵⁶²Aketch op cit n507 at 19.

6.8 Conclusion

The efforts of constitutional review in Kenya illustrate that the need for incorporation of the environmental right into the Constitution has been recognised.⁵⁶³ The finalisation of the review process of the Constitution will perhaps provide for the right to environment as a fundamental human right, which elevates the right to the level of other constitutional rights in Kenya.⁵⁶⁴

The enactment of EMCA was a milestone in promoting sustainable environmental management in the country.⁵⁶⁵ The Act provides for the harmonisation of various sectoral statutes, which address aspects of the environment.⁵⁶⁶

Some sectoral statutes have inadequate provisions for prosecution of environmental offenders, while in some; penalties are not sufficiently punitive to deter offenders. EMCA provides an institutional framework and procedures for management of the environment, including provisions for conflict resolution.⁵⁶⁷

There remain steps to be taken before EMCA can be judged a success.⁵⁶⁸ The High Court and NET have original jurisdiction to make orders and directives to safeguard the environment upon application by any person.⁵⁶⁹ If there is an environmental conflict, a party may choose to go to the High Court instead of invoking the NET internal procedure, which may result in an overlap leading to fragmented environmental management, governance and enforcement efforts.⁵⁷⁰

The principles of EMCA largely fall short of the essential elements of EFL. The principles of EMCA are not comprehensive to provide guidance to decision making in environmental matters.⁵⁷¹

The principles do not contain any provision relating to their applicability in the administration of EMCA and other environmental legislation. The purpose for which they are incorporated in the Act is also not defined, and by contrast it cannot be assumed that all other environmental legislation should be guided by the principles nor embedded in the Act.

EMCA is a framework legislation aimed at promotion of effective management and governance of environmental laws.⁵⁷² The principles must therefore lay a foundation as to how effective management and environmental governance should be achieved. There should therefore be

⁵⁶³See Chapter 6.2 *supra*.

⁵⁶⁴Art 67 (a)(c) of the Draft Constitution of Kenya.

⁵⁶⁵Kotze & Paterson op cit n212 at 458.

⁵⁶⁶S 148 of EMCA.

⁵⁶⁷See Chapter 6.7 *supra*.

⁵⁶⁸Kotze & Paterson op cit n212 at 460.

⁵⁶⁹S 3(3).

⁵⁷⁰See generally Chapter 6.5.5 *supra*.

⁵⁷¹See Chapter 2.2 of the thesis.

⁵⁷²See the preamble of EMCA.

principles on cooperative governance and achievement of sustainable use and development of natural resources.⁵⁷³

The Act is also expected to provide a framework for environmental policy formulation. It is therefore important for the guiding principles to provide a policy procedure and the relevance of the principles in policy formulation for the better achievement of environmental objectives.⁵⁷⁴ EMCA does not adequately deal with the formulation of environmental policy, which is inherently important to the flexibility of framework legislation.⁵⁷⁵

The environmental factors are interrelated and therefore environmental management and governance should be integrated.⁵⁷⁶ Integration of environmental governance is characterised by the involvement of all stakeholders in the management and formulation of environmental policy to reduce fragmentation in environmental governance.⁵⁷⁷ EMCA does not contain any provision dealing with the integration of environmental management and governance.

IEM is achieved by the establishment of appropriate institutions to champion the environmental cause.⁵⁷⁸ The institutions are tasked with various roles of environmental management for the achievement of effective governance efforts. EMCA establishes extensive and adequate institutions for environmental management. These institutions are strategically placed to ensure that environmental justice is accessible.⁵⁷⁹

The effectiveness of these institutions depends on their cooperation in environmental governance. Cooperative governance must be promoted at all levels. EMCA only provides for international cooperative governance, but not for national governance as a general obligation for all decision makers under the Act.⁵⁸⁰

Intra-governmental governance is the responsibility of NEC which does not have the capacity to undertake such obligation, which is paramount to environmental legislation and the achievement of environmental objectives.⁵⁸¹ EMCA should incorporate the provisions for cooperative governance and should place such responsibility on one of the government departments as a lead agent, preferably in the Ministry of Environment.⁵⁸²

⁵⁷³See Chapter 4.3 of the thesis.

⁵⁷⁴See Chapter 2.3.2 of the thesis.

⁵⁷⁵See Chapter 6.4.2 *supra*

⁵⁷⁶Strydom & King op cit n69 at 31.

⁵⁷⁷Nel & du Plessis op cit n157 at 109.

⁵⁷⁸See Chapter 2.5 of the thesis.

⁵⁷⁹See Chapter 6.5 *supra*.

⁵⁸⁰See Chapter 6.4.4.2 *supra*.

⁵⁸¹See Chapter 6.5.1 *supra*.

⁵⁸²Strydom & King op cit n69 at 38.

There is no clear reference in the legislation to government's own responsibility under the Act, and might result in the government not being bound by the Act. Clear and proper wording needs to be provided to this effect to prevent government from violating the provisions of the Act.⁵⁸³

The Environmental Ombudsman is one of the institutions which can facilitate for the achievement of effective environmental management and governance.⁵⁸⁴ The Ombudsman is a public protector and an independent institution with the capacity to investigate maladministration of environmental matters, including the actions of government. The institution is not currently established in Kenya, but it is necessary.

In order to ensure that the environmental legislation is enforceable, EMCA should consider incorporating, amongst the enforcement measures and procedures, the use of civil sanctions such as interdicts and damages, which are not constrained by criminal procedure, and therefore cheaper and more efficient to impose than criminal sanctions.⁵⁸⁵ NET and the High Court also have no powers to grant damages or compensation under the Act, and therefore an aggrieved party has to look to other legal provisions.⁵⁸⁶



⁵⁸³See Chapter 2.3 of the thesis.

⁵⁸⁴See Chapter 2.4.2 of the thesis.

⁵⁸⁵See Chapter 6.6.3 *supra*.

⁵⁸⁶See Chapter 6.5.5 *supra*.

Chapter 7

Tanzanian Environmental Management Act No. 20 of 2004	86
7.1 Introduction	87
7.2 The right to environment	87
7.3 Principles of environmental management legislation	89
7.4 Characteristics of environmental management legislation	90
7.4.1 Flexibility	90
7.4.2 Policies and Principles	90
7.4.3 Civil society involvement	90
7.5 Establishment of cooperative governance	91
7.5.1 International cooperation	91
7.5.2 Intra-governmental cooperation	92
7.6 Institutional arrangements	92
7.6.1 National Environmental Advisory Council	92
7.6.2 National Environmental Management Council	92
7.6.3 National Environmental Standards Committee	93
7.6.4 Environmental Appeals Tribunal	93
7.6.5 The Environmental Ombudsman	94
7.7 Compliance, enforcement and implementation	94
7.7.1 Compliance procedures	94
7.7.2 Conflict resolution	95
7.7.3 Criminal sanctions	95
7.7.4 Civil measures	95
7.8 Conclusion	96

7.1 Introduction

The United Republic of Tanzania has two constitutions,⁵⁸⁷ creating two governments and effectively covering three jurisdictions within the country. These constitutions have determined governance jurisdictions both geographically and administratively. Both constitutions are however enforceable and bind all the citizens of Tanzania.

The legislative power in relation to environmental matters falls under the jurisdiction of the Constitution of the Republic of Tanzania⁵⁸⁸ and for purposes of this research, only the provisions of this constitution will be determined.

This chapter will consider the provisions of the Constitution particularly with regard to the right to environment. Other environmental clauses, if any, are looked at with the objective of ascertaining how the constitution affords protection to the environment.

Tanzania is one of the countries which have adopted EFL for the protection of the environment. The chapter investigates how the framework legislation puts into motion the constitutional provision relating to environment, and whether the objectives of such legislation are achievable.

The Environmental Management Act of Tanzania,⁵⁸⁹ as framework legislation, provides principles for decision making, and institutions necessary for the implementation of the objectives of the Act, as well as enforcement and compliance procedures. The chapter investigates the effectiveness of these institutions in carrying out their mandate and how they better the achievement of objectives of the Act

Primarily, this chapter sets to determine whether the Environmental Management Act of Tanzania contains essential elements of environmental legislation which define the overarching environmental objectives.

The chapter evaluates EFL of Tanzania. It demonstrates how the management legislation has contributed to improve the management of environmental legislation in Tanzania. The effectiveness of institutional arrangements under the Act is also analysed.

7.2 The right to environment

The Constitution of Tanzania⁵⁹⁰ does not provide for the right to environment. The Constitution only contains the environmental clauses on the directives principles of state policy. The lack of environmental right has not hampered the courts from giving effect to the environmental protection by inferring the right from other constitutional rights.

⁵⁸⁷The Constitution of the United Republic of Tanzania of 1977 and the Constitution of the Revolutionary Government of Zanzibar of 1984.

⁵⁸⁸Kotze & Paterson op cit n212 at 508.

⁵⁸⁹Act No. 20 of 2004.

⁵⁹⁰Constitution of the United Republic of Tanzania, 1977.

In *Joseph D. Kessy and others v The City Council of Dar es Salaam*,⁵⁹¹ the Courts in giving effect to environmental protection interpreted the right to life⁵⁹² to include the right to live in a healthy environment.

The directives principles of state policy recognise the protection of the environment by placing a duty on every person to protect the natural resources.⁵⁹³ They provide that:

‘(1) Every person has the duty to protect the natural resources of the United Republic, the property of the state authority, all property collectively owned by the people, and also to respect another person’s property.’⁵⁹⁴

The Directives of State Policy are not legally enforceable⁵⁹⁵ but play a significant role in environmental protection, by requiring government and its agencies to direct their policies and businesses to achieve the objectives of environmental protection, management and governance.⁵⁹⁶

The Constitution compels the organs of state to take cognisance of, observe, and apply the directives principles of state policy in their activities and decision making.⁵⁹⁷ The courts have also laid down the principles that should be applied in interpreting the constitution. In *Julius Ishengoma Ndyanabo v The Attorney-General*,⁵⁹⁸ it was observed that:

‘the provisions touching fundamental rights have to be interpreted in a broad and liberal manner thereby jealously protecting and developing the dimensions of those rights and ensuring that our people enjoy their rights, our democracy not only functions but also grows, and the will and dominant aspirations of the people prevail. Restrictions on fundamental rights must be strictly construed.’⁵⁹⁹

To ensure that the objectives of the constitutional right are achieved, subsidiary legislation that facilitates the implementation of the right must be adopted. Such legislation must create a framework for the effective management of environmental instruments.

Although the courts are proactive in giving force to the directive principles in the promotion of human rights, it is still imperative and in the interest of all Tanzanians for the Constitution to expressly provide for the right to environment.

⁵⁹¹HC Civ. Case No. 299 of 1998 (unreported).

⁵⁹²Art 14 provides that ‘every person has the right to life and to the protection of his life by the society in accordance with law.’

⁵⁹³The natural resources referred to in Article 27(1) include: forest; other biological resources; soils and minerals.

⁵⁹⁴Art 27.

⁵⁹⁵Kotze & Paterson op cit n212 at 513.

⁵⁹⁶Art 9(1)(c).

⁵⁹⁷Art 7(1).

⁵⁹⁸Court of Appeal of Tanzania, Civ. Appeal No. 4 of 2001 (unreported).

⁵⁹⁹At 17.

In absence of the constitutional environmental right, the Environmental Management Act⁶⁰⁰ of Tanzania provides for the right to a clean, safe and healthy environment.⁶⁰¹ The right is aimed at giving effect to the constitution environmental clauses

The Environmental Management Act facilitates for the achievement of sustainable use and development of the environment. The objectives of the Act are to promote the enhancement, protection, conservation and management of the environment.⁶⁰² The objectives are achieved through principles, institutional arrangements, and compliance and enforcement procedures necessary for the implementation of environmental legislation.⁶⁰³

7.3 Principles of environmental management legislation

The Environmental Management Act of Tanzania contains general principles which bind all decision makers in making any decision relating to the environment.⁶⁰⁴ An environment related decision includes development of environmental legislation and policies necessary for the achievement of the objectives of the Act.

In the development of environmental legislation and policy, decision makers are to be guided by the principles, particularly with the object of taking into account the interests of stakeholders in the protection of the environment through public participation.⁶⁰⁵

Public participation ensures that environmental justice and information is easily accessible by allowing for improved opportunities, in the deliberations of environmental forums. The deliberation facilitates formulation of environmental policies which are reasonably comprehensive and realisable.⁶⁰⁶

Public participation is promoted at all levels of environmental governance.⁶⁰⁷ The principles of the Act provide for the involvement of the public through representation in relevant institutions designed to promote effective environmental governance. These institutions are also to consider the principles of the Act in their efforts to ensure that environmental governance is integrated.⁶⁰⁸

IEM necessitates for effective environmental governance efforts through cooperation of all the organs of state in the protection and management of environmental legislation. The principles of

⁶⁰⁰Act No. 20 of 2004.

⁶⁰¹S 4(1).

⁶⁰²S 4(7).

⁶⁰³This essential element of EFL has been discussed in details in the previous chapters. The focus shall be on whether Tanzania Environmental Management Act contains such components.

⁶⁰⁴S 4(7)(3).

⁶⁰⁵S 4(7)(3)(e).

⁶⁰⁶See Chapter 7.4.2 *infra*.

⁶⁰⁷S 178 states that the public has the right to participate in decisions concerning the design of environmental policies, strategies, plans and programmes, and to participate in the preparation of laws and regulations relating to the environment.

⁶⁰⁸S 4(8).

the Act recognise the importance of cooperation by placing responsibility of promotion of IEM on the Ministry of Environment and Tourism.⁶⁰⁹

7.4 Characteristics of environmental management legislation

7.4.1 Flexibility

The environmental factors are diverse and evolve with time. It is therefore necessary for EFL to be flexible in conception to allow for modification and alignment with the changing circumstances.

Flexibility is achieved by allowing the adoption of environmental policies which are necessary for the implementation of the provisions of the Act.⁶¹⁰ The competent authorities must also be given the power to adopt regulations which may be necessary for the enforcement and implementation of the objects of the Act.

One of the functions of the National Environmental Advisory Committee (NEAC) is to review and advise the Minister on any environmental standards, guidelines and regulations which are to be made pursuant to the provisions of this Act,⁶¹¹ to adapt it to the changing circumstances.

The principles oblige the decision makers to have due regard to the National Environmental Policy⁶¹² in their efforts to implement environmental instruments. The Act also recognises that, for the Minister to be able to execute legislative functions, the relevant and necessary technical support,⁶¹³ should be provided and that includes support in terms of current and existing circumstances.

7.4.2 Policies and principles

The Environmental Management Act provides expressly in the principles that the Act shall provide a legal framework for the development of environmental policies,⁶¹⁴ and that in the development of policy, the decision makers should be guided by the principles.

The principles also provide for the participation of the public in the formulation of environmental policy and that such participation should provide a comprehensive policy which will facilitate for the achievement of the objectives of environmental protection and effective governance efforts.

The Act provides guidance to be followed in determination of environmental disputes, particularly the consideration of principle of public participation in the development of environmental policy.⁶¹⁵

7.4.3 Civil society involvement

⁶⁰⁹S 4(7)(4).

⁶¹⁰See Chapter 2.3.1 of the thesis.

⁶¹¹S 12(e).

⁶¹²S 4(9).

⁶¹³S 4(7)(2).

⁶¹⁴S 7(2).

⁶¹⁵S 5(3)(d).

The involvement of the public and government in environmental management cannot be overemphasized. The Act facilitates for adequate broad-based participation in the promotion of effective environmental governance and policy formulation.⁶¹⁶

The membership of the institutions under the Act is also characterised by the involvement of the members of the public and relevant stakeholders who are responsible for the management and governance of environmental instruments.⁶¹⁷

The NEAC is comprised of members whose experience should reflect the various fields of environmental management in the public, private sector and the civil society, which ensures that NEC takes into account the interest of all relevant stakeholders.⁶¹⁸

7.5 Establishment of cooperative governance

7.5.1 International cooperation

International cooperation is a constitutional obligation aimed at giving effect to the international agreements.⁶¹⁹ The Act recognises international environmental cooperation by providing for the measures of implementing international agreements to which Tanzania is a signatory.⁶²⁰

The Act empowers the Minister to make legislative proposal which are aimed at giving effect to the international environmental agreements to the National Assembly for consideration.⁶²¹ Such legislative proposals should be accompanied by the proposed measures of enforcement and implementation, which should generally benefit the natural resources of Tanzania and the international community.⁶²²

The Act also provides for the promotion of formulation of trans-boundary environmental agreements as the responsibility of Department of Environment.⁶²³ In the implementation of such agreements, the department must consider the principle of international cooperation in the management of environmental resources shared by two or more states.⁶²⁴

The courts are also to be guided by the principles of international law such as the principle of sustainable development; polluter pays principle, precautionary principle and the preventative principle⁶²⁵ in enforcing the environmental legislation.⁶²⁶ The applicability of these principles was confirmed in *Erick David Massawe v The Tanzania National Roads Agency, Loi Langisho*

⁶¹⁶S 178.

⁶¹⁷See Chapter 7.5 infra.

⁶¹⁸S 11(2).

⁶¹⁹S 9(1) (f) of the Constitution of Tanzania.

⁶²⁰S 179.

⁶²¹S 179(1)(a).

⁶²²S 179(1)(a).

⁶²³S 180(1).

⁶²⁴S 180(2).

⁶²⁵S 3.

⁶²⁶Regional obligation is recognised in the same manner and under this provision in the Act and will not be discussed further.

*Mollel and the Attorney-General*⁶²⁷ where the Court ordered the respondent to pay the costs of rehabilitating the environment as a result of the soil which was deposited on the side of the road which interfered with the storm drainage next to the applicant's property.

7.5.2 Intra-governmental cooperation

The Act places the responsibility for the promotion of cooperative governance on the Minister responsible for matters relating to the environment.⁶²⁸ Cooperative governance should be achieved by the involvement of all relevant stakeholders including all organs of state whose mandate is to make decisions relating to the environment.

The Act provides for cooperation between all organs of state and other bodies engaged in environmental management as a cross-cutting issue. Such cooperation should embrace collaboration, consultation and cooperation with any person having functions relating to the environment.⁶²⁹

7.6 Institutional arrangements

7.6.1 National Environmental Advisory Council

The Act provides for the establishment of the National Environmental Advisory Council (NEAC) which shall be the principal advisor to the Minister in matters relating to the protection and promotion of effective environmental governance.

The NEAC is tasked with examining matters referred to it by the Minister relating to the protection and management of the environment, and to make any necessary recommendations that may help in achieving the objectives of the Act.⁶³⁰

The NEAC is responsible for reviewing and advising the Minister on any environmental standards, guidelines and regulations which are to be made and incidental to the Act.

The membership of the NEAC is comprised of members whose experience reflects the various fields of environmental management in the public sector, private sector, and civil society. The members mainly include heads of various organs of state, and leaders of non-governmental institutions with the necessary skills and experience in environmental matters

7.6.2 National Environmental Management Council

The National Environmental Management Council (NEMC) is established to undertake enforcement, compliance, review and monitoring of environmental impact assessments.⁶³¹ It facilitates public participation in environmental decision making by exercising general

⁶²⁷HC of Tanzania (Land Division) at Arusha, Land Case No. 16 of 2004 (unreported).

⁶²⁸S 7(4).

⁶²⁹See s 7(4).

⁶³⁰S 11.

⁶³¹S 16.

supervision and coordination over all matters relating to the environment and national environment policy.

NEMC also promotes cooperative environmental governance⁶³² between sectoral ministries, by facilitating the implementation of sector ministries programmes intended to enhance environmental education and public awareness about the need for sound environmental management, as well as, for enlisting public support and encouraging the effort made by other entities, in the management and governance of the environment.⁶³³

7.6.3 National Environmental Standards Committee

The National Environmental Standards Committee (NESC) is adopted from the Bureau of Standards Act,⁶³⁴ whose role is to advise the Minister on proposals of environmental quality standards and to conduct inspections relating to compliance with the set standards, within the Republic of Tanzania.⁶³⁵

For the purposes of enforcement of environmental quality standards, NESC should cooperate with other organs of state and agencies such as Public Health Department, Occupational Health and Safety Agency, Tanzania Bureau of Standards, Tanzania Atomic Agency, Chief Government Chemist Laboratory Agency, and Tanzania Food and Drugs Authority.⁶³⁶

NESC is empowered to adopt policy procedures which bind everyone who undertakes any activity which is likely to adversely affect the environment, to comply with the set standards. All the affected institutions are also required to adopt necessary measures to meet the requirements of the NESC policies on environmental quality standards.⁶³⁷

NESC is granted with powers of inspection to detect violation of environmental standards and to issue compliance orders. Failure to comply with compliance orders is an offence under the Act.⁶³⁸

The Act however does not prescribe how the membership of the NESC should be composed and whether the NESC will have adequate cross sectoral representation to ensure that all relevant stakeholders with the necessary expertise are involved.

7.6.4 Environmental Appeals Tribunal

The Environmental Appeals Tribunal (EAT) is chaired by a person qualified to be a judge and appointed by the President, and comprises an advocate of the High Court of Tanzania, one member with high academic qualifications and experience in environmental law, and two other

⁶³²S 17(a).

⁶³³S 18(2)(h).

⁶³⁴Act 3 of 1975.

⁶³⁵S 140.

⁶³⁶S 142(3).

⁶³⁷S 142(1)(c).

⁶³⁸S 142.

members who have demonstrated exemplary professional competence in the field of environmental management.⁶³⁹

The EAT is responsible for hearing appeals arising from any decision under the Act.⁶⁴⁰ It has the jurisdiction to adjudicate appeals on the decisions of the competent authorities and award appropriate remedies⁶⁴¹ to rectify any possible miscarriage of justice relating to environmental matters.

Any person who is aggrieved by the decision of the EAT on a point of law may appeal directly to the High Court of Tanzania, and such appeal should be heard by a panel of three judges⁶⁴² as the highest decision making body in relation to environmental disputes.

7.6.5 Environmental Ombudsman

The Act does not provide for the establishment of the Environmental Ombudsman as an independent institution that may undertake and enforce compliance with environmental legislation in the interest of the public.⁶⁴³

The Office of Environmental Ombudsman is independent and tasked with the role of investigating complaints of injustice or maladministration in the public service received from the public and body corporate relating to environmental matters.⁶⁴⁴ The Ombudsman, after investigating the complaints, should make recommendations to the appropriate authorities for compliance with environmental legislation.⁶⁴⁵

The Office has the power to summon witnesses where necessary to give evidence before it. The Environmental Ombudsman makes a special report to the National Assembly for non-compliance with environmental legislation.⁶⁴⁶ The Office may play a significant role in the management and governance of environmental matters as it has the power to enforce compliance within government and the public sector.⁶⁴⁷

7.7 Compliance, enforcement and implementation

7.7.1 Compliance procedures

The compliance and enforcement of the provisions of the Act is the responsibility of the institutions exercising their powers and functions under the Act.⁶⁴⁸ It provides compliance and

⁶³⁹S 204(1).

⁶⁴⁰S 206(1).

⁶⁴¹S 206(3) empowers the Environmental Appeals Tribunal to confirm, vary or set aside the order, notice, direction or decision complained about, and or makes such other orders deemed necessary.

⁶⁴²S 209.

⁶⁴³See Chapter 2.4.2 of the thesis.

⁶⁴⁴<http://www.eisa.org.za/WEP/comagency.htm> op cit n92.

⁶⁴⁵<http://www.eisa.org.za/WEP/comagency.htm> op cit n92.

⁶⁴⁶<http://www.eisa.org.za/WEP/comagency.htm> op cit n92.

⁶⁴⁷See Chapter 2.4.2 the thesis.

⁶⁴⁸S 182(2).

enforcement procedures to be used by these institutions in their governance efforts to effectively achieve its objectives.⁶⁴⁹

The Act empowers the NEMC to appoint Environmental Inspectors whose role is to monitor and enforce compliance with the provisions of the Act and any other environmental legislation.⁶⁵⁰ Environmental Inspectors are mandated to enter premises and conduct routine inspections which are aimed at ensuring that environmental quality standards are observed.

The Act also empowers the Director of Public Prosecutions (DPP) of Tanzania to designate public prosecutors to specialise in the prosecution of environmental offences and any other offences relating to the provisions of the Act as compliance and enforcement measure.⁶⁵¹

7.7.2 Conflict resolution

The Environmental Management Act does not provide for the mechanisms of resolving conflict between organs of state that have concurrent competence in making decisions relating to the environment. It is therefore not clear how potential conflicts arising from legislation concerning authorisation licences for development will be resolved.

7.7.3 Criminal sanctions

The Act provides for criminal⁶⁵² and civil measures as possible sanctions for the settlement of environmental disputes. The power to enforce both civil and criminal measures under the Act is vested on the courts and subject to judicial trial processes of litigation.⁶⁵³ The cost implications of litigation cannot be over emphasised, as well as how the process denies those who cannot afford the cost environmental justice.

The Act does not recognise alternative dispute resolution mechanisms as enforcement measures which help to promote access to justice in environmental disputes.⁶⁵⁴ Alternative dispute resolution measures are easily accessible and cheaper to impose, as parties to the dispute do not need to follow a lengthy process of court and do not require legal representation.

The Act does not provide for an alternative to parties to environmental dispute who may prefer to refer the matter to arbitration, mediation or conciliation, rather than instituting action in court which may deny them access to justice due to circumstances such as lack of finance, *locus standi*, insufficient proof and so forth.

7.7.4 Civil measures

⁶⁴⁹S 182 contains the general compliance procedure for enforcement of the provision of the Act.

⁶⁵⁰S 182.

⁶⁵¹S 182(3).

⁶⁵²S 191.

⁶⁵³S 191f.

⁶⁵⁴Kidd op cit n111 at 22.

The Act provides for civil liability resulting from any damage caused by non-compliance with the provisions of environmental legislation.⁶⁵⁵ It expressly states that a conviction for an offence committed under the Act does not exonerate any person or body corporate from civil proceedings which may be instituted against him or her or that body corporate.⁶⁵⁶

The Act further provides that in addition to criminal sanctions, individuals who are injured will continue to have recourse to civil enforcement against any violation of the provisions of the Act and shall have a right to obtain compensation from the violator through private civil suits.⁶⁵⁷

Civil penalties are easier to impose than criminal sanctions because they require less stringent standard of proof during litigation. It is easier to satisfy the balance of probabilities than proof beyond reasonable doubt which is required for criminal sanctions.⁶⁵⁸

The parties to civil proceedings may also opt to settle the matter out of court during trial preparatory stages to avoid exorbitant costs of litigation. Such may be achieved by complying with letters of demand and proposing for settlement procedures required by law such as payment cost for rehabilitation.

7.8 Conclusion

The Constitution of Tanzania does not incorporate the right to environment which is provided under the Environmental Management Act of Tanzania and that denies the Tanzanian community the benefit of constitutional environmental protection.⁶⁵⁹ The government has an obligation to adopt necessary measures for the implementation of the rights contained in the Bill of Rights, and such benefit is by implication not extended to the environmental objectives due to absence of the right to environment in the Constitution.⁶⁶⁰

The Constitution only provides for the environmental clauses in the directives principles of state policy which are put into motion by the Environmental Management Act. The Environmental Management Act provides for the guiding principles, institutions and compliance and enforcement measures necessary for the implementation of the constitutional environmental clauses and the Act.⁶⁶¹

The principles of Environmental Management Act are not comprehensive enough to provide proper guidance to decision makers as they fall short of other inherently important elements to be considered in environmental matters. The principles do not contain any provision relating to the consideration of alternative dispute resolution mechanisms in resolving environmental disputes.⁶⁶²

⁶⁵⁵S 192.

⁶⁵⁶S 192(1).

⁶⁵⁷S 225.

⁶⁵⁸Kidd op cit n111 at 44.

⁶⁵⁹See Chapter 7.2 *supra*.

⁶⁶⁰*Grotboom supra* op cit n 252 at 55.

⁶⁶¹See Chapter 2 of the thesis.

⁶⁶²See Chapter 7.3 *supra*.

In addition, the principles do not impose a duty on the decision makers to promote cooperative environmental governance which forms the basis for effective environmental protection efforts. The cooperation of all organs of state should be promoted with clear particularity as these departments are placed with the responsibility of making decisions which are likely to adversely impact on the environment.⁶⁶³

The promotion of effective environmental policy is adequately provided for in the Act. The principles provide for the participation of the public and relevant stakeholders in development of environmental policy. The principles are also echoed by other provisions of the Act which emphasise the involvement of the public in making of decisions relating to environmental management and protection.⁶⁶⁴

The participation of the public is also provided for at all levels of environmental governance facilitating for effective environmental management and governance efforts. This ensures that the interests of the public are considerably and consciously taken into account.⁶⁶⁵

The Act however provides for insufficient institutions to champion the environmental cause. Only two institutions under the act are provided for the active involvement in environmental management and governance. The other institutions are specific in objective and not tasked with environmental governance and management.⁶⁶⁶ There is a need to establish other institutions which will improve the achievement of objectives of environmental protection such as DEC. Such institutions ensure that environmental justice is easily accessible.⁶⁶⁷

The Act contains environmental offences and civil measures for non-compliance with the provisions of the Act. The other dispute resolution mechanisms which are inherently important in the settlement of environmental conflicts such as arbitration, mediation and conciliation, are not recognised in the Act.⁶⁶⁸ These mechanisms are important and play a vital role in the enforcement and implementation of environmental legislation and should be incorporated in Act.⁶⁶⁹

⁶⁶³See Chapter 7.4.4.3 *supra*.

⁶⁶⁴See Chapter 7.4.2 *supra*.

⁶⁶⁵See generally Chapter 7.4.3 *supra*.

⁶⁶⁶See Chapter 7.5.

⁶⁶⁷See s 30 of EMCA.

⁶⁶⁸See Chapter 7.6.3.

⁶⁶⁹Kidd op cit n111 at 22.

Chapter 8

Comparison between the Botswana environmental management system and the Kenyan, Namibian, Tanzanian and South African environmental management systems 98

8.1 Introduction	99
8.2 The right to environment	99
8.3 Principles of environmental management legislation	101
8.4 Characteristics of environmental management legislation	102
8.4.1 Policies and principles	102
8.4.2 Civil society involvement	102
8.5 Establishment of cooperative governance	103
8.5.1 International cooperation	103
8.5.2 Regional cooperation	104
8.5.3 Intra-governmental cooperation	104
8.6 Institutional arrangements	105
8.7 Compliance, enforcement and implementation	106
8.7.1 Compliance procedures	106
8.7.2 Conflict resolution	106
8.8 Environmental challenges	107
8.8.1 Botswana	107
8.8.2 Kenya	108
8.8.3 Namibia	108
8.8.4 Tanzania	109
8.8.5 South Africa	109
8.9 Conclusion	110



8.1 Introduction

The above chapters have demonstrated the importance of the right to the environment as a constitutional fundamental right and how this contributes to effective environmental protection, management and governance.

The environmental framework legislation that sets into motion the constitutional right to the environment and other constitutional environmental clauses has been discussed, with the view to demonstrating the relationship between the constitution as the supreme law of any given state and the environmental framework legislation as a framework for all environmental legislation.

This chapter compares the environmental constitutional provisions dealing with the protection of the environment and natural resources. Some environmental clauses are contained in the Bill of Rights, while others are contained in the Directive Principles of State Policy.

This chapter focuses on the comparison of the environmental framework legislation of South Africa, Kenya, Namibia and Tanzania and how they give effect to the constitutional right and environmental clauses.

The components of these environmental framework acts, especially their essential elements such as principles, characteristics particularly flexibility and public participation, institutions, and compliance and enforcement measures, are discussed with the objective of finding how they improve the environmental management and governance efforts.

The defects or short-comings identified are analysed with the view to finding how the proposed environmental management legislation for Botswana can curb such defects, especially on the adoption of the environmental management legislation as a model of best practice.

The chapter demonstrates some of the environmental challenges emanating from the environmental management and governance system of Botswana, Kenya, Namibia, Tanzania and South Africa which have not been addressed by the environmental framework legislation.

8.2 The right to environment

The Constitutions of Namibia, Kenya and Tanzania do not contain a right to the environment. In Namibia and Tanzania, there exist only environmental clauses in the Constitution dealing with the protection and use of natural resources. These environmental clauses are contained in the Directive Principles of State Policy which are generally not enforceable as they do not place an obligation on government to provide measures necessary for citizens to enforce the right to environment.⁶⁷⁰

The courts in Tanzania have, however, interpreted the right to life to include the right to a healthy environment as a measure of providing protection to the environment.⁶⁷¹ Nevertheless the right to the environment is still necessary as a fundamental right to elevate the environmental

⁶⁷⁰See Kotze & Paterson op cit n212 at 513.

⁶⁷¹See footnote 599 *supra*.

objectives to the status of other constitutional rights.⁶⁷² This renders the right to the environment to be as enforceable as any other right in the constitution.

The Draft Constitution of Kenya, which has not been finalized at the time of writing this article, contains a right to the environment. The right to the environment is currently entrenched into the Environmental Management and Coordination Act of Kenya,⁶⁷³ but not as a fundamental human right since it is not included in the constitutional fundamental rights.

South Africa's Constitution provides for the right to the environment as a fundamental human right contained in the Bill of Rights.⁶⁷⁴ The right is as enforceable as any other constitutional right contained in the Bill of Rights, and may only be limited in terms of law of general application subject to the limitation clause.

The South African Constitutional Court in *Government of the Republic of South Africa and others v. Grootboom case*⁶⁷⁵ confirmed the position and status of the right to the environment as a fundamental human right. The court held that the government has an obligation to adopt measures necessary for the implementation of the right to the environment.⁶⁷⁶

The inclusion of the right to environment plays a significant role in effective environmental management and governance. As a human right, it ensures that environmental principles and objectives which are aimed at the protection of the environment are duly considered in environmental decision making.

As there is no right to the environment in Botswana, it is necessary, for effective protection and promotion of environmental governance, to incorporate the right to the environment into the constitution of Botswana.

Kenya, Namibia, South Africa, and Tanzania have adopted EFL dealing with the use and protection of the environment. The environmental framework legislation provides for the guiding principles, institutions, compliance and enforcement procedures which are necessary for the implementation of environmental legislation.⁶⁷⁷ The framework legislation facilitates for the achievement of the principle of sustainable use and development of natural resources.

The below figure illustrates some of the essential features of environmental legislation of different states considered in this thesis.

⁶⁷²See also T.P. van Reenen op cit n95 at 273.

⁶⁷³S 3(1) of EMCA.

⁶⁷⁴S 24 of the Constitution of South Africa. See Chapter 4.1 *supra*.

⁶⁷⁵2001 (1) SA 46 (CC).

⁶⁷⁶See *Grootboom supra* at para 69B. See also Chapter 4.1 *supra*.

⁶⁷⁷See Chapter 2 of the thesis.

Country	Environmental right	Directive principles of state policy	Principles	Flexibility
Botswana	No	No	No	No
Kenya	No	Yes	Few	Yes
Namibia	No	Yes	Few	Yes
Tanzania	Yes*	Yes	Few	Yes
South Africa	Yes	Yes	Adequate	Yes

Figure 1. The essential features of environmental legislation.

*included in Environmental Management Act.

8.3 Principles of environmental management legislation

The Environmental Management and Coordination Act of Kenya contain very few principles particularly as to applicability of the Act.⁶⁷⁸ The principles do not contain any provision relating to the guidance in formulation of other environmental legislation, policy formulation and public participation in environmental policy development, conflict resolution and integration of environmental management; and the principles of the Environmental Management Act of Tanzania are similar.⁶⁷⁹

The principles of the Environmental Management Act of Namibia are inadequate for framework legislation. The principles are not comprehensive enough to address environmental issues such as guidelines for environmental decision making, promotion of cooperative governance integration of environmental management and conflict resolution. The principles are inherently important to environmental governance and should form the foundation of environmental framework legislation.

The South African National Environmental Management Act contains comprehensive principles for the guidance of decision makers in making decisions relating to the protection of the environment.⁶⁸⁰ The principles, which are applicable to all organs of state, provide for effective environmental management and governance by incorporating essential elements necessary for

⁶⁷⁸Ss 3(5)(e) & (7).

⁶⁷⁹See generally Chapter 7 of the thesis.

⁶⁸⁰S 2 of NEMA.

cooperative governance. The courts have also confirmed the applicability of NEMA principles.⁶⁸¹

8.4 Characteristics of environmental management legislation

8.4.1 Policies and principles

The principles for EMCA do not sufficiently provide guidance for policy making and public participation in the development of environmental legislation in Kenya. The environmental policy formulation is not adequately provided for in the Act as a necessary measure for effective implementation of environmental legislation.

The Namibia Environmental Management Act contains principles for environmental policy formulation.⁶⁸² The Act promotes public participation in the development of environmental policy. However the Act does not establish whether the principles bind all the decision makers relevant to the environmental cause. The applicability of policy principles is therefore not clear and unsettled.

The Tanzania Environmental Management Act adequately provides for environmental policy considerations. The act sufficiently provides a guideline for environmental policy development and the involvement of civil society in the formulation of environmental policy.⁶⁸³ The Act facilitates in other provisions for public participation in environmental decision making, which ensures that the interests of the public are adequately taken into account in decision making.

The National Environment Management Act of South Africa also provides for policy considerations in the principles of the Act. The principles are to guide all decision makers in the development of environmental policy which is necessary as an implementation measure. The principles also promote civil society involvement in the development of environmental policy as well as cooperation between all organs of state.⁶⁸⁴

8.4.2 Civil society involvement

EMCA provides for public participation in the development of environmental policy and decision making in Kenya.⁶⁸⁵ The membership of the institutions created under EMCA is drawn from all government sectors including the members of the public and academic institutions.⁶⁸⁶ The Act also provides that such people should have the necessary skills and experience relevant to management and protection of the environment.⁶⁸⁷

The Namibia Environmental Management Act provides for public participation of all the interested and affected parties in the environmental decision making. Public participation is

⁶⁸¹See *BP Southern Africa (Pty) Ltd* op cit n228 at 146I.

⁶⁸²S 3(1).

⁶⁸³S 7(2).

⁶⁸⁴See generally Chapter 4.4.2 of the thesis.

⁶⁸⁵See footnote 480 *supra*.

⁶⁸⁶S 4(5).

⁶⁸⁷See Chapter 6.4.3 of the thesis.

promoted at all levels of environmental governance, including in the formulation of environmental policy.⁶⁸⁸ The Act therefore provides for public awareness of environmental objectives through a collective approach to environmental governance.

Public participation in environmental decision making is also adequately provided for in the Environmental Management Act of Tanzania.⁶⁸⁹ The civil society involvement in environmental decision making cannot be over emphasised. The institutions under the Act also include, in their membership, the members of the public and non-governmental organisations.⁶⁹⁰

The National Environmental Management Act of South Africa recognises the importance of public participation in making decisions relating to environmental protection. The Act comprehensively provides for civil society involvement in the development of environmental policy, as well as in the membership of institutions for enforcement and governance created under the Act.⁶⁹¹

8.5 Establishment of cooperative governance

8.5.1 International cooperation

EMCA provides for the adoption of legislative measures necessary for the implementation and enforcement of international agreements, of which Kenya is a signatory.⁶⁹² The Act further provides a guiding principle to the courts in determining environmental disputes to be guided by the principles of international law.⁶⁹³

Similarly in Namibia, the Environmental Management Act provides for the adoption of legislative measures necessary for the implementation and enforcement of international environmental instruments.⁶⁹⁴ The Act further promotes for the participation of the public in the formulation of national legislative measures for implementation of international agreements which are to be achieved through public education, awareness campaigns, and dissemination of information on international environmental instruments.⁶⁹⁵

Legislative proposals necessary for the implementation of international agreements in Tanzania are also to be adopted by parliament, in order to enable Tanzania to carry out its obligations under the international agreements. The Environmental Management Act provides for international cooperation by promoting cooperation agreements relating to the use of trans-boundary natural resources.⁶⁹⁶

⁶⁸⁸S 3(1).

⁶⁸⁹S 7(2).

⁶⁹⁰See Chapter 7.5 of the thesis.

⁶⁹¹See generally Chapter 4.4.3 of the thesis.

⁶⁹²S 124(a).

⁶⁹³S 3(5(c)).

⁶⁹⁴S 48.

⁶⁹⁵See generally Chapter 5.4.4.1 of the thesis.

⁶⁹⁶See Chapter 7.4.4.1 of the thesis.

The National Environmental Management Act of South Africa provides for international cooperation in environmental decision making as a necessary measure for the achievement of effective environmental governance. In an attempt to promote international cooperation, the Act provides for the development of management plans and implementation plans that reflect a commitment to Agenda 21.⁶⁹⁷

8.5.2 Regional cooperation

The environmental framework laws of Kenya, Namibia, Tanzania, and South Africa contain provisions which are aimed at giving effect to regional agreements and cooperation. The Acts provide for the adoption of measures necessary for the implementation of regional obligations in the national processes of their respective states.⁶⁹⁸

8.5.3 Intra-governmental cooperation

The promotion of intra-governmental cooperation in Kenya under EMCA is the responsibility of National Environmental Council, which is comprised of civil servants and members of the public.⁶⁹⁹ The duty to promote cooperation in environmental governance in Namibia is placed on the Sustainable Development Advisory Council.⁷⁰⁰

The government institutions do not have a duty to cooperate in making decisions relating to the use and protection of the natural resources. The achievement of cooperative environmental governance may be difficult if these institutions do not have any influence on all organs of state and other sectoral ministries which are not bound by the provisions of the Act.⁷⁰¹

The approach to intra-governmental cooperation in Tanzania and South Africa is similar. The environmental framework legislations of these countries promote the cooperation of all organs of government in environmental management. The framework Acts also provide for the conclusion of cooperative agreements between government departments in environmental decision making.

The table below illustrates some of the characteristics of environmental legislation of different states considered in this thesis.

Country	Civil society involvement	National cooperation	Regional cooperation	International cooperation	Integration
Botswana	No	No	No	No	No
Kenya	Yes	No	Yes	Yes	No

⁶⁹⁷S 26.

⁶⁹⁸See Chapter 4.44; Chapter 5.4.4; Chapter 6.4.4 and Chapter 7.4.4 of the thesis.

⁶⁹⁹See Chapter 6.4.4.2 of the thesis.

⁷⁰⁰S 48.

⁷⁰¹See Chapter 5.5.1 of the thesis.

Namibia	Yes	No	Yes	Yes	No
Tanzania	Yes	Yes	Yes	Yes	Yes
South Africa	Yes	Yes	Yes	Yes	Yes

Figure 2 Characteristics of environmental legislation

8.6 Institutional arrangements

EMCA provides adequate institutions for compliance and enforcement of environmental legislation in Kenya. The institutions are characterised by broad-based public participation in conception, ensuring that the public is involved in environmental governance. The traditional conflict resolution institutions are also recognised under the Act, thereby promoting access to environmental justice as these institutions extend to all the communities in Kenya.⁷⁰²

The Namibia Environmental Management Act provides for the establishment of institutions but they are not granted with enough power to enforce compliance with environmental legislation. The institutions are not given the responsibility to investigate and take action for non-compliance, but are given the responsibility to determine and advise the Minister on any matter concerning the protection of the environment. However, the constitution of Namibia extends the responsibilities of the Ombudsman to the investigation of environmental crimes as an independent institution, which facilitates for effective compliance with environmental legislation.⁷⁰³

The Tanzania Environmental Management Act provides for the establishment of only two institutions active in environmental management and governance. These institutions are insufficient to champion the environmental cause, and there is a need for the establishment of other institutions such as District Environmental Committees.⁷⁰⁴

NEMA Amendment Act⁷⁰⁵ provides for the de-establishment of the existing institutions and empowers the Minister to establish any institution when necessary to undertake various roles of environmental management and governance.⁷⁰⁶ There is, however, no Environmental Ombudsman who can act as an independent public protector in environmental causes. The Office of the Ombudsman can investigate and take action against anybody including the state for failing to comply with environmental legislation.⁷⁰⁷

⁷⁰²See Chapter 6.5 of the thesis.

⁷⁰³See Chapter 5.5 of the thesis.

⁷⁰⁴See Chapter 7.5 of the thesis.

⁷⁰⁵No. 14 of 2009.

⁷⁰⁶See Chapter 4.5 of the thesis.

⁷⁰⁷See Chapter 4.5 of the thesis.

8.7 Compliance, enforcement and implementation

8.7.1 Compliance procedures

The environmental framework legislations of Kenya, Namibia, Tanzania, and South Africa provide for the compliance procedures. The Acts provide for the establishment of Environmental Inspectors, whose role is to monitor and enforce compliance with the environmental legislation.

The Acts also provide for the procedures to be followed in enforcing compliance. Detailed procedures and guidelines for compliance order and appeals against compliance orders are provided. The procedures further provide for the appeals to the High Court against the decisions of the competent authorities under the Act in relation to environmental decision making.

8.7.2 Conflict resolution

The environmental framework legislations of Namibia and Tanzania do not provide for the use of alternative dispute resolution measures in environmental disputes. These institutions are however necessary for the determination of environmental disputes due to the natures of environmental media and environmental crimes. The framework legislation must be flexible enough to allow parties to refer environmental disputes to conflict resolution forums of their choice.⁷⁰⁸

Criminal sanctions are dominant as enforcement measures in the entire environmental framework acts of Kenya, Namibia, Tanzania and South Africa. They are an essential feature of any legislation that prohibits certain practices and thus it is reasonable that environmental legislation should contain criminal sanctions.⁷⁰⁹

Namibia and Kenya do not incorporate civil measures such as interdicts, civil penalties and delictual measures into the provisions of the framework legislations as enforcement measures.⁷¹⁰ Not all environmental crimes are criminal in nature and as such, civil measures are inherently relevant as enforcement measures of environmental disputes.⁷¹¹

The civil measures are however recognised under the framework legislations of Tanzania and South Africa as enforcement measures. The Acts provide for civil measures to be imposed in addition to criminal sanction, providing for a more strict approach to environmental compliance and enforcement.⁷¹²

The below figure illustrates some of the institutions necessary for the management of environmental legislation in different states considered in this thesis.

⁷⁰⁸See Chapter 5.6.3 and Chapter 7.6.3 of the thesis.

⁷⁰⁹Kidd op cit n111 at 42.

⁷¹⁰See Chapter 5.6.2 and Chapter 6.6.2 of the thesis.

⁷¹¹Kidd op cit n111 at 44.

⁷¹²See Chapter 4.6.2 and Chapter 7.6.2 of the thesis.

Country	EAC	NEC	CEC	PEC	DEC	NET	Criminal and civil sanctions
Botswana	No	No	No	No	No	No	Criminal
Kenya	Yes	Yes	No	Yes	Yes	Yes	Criminal
Namibia	Yes	Yes	No	No	No	No	Criminal
Tanzania	Yes	Yes	Yes	No	No	Yes	Both
South Africa	Yes*	Yes*	Yes*	No	No	Yes**	Both

Figure 3 Institutions necessary for effective environmental management

Key: * To be dis-established

** Established under National Water Act⁷¹³

8.8 Environmental challenges

8.8.1 Botswana

The major environmental challenge is the absence of an environmental framework act to promote effective environmental governance and address fragmented environmental structures for the achievement of the principle of sustainable use and development of natural resources.⁷¹⁴

Currently, environmental policy and legislation are independently managed by various government departments, leading to fragmented environmental decision making.⁷¹⁵ Fragmentation results in disjointed and inconsistencies in decision making which renders the governance efforts futile.⁷¹⁶

The environmental management and governance is not integrated, despite the interrelatedness of environmental media, and this may lead to exploitation of the environment when polluters rely on authorisations obtained from one department to develop the project which is conversely regulated by another. This is also due to the absence of environmental cooperative obligation between government departments.⁷¹⁷

⁷¹³No. 36 of 1998.

⁷¹⁴See Chapter 3.5 of the thesis

⁷¹⁵See Chapter 3.3.2 of the thesis.

⁷¹⁶Strydom & King op cit n69 at 30.

⁷¹⁷See Chapter 3.4.1 of the thesis.

These environmental challenges may be overcome by the promulgation of environmental framework legislation which provides the general principles for environmental management. The principles, which bind all decision makers, provide for cooperative governance, integrated environmental governance, and a guideline for environmental decision making that addresses the fragmentation of environmental management structures.⁷¹⁸

8.8.2 Kenya

EMCA provides for the recognition of the traditional disputes resolution forums as alternative disputes resolution measures to be used in environmental disputes.⁷¹⁹ These traditional forums, which are mainly situated in the districts and rural villages, are headed by traditional chiefs and village elders without any legal knowledge, skills and capacity to deal with complex environmental issues.⁷²⁰

The traditional disputes forums are characterised by the application of customary law which varies from one tribe to the other, and this is likely to bring inconsistencies in environmental knowledge and the determination of environmental disputes.⁷²¹ Customary law is not always relevant to environmental disputes and the unregulated use of traditional forums may be detrimental to the environmental cause.

The Act also binds all the decision makers in making decisions relating to the environment, which extends to the traditional forums which may lack the necessary skills to interpret and understand environmental legislation.⁷²²

Kenya is endowed with a coastal zone and as such should be concerned with international waters.⁷²³ EMCA, which is relatively old in conception,⁷²⁴ should apply to marine legislation or at least to have marine legislation which extensively regulates the use and protection of marine living resources embedded under EMCA, to ensure the sustainable use, development, and management of marine living resources.

The institutions under EMCA are not granted the necessary power to enforce compliance with environmental legislation. The courts also do not recognise the decisions of the District Environmental Committees created under the Act, rendering the environmental management and governance efforts of this institution futile.⁷²⁵

8.8.3 Namibia

The Environmental Management Act of Namibia does not sufficiently provide guiding principles to decision makers in making decision relating to the environment. It is therefore not clear from

⁷¹⁸See generally Chapter 2 of the thesis.

⁷¹⁹Section 3(5)(b).

⁷²⁰Aketch op cit n507 at 24.

⁷²¹See Chapter 6.6.1 of the thesis.

⁷²²See Chapter 6.3 of the thesis.

⁷²³Kotze & Paterson op cit n212 at 453.

⁷²⁴Act No. 8 of 1999.

⁷²⁵See generally Chapter 6.5.3.2 of the thesis.

the provisions of the Act whether the decision makers are bound by the principles of the Act or not.⁷²⁶ This remains a challenge, especially where the Act has not been subject to judicial consideration to settle its status and applicability.

The Act also does not address the complexities of intra-governmental cooperation which forms the basis of the promotion of integrated environmental governance.⁷²⁷ Environmental elements are interrelated and often place responsibilities on different spheres of government, which requires integration for the achievement of effective environmental governance. Failing to promote cooperation in environmental governance may result in fragmented governance structures which defeat the environmental management and governance effort.⁷²⁸

8.8.4 Tanzania

The application and relevance of the Environmental Management Act of Tanzania is challenged by the National Environmental Policy,⁷²⁹ which is characterised by objectives relevant to the environmental framework legislation. The Environmental Management Act recognises the National Environmental Policy and provides that decision makers should give effect to the policy framework structure.⁷³⁰

The National Environmental Policy is a framework structure for all environmental policies in Tanzania.⁷³¹ Its objective is to promote environmental governance and cross sectoral planning and coordination. It also seeks to achieve integrated cooperative environment governance and accountability of all the institutions relevant to environmental decision making.⁷³²

The objectives of the National Environmental Policy are the key elements which should be incorporated under the environmental framework legislation, to avoid parallel centers of power in environmental decision making. This may encourage the polluters to rely on the policy where appropriate, to avoid compliance with the Act.⁷³³

Although the policy framework is necessary for the protection, management and governance of the environment, it may frustrate the effectiveness of governance efforts of environmental framework legislation, particularly when the Act promotes the consideration of environmental policy.⁷³⁴ In my view, the policy should promote the achievement of the objectives of environmental legislation and not the other way around.

8.8.5 South Africa

⁷²⁶See Chapter 5.3 of the thesis.

⁷²⁷See Chapter 5.4 of the thesis.

⁷²⁸Nel & du Plessis op cit n157 at 184.

⁷²⁹Policy of 1997.

⁷³⁰S 4(9).

⁷³¹Kotze & Paterson op cit n212 at 510.

⁷³²Art 4.

⁷³³See generally Kotze & Paterson op cit n212 at 510.

⁷³⁴S 4(9).

The environmental management and governance system in South Africa is still fragmented, resulting in disjointed decision making and uncoordinated governance efforts.⁷³⁵ This is due to lack of a central lead agent that controls all environmental matters and can coordinate all organs of state in environmental decision making.

There is a need to promote environmental cooperative governance. The cooperation agreements contained in NEMA do not specify possible sanctions for failing to comply with cooperation agreement. The sanctions are left to the discretion of the parties to the agreement as to whether to include sanctions or not.⁷³⁶ This may defeat the objects of the Act, where all the parties to the agreement are reluctant to include sanctions because of the disadvantage of compliance with the provisions of the Act or cooperation agreement.

The failure to establish an Environmental Ombudsman Office to act in the interest of the public in matters relating to environmental disputes, particularly from the actions of government, defeats the objects of effective environmental management and governance efforts.⁷³⁷ There is therefore no independent body with the necessary political power and capacity to enjoin government to comply with environmental legislation.

The de-establishment of the existing institutions created by NEMA may bring inconsistencies to environmental governance, as the institutions already have clearly defined roles which have developed over time and are already known to the public.⁷³⁸ The power of the Minister to establish institutions on need basis, if not regulated, may defeat the objects of effective environmental governance where there is a need for an institution to investigate government's wrong-doings.

8.9 Conclusion

The countries which have adopted EFL⁷³⁹ are still faced with environmental challenges which could not be achieved by the legislation. This may be due to a number of factors including public awareness,⁷⁴⁰ the unwillingness to participate in environmental management,⁷⁴¹ fragmented environmental structures⁷⁴² and lack of cooperative environmental governance within sectoral line ministries. Some environmental challenges are attributable to insufficient legislative powers granted to institutions under the Act.⁷⁴³

EFL contributes significantly to effective environmental management. The legislation provides for the mechanisms which are necessary to champion the environmental cause.⁷⁴⁴ The effective implementation of such mechanisms depends on the effectiveness of institutions established to

⁷³⁵ Kotze & De la Harpe op cit n80 at 22.

⁷³⁶ S 35 of NEMA.

⁷³⁷ See Chapter 4.7 of the thesis.

⁷³⁸ See s 6 of NEMA Amendment Act No. 14 of 2009.

⁷³⁹ Kenya, Namibia, Tanzania and South Africa for the purposes of this research.

⁷⁴⁰ See chapter 8.8.2 *supra*.

⁷⁴¹ See chapter 8.8.3 *supra*.

⁷⁴² See chapter 8.8.5 *supra*.

⁷⁴³ See chapter 8.8.4 *supra*.

⁷⁴⁴ See generally chapter 2.5 of the thesis.

carry out environmental management mandate. If the EFL is not implementable, or the institutions are inactive, then the objectives of such legislation will not be achieved.⁷⁴⁵

The environmental legislation is largely embedded on the EFL and therefore, the principles of EFL must be comprehensive in conception so as to provide a general guideline to all environmental decision makers.⁷⁴⁶ Comprehensive principles contribute to effective environmental management by creating a broad-embracing management system which facilitates and promotes an integrated approach to environmental management.⁷⁴⁷

The contribution of conflict resolution mechanisms in environmental management cannot be overemphasized. The recognition of alternative dispute resolution structures can contribute to speedy access to environmental justice and afford parties to environmental disputes a system of their choice to determine the dispute.⁷⁴⁸

The EFL of these countries, are common in features especially with regard to the essential features of EFL and their environmental challenges are almost common. The achievement of effective environmental management largely depends on the internal structures of each country and the integration of environmental programmes as a collective undertaking.⁷⁴⁹ Each country must therefore support the implementation of EFL so as to ensure the achievement of environmental objectives and protection of the environment for sustainable use and development of environmental media.⁷⁵⁰



⁷⁴⁵ See chapter 4.8 of the thesis.

⁷⁴⁶ See chapter 8.3 *supra*.

⁷⁴⁷ Kotze op cit n43 at chapter 2.6.1

⁷⁴⁸ Kidd op cit n111 at 43.

⁷⁴⁹ Nel & du Plessis op cit n12 at 10.

⁷⁵⁰ Kotze op cit n43 at chapter 2.6.1.

Chapter 9

Conclusion

Table of contents

9.1 Introduction	113
9.2 Principles of the Act	113
9.3 Policy formulation	114
9.4 Institutional arrangements	115
9.4.1 Environmental Advisory Council	115
9.4.2 Committee for Environmental Coordination	115
9.4.3 District Environmental Committees	116
9.4.4 The Environmental Ombudsman	116
9.4.5 National Environmental Tribunal	117
9.5 Cooperative governance	117
9.6 Compliance procedures	118
9.7 Conflict resolution	119



9.1 Introduction

The importance of the constitutional right to the environment has been outlined, as well as the relationship between the constitutional environmental provisions and the environmental framework legislation. These are the environmental tools which are lacking in Botswana for effective environmental protection, management and governance.

As already stated above,⁷⁵¹ there is a need for the promulgation of the environmental framework legislation in Botswana to improve the environmental management and governance efforts and also to bring the environmental laws of Botswana to compatibility with international environmental law.

Environmental legislation is necessary for the benefit of the environment as it provides improved opportunities for the protection of the environmental media through sustainable environmental programmes aimed at promoting sustainable use and development of the natural resources.⁷⁵²

The proposed environmental framework legislation for Botswana must conform to the essential elements of environmental framework legislation which are necessary for the implementation, compliance and enforcement of environmental legislation.⁷⁵³ Such elements include the guiding principles for environmental decision making, institutions for the promotion and achievement of environmental objectives as well as the compliance and enforcement measures which are necessary for implementation of the Act.⁷⁵⁴

9.2 Principles of the Act

The principles of the proposed environmental framework legislation must be comprehensive in conception to be able to provide a guideline to decision makers in almost all the essential aspects incidental to the environment.⁷⁵⁵ They must provide guidance in policy formulation, development of environmental legislation, integration of environmental management, cooperative governance, public participation in environmental decision making, and conflict resolution measures for environmental legislation conflicts and environmental crimes.⁷⁵⁶

The principles must be applicable to all organs of state and non-governmental organisations responsible for the implementation of environmental legislation and making decisions which are likely to adversely affect the environment.⁷⁵⁷ The principles must bind all decision makers to refer to the environmental framework legislation when making any decision relating to the environment.⁷⁵⁸

⁷⁵¹See Chapter 3.5 of the thesis.

⁷⁵²Nel & du Plessis op cit n12 at 19.

⁷⁵³See generally Chapter 2 of the thesis.

⁷⁵⁴Kotze & De la Harpe op cit n80 at 22.

⁷⁵⁵See principles of NEMA in Chapter 4.3 of the thesis.

⁷⁵⁶See Chapter 2 of the thesis.

⁷⁵⁷S 2 of NEMA.

⁷⁵⁸Glazewski op cit n1 at 139.

The principles must provide for the promotion of sustainable use and development in making decisions relating to environmental protection.⁷⁵⁹ The sustainable development guideline must also be comprehensive to provide for the protection of environmental media including the protection of ecosystems, landscapes, and non-renewable natural resources.

Principles must also provide for consideration of international environmental principles such as polluter pay principle, preventative principle, precautionary principle, principle of intergenerational equity, and public participation principle. The principles must promote the adoption of the best practicable methods of integrated environmental management necessary for the achievement of the principle of sustainability as an environmental objective.⁷⁶⁰

Botswana, in developing the environmental framework legislation, should adopt the model of comprehensive principles of environmental framework legislation as demonstrated by NEMA of South Africa.⁷⁶¹ In addition, Botswana should include guidelines to the courts and quasi-judicial tribunals in interpreting environmental legislation and dealing with environmental disputes to consider the principles of international environmental law and the objects of the framework legislation, as demonstrated in the Environmental Management and Coordination Act of Kenya.⁷⁶²

9.3 Policy formulation

The proposed environmental framework legislation of Botswana must contain a guideline for the development of national environment policy. The development of sound policy must precede the framework Act and this must be provided for in the principles of the Act.

The policy guidelines which are normally included in the directive principles of state policy are not binding,⁷⁶³ but must be comprehensive to include a wide range of environmental considerations such as integration of authorisation processes and alignment of governance policy across the various spheres of government, and integrated use of various environmental legislation and implementation procedures such as civil based instrument and cooperation agreements necessary for effective environmental governance.⁷⁶⁴ Integration of environmental governance helps to reduce fragmentation of environmental governance and decision making.⁷⁶⁵

The development of environmental policy must be characterised by the involvement of civil society in the development and implementation processes. The policy guideline should therefore promote public participation in policy development to ensure that the interest of the public are incorporated into the environmental policy.⁷⁶⁶

⁷⁵⁹S 2(4) of NEMA.

⁷⁶⁰Strydom op cit n69 at 30.

⁷⁶¹See Chapter 1 of NEMA.

⁷⁶²S 3.

⁷⁶³See Chapter 5.4.1 of the thesis.

⁷⁶⁴Strydom & King op cit n69 at 31.

⁷⁶⁵See Chapter 4.5.4 of the thesis.

⁷⁶⁶Kidd op cit n53 at 45.

Botswana should adopt a comprehensive approach to environmental policy formulation like the one adopted by the Environmental Management Act of Tanzania.⁷⁶⁷ The proposed framework legislation should provide for involvement of all relevant stakeholders to reduce the current fragmented environmental policies and environmental decision making.

9.4 Institutional arrangements

The proposed environmental framework legislation for Botswana must provide for the establishment of institutions necessary for the monitoring of compliance, enforcement, and implementation of the environmental legislation. These institutions also facilitate the achievement of cooperative and integrated environmental governance which is inherent to environmental protection.⁷⁶⁸

9.4.1 Environmental Advisory Council

The Environmental Advisory Council must be established to advise government on environmental considerations and other matters of environmental concern. The Environmental Advisory Council must be given the role to oversee and monitor the effectiveness of other environmental institutions and make recommendations to the relevant authorities.⁷⁶⁹

The Environmental Advisory Council, as the highest advisory body, must be comprised of civil servants holding high positions of directorship in various government departments with the necessary skills and experience relevant to the environment.⁷⁷⁰ The established Environmental Advisory Councils of Kenya, Namibia, Tanzania and South Africa, which are to be de-established,⁷⁷¹ are characterised by members who are directors in various government departments.

The members of the public must be represented in the Environmental Advisory Council by people of good standing in society, with the necessary skills and experience relevant to the environment, such as the Chairperson of the Law Society and leaders of non-governmental organisations active in environmental management.⁷⁷²

9.4.2 Committee for Environmental Coordination

The Committee for Environmental Coordination is one of the institutions which are necessary for the implementation and governance of environmental legislation. The Committee must be responsible for promoting cooperative environmental governance and integration of

⁷⁶⁷See Chapter 7 *supra*.

⁷⁶⁸See generally Chapter 4 of the thesis.

⁷⁶⁹See s 6 of NEMA. Though the institution is to be de-established in terms of NEMA Amendment Act of 2009, it is still necessary for environmental protection.

⁷⁷⁰See s 11 of Tanzania Environmental Management Act.

⁷⁷¹S 6 of NEMA Amendment Act No. 14 of 2009.

⁷⁷²S 4(5) of EMCA of Kenya.

environmental decision making.⁷⁷³ The committee must be a central check point for environmental authorisations and approvals.

The membership of the Committee must be drawn from government employees and must have the necessary capacity and power to enforce cooperation between various spheres of government. The Committee must also have the power to advise and set environmental quality standards necessary for the greater protection of the environment.⁷⁷⁴

9.4.3 District Environmental Committees

The Environmental Management and Coordination Act of Kenya provides for the establishment of the District Environmental Committees.⁷⁷⁵ The District Environmental Committees facilitate access to environmental information and justice as they extend to all the districts in the country.⁷⁷⁶ These committees, if given the necessary administrative power, can contribute to the effective environmental management and governance through a hands-on approach in environmental matters within their area of jurisdiction.

The District Environmental Committees must be responsible for disseminating environmental information and advising the members of the public on environmental standards. They must also be tasked with promotion of public education and environmental awareness within their respective districts.⁷⁷⁷

These committees must have Environmental Inspectors who shall be responsible for enforcing environmental legislation and compliance orders from other institutions. The Environmental Inspectors must have the power to enter and search premises and issue compliance orders. They must conduct investigations relating to enforcement, compliance and implementation of environmental legislation at district levels, and make recommendations to the Committee for Environmental Coordination and the Environmental Advisory Council.⁷⁷⁸

The environmental framework legislation for Botswana must provide for the establishment of District Environmental Committees whose membership should be drawn from local government authorities and members of the public active in environmental protection.

9.4.4 Environmental Ombudsman

One of the public interest organisations necessary and relevant to enforce compliance with environmental legislation is the Environmental Ombudsman. The proposed framework legislation for Botswana must provide for the establishment of an Environmental Ombudsman

⁷⁷³See Chapter 4.6.3 of the thesis.

⁷⁷⁴See Chapter 4.7 of the thesis.

⁷⁷⁵See Chapter 6.5.3.2 of the thesis.

⁷⁷⁶Aketch op cit n507 at 21.

⁷⁷⁷See Chapter 6.5.3.2 of the thesis.

⁷⁷⁸See Chapter 4.6.4 of the thesis.

who shall be an independent institution responsible for investigating and taking action against anybody, including the government, for failing to comply with environmental legislation.⁷⁷⁹

9.4.5 National Environmental Tribunal

The environmental framework legislation for Botswana must provide for the establishment of the National Environmental Tribunal with original jurisdiction to hear and determine environmental disputes. The Tribunal must be characterised by its independence and impartiality from any organ of state and other organisations in carrying out its functions.⁷⁸⁰

The National Environmental Tribunal must have the authority to hear appeals of all decisions made by the competent authorities relating to the environment and its orders must be binding as any orders of court of law.⁷⁸¹

The Tribunal must be headed by persons of good standing within society, who are qualified judges, in order to ensure quality, well-reasoned and informed environmental judgments which should not bring the judiciary of the country into disrepute, and which promote environmental justice.⁷⁸²

Any appeals from the Tribunal must be made to the full bench of the High Court, sitting as an appeal court and final dispute resolution forum in environmental disputes.⁷⁸³

9.4.6 Cooperative governance

The environmental framework legislation for Botswana must promote cooperative environmental governance as an essential element for effective environmental management. Cooperation in environmental governance provides an integrated approach to environmental governance and facilitates the achievement of environmental objectives.⁷⁸⁴

Cooperative governance at all levels ensures proper and sustainable governance and may be useful in addressing governance inefficiencies relating to environmental governance. Proper environmental management and governance require coherence, legal certainty, accountability and a holistic approach to environmental management.⁷⁸⁵

Cooperation at international and regional level is necessary for aligning national environmental legislation in compatibility with international environmental law.⁷⁸⁶ The consideration of legislative measures necessary for the implementation of international agreements enables any

⁷⁷⁹The Environmental Management Act of Tanzania provides for the establishment of the Environmental Commissioner whose duties are similar to the proposed Environmental Ombudsman, but is not an autonomous institution.

⁷⁸⁰See Chapter 7.6.4 of the thesis.

⁷⁸¹See s 204 of the Environmental Management Act of Tanzania.

⁷⁸²See Chapter 6.6.5 of the thesis.

⁷⁸³See Chapter 7.6.4 of the thesis.

⁷⁸⁴Strydom & King op cit n69 at 30.

⁷⁸⁵Kotze & De la Harpe op cit n80 at 6.

⁷⁸⁶Strydom & King op cit n69 at 31.

given state to comply with its international obligation of sustainable use and development of the environment.⁷⁸⁷

The proposed framework legislation must contain provisions and principles necessary for the promotion of international and regional environmental cooperation as a constitutional obligation. International cooperation is a common feature for the environmental framework legislations for Kenya, Namibia, Tanzania and South Africa.

Intra-governmental cooperation must also be incorporated into the provisions of the proposed environmental framework legislation for the achievement of effective environmental management and governance efforts.⁷⁸⁸ The cooperation of national institutions, including all organs of state, provides an integrated approach to environmental governance and helps to reduce fragmentation in environmental decision making.⁷⁸⁹

Intra-governmental cooperation must be promoted at all levels of environmental decision making, including the formulation and implementation of environmental policy as well as in the monitoring and enforcement of environmental legislation.⁷⁹⁰

Cooperation agreements are also necessary for the achievement of intra-governmental cooperation, as they reflect a commitment by the party to the agreement to cooperate in environmental decision making and to adhere to the agreed standards and objectives of environmental management.⁷⁹¹

The cooperation agreements must contain penal measures for non-compliance with the agreements so as to ensure that they are implementable. These agreements may also address some of the environmental governance and management inefficiencies created by fragmentation.⁷⁹²

The proposed environmental framework legislation for Botswana must recognise and provide for cooperative environmental governance and provide for the cooperation agreements necessary for the achievement of effective environmental governance. The cooperation agreements are also a common feature for Namibian and South African environmental framework legislations.

9.5 Compliance procedures

Compliance procedure is one of the common features of environmental framework legislations considered above. Compliance procedures are necessary to empower the competent authorities to enforce compliance with environmental legislation.⁷⁹³ These procedures also inform all

⁷⁸⁷SADC Treaty op cit n72 at Art 22.

⁷⁸⁸Nel & du Plessis op cit n157 at 183.

⁷⁸⁹Kotze & De la Harpe op cit n80 at 31.

⁷⁹⁰See Chapter 5.8 of the thesis.

⁷⁹¹Bosman, Kotze & du Plessis op cit n85 at 420.

⁷⁹²Kotze & de la Harpe op cit n80 at 23.

⁷⁹³Paterson & Kotze op cit n87 at 6.

interested and affected parties as to the remedies and appeal procedures available for environmental disputes, particularly to those aggrieved with environmental decisions.⁷⁹⁴

The environmental framework legislation for Botswana must contain a clear and ascertainable procedure for compliance with environmental legislation.

9.6 Conflict resolution

The environmental framework legislation for Botswana must contain conflict resolution procedures to be used in environmental disputes. The legislation must provide for possible measures that can be used in environmental disputes such as arbitration, negotiation, and mediation. These measures must be able to be adopted at the choice of parties to a dispute.⁷⁹⁵

The legislation must also provide for the procedure to be used to resolve conflict between environmental legislation and it must outline a guideline procedure to be used in legislation conflicts.⁷⁹⁶ This will provide certainty as to the status of environmental laws as well as speedy dissolution of environmental disputes.

The legislation must prescribe criminal and civil measures as possible sanctions for non-compliance with environmental legislation. The court must be granted the necessary power to mete out deterrent punishment that can promote compliance with environmental legislation. The court must be provided with a guideline to be considered in meting out punishment, such as the financial gain to the violator as a result of non-compliance, as well as the good faith efforts to comply with environmental legislation, as aggravating and mitigating factors respectively.⁷⁹⁷

The Act must provide a general offence section for non-compliance with the provisions of environmental legislation, to avoid technicalities that may result in the difficulty of proving elements of environmental crime.⁷⁹⁸

The civil measures such as interdicts, civil penalties and delictual measures must be prescribed as possible sanctions for non-compliance with environmental legislation, to reduce environmental damage and to allow the aggrieved parties to recover damages resulting from non-compliance with environmental legislation.⁷⁹⁹

⁷⁹⁴See Chapter 8.7.1 of the thesis.

⁷⁹⁵Kidd op cit n111 at 28.

⁷⁹⁶Nel & du Plessis op cit n12 at 13.

⁷⁹⁷S 3(5)(e) & (7) of EMCA of Kenya.

⁷⁹⁸See Chapter 8.8.5 of the thesis.

⁷⁹⁹See Chapter 4.6.2 of the thesis.

Chapter 10

Recommendations

The following are recommended for the proposed environmental framework legislation for Botswana, as the basic and essential elements for the promotion of effective environmental management and governance.

Chapter 1

General principles

Chapter 1 of the Act must contain the principles of environmental framework legislation. The principles must generally provide a guideline for environmental decision making. They must also provide a guideline for the development and interpretation of environmental legislation and environmental policy, as well as conflict resolution of environmental disputes.

The principles must provide a guideline for environmental management and sustainable development. The environmental management principles must incorporate cooperative environmental governance at all levels (international, regional, and national), integration of environmental management, and coordinated environmental decision making.

The Act must also provide for the considerations of principles of sustainable development in environmental management. Such principles must provide a guideline for the protection of ecosystems, landscapes, and non-renewable natural resources, and promote the development of these environmental media for the benefit of present and future generation.

The principles of the Act must apply to all decision makers including all organs of state and the judiciary. The principles must guide the court in determining environmental disputes, particularly the consideration of international environmental law disputes such as principle of intergenerational equity, polluter pay principle, precautionary principle, preventative principle, public participation principle, and the principle of good neighborliness.

This chapter must also provide for judicial review of administrative action for failing to comply with the principles of Environmental Framework Act.

Chapter 2

Institutional arrangements

Chapter 2 must provide for the establishment of the institutions necessary for the implementation, enforcement and compliance with the provisions of environmental legislation.

This chapter must provide for the establishment of the Environmental Advisory Council as the highest advisory body in matters relating to the environment. The chapter must provide for the membership of the Advisory Council, powers and functions, procedures for conduct of business, disqualification, and remuneration.

The chapter must provide for the establishment of the CEC for Environmental Coordination, and its duties and functions. The membership of the Committee, particularly the involvement of civil society must be prescribed. The powers of the CEC to enforce compliance with environmental legislation must be prescribed, as well as general matters of conduct of business, appointment, disqualification, and remuneration of CEC members.

The chapter must provide for the establishment of DEC throughout the country. The DECs must have EI for monitoring compliance and enforcement with environmental legislation. This chapter must detail the procedure for the appointment of members of the DEC and EI, their powers and functions, procedure for appointment and disqualification, offences for the environmental inspectors, code of conduct, and their monetary entitlements.

The chapter must provide for the establishment of the NET, which shall have original jurisdiction to hear all environmental disputes. The tribunal must hear appeals from competent authorities in all environmental crimes, and its findings and orders must be binding as any orders of court of law.

The membership of the NET, which must be headed by a person qualified to be a judge and appointed by the President, must be provided in this chapter. Other members of the NET may include technical experts relevant to the issue in disputes to render specialised advice, the Chairperson of Law Society, and any other members of non-governmental organisations of good standing in society.

The chapter must provide for the establishment of the Environmental Ombudsman. The duties, powers and functions, general procedure for the appointment of officers, and conduct of business of the Office of Environmental Ombudsman must be prescribed. The independence of this office must be prescribed as well.

Chapter 3

Cooperative environmental governance

Chapter 3 must provide for the promotion of cooperation in environmental governance. The chapter must provide for international cooperation, regional cooperation, and national cooperation, amongst all organs of state and institutions created under the Act. The chapter must provide a procedure for sharing of information and instances under which information may not be shared.

This chapter must provide for the conclusion of cooperation agreements between government departments and environmental institutions, as well as anybody responsible for making environmental decisions. The contents of environmental cooperation agreements such as the objectives of the agreement, environmental standards, cooperation procedures, and penal measures for failing to comply with environmental cooperation agreements, must also be prescribed.

The chapter must prescribe procedure for cooperative environmental governance. Such procedure must include the preparation of environmental management plans and implementation plans. The guideline to be considered in preparation of the environmental implementation plans

must be provided and may include the description of policy, plans and programmes of every government department, the manner in which such department will ensure that the implementation plans comply with the other provisions of the Act, as well as the compliance and enforcement measures that the department intends to adopt in implementing the plans.

The contents of the environmental management plans may include the description of the activities of government departments that may affect the environment, description of environmental policies relevant to the departments, as well as the arrangements for cooperation with other government departments in environmental management and governance.

Chapter 4

International environmental agreements

Chapter 4 must provide for the promotion of international environmental cooperation. The chapter must provide for the adoption of legislative proposals which are aimed at giving effect to international environmental instruments.

The chapter must provide for the promotion and implementation of regional environmental law instruments. Public participation in the formulation of regional environmental law instruments must be promoted and the chapter must provide for submission of reports on the commitment to implement regional and international environmental law instruments to Parliament by all relevant government departments.

This chapter must provide a procedure to be adopted by environmental decision makers when giving effect to international environmental instruments. Such procedure may include the involvement of the public in the legislative proposals as well as in the domestication of international environmental instruments.

Chapter 5

Public participation in environmental governance

Chapter 5 must provide for public participation in environmental governance as a matter of principle. The chapter must provide for the involvement of the public in environmental policy formulation, strategies, plans and programmes and to participate in the preparation of laws and regulations, their enforcement and compliance and any other decision relating to the environment.

The procedure for involving the members of the public in environmental decision making must be prescribed, such as public meetings, environmental public campaigns and environmental awareness programmes. The chapter must provide for taking into account the deliberations and contributions of the public in environmental decision making, and only under exceptional circumstances and with good reasons, such as national security reasons, should public opinion be justifiable not to take into account.

This chapter must prescribe for access to environmental information by the members of the public, presentation with opportunities to participate on reasonable notice, as well as their involvement in the institutional arrangement created under the Act. The penal measures for failing to comply with the principle of public participation must also be prescribed.

Chapter 6

Integrated environmental management

Chapter 6 must provide for the promotion of integrated environmental management and governance. The general objectives of integrated environmental management must be specified, such as the promotion of principles of environmental framework legislation, the adoption of best practicable methods in environmental management, and consideration of environmental attributes in management and decision-making which may adversely affect the environment.

This chapter must prescribe the guidelines to be considered in promoting integrated environmental management. Such measures must include the consideration of potential impacts of any proposed activity on the environment, socio-economic conditions, and cultural heritages.

The chapter must provide for the holistic consideration of the provisions of the Act, including the principles in the achievement of the objectives of integrated environmental management. The penal measure for failing to comply with the provisions of this chapter must also be prescribed in this chapter.

Chapter 7

Authorisation processes

Chapter 7 must provide for the designation of the DEA as the lead governmental environmental agent. DEA must be a central point of all environmental authorisations required under all environmental legislations for any development which is affected by such authorisations.

The DEA must be granted with the power to issue provisional interdicts for any development on reasonable suspicion that authorisation processes have not been complied with, until the developer brings proof to the contrary.

This chapter must prescribe a procedure to be used for application for authorisation as well as the guidelines and factors to be considered in determining applications for authorisation for any listed activity under any environmental legislation.

The chapter must, in addition to the guiding principles of cooperation in environmental governance, prescribe a procedure to be used in determining applications which are incidentally cross sectoral and prescribe the involvement of all relevant departments and any other persons who can contribute in the determination of application for authorisation.

The chapter must prescribe an overall Clearance Certificate to be used by the DEA, which shows that all the authorisation processes have been complied with. The Clearance Certificate must be

standard and required for all the listed activities to ensure certainty and consistency in environmental authorisation.

Chapter 8

Conflict resolution

Chapter 8 must outline the conflict resolution procedures which can be used to resolve environmental disputes.

The conflict resolution measures for resolving conflict in environmental legislation must be prescribed. This chapter must expressly provide that all environmental legislation must comply with the provisions of environmental framework Act and any environmental laws inconsistent with it should be prevailed by the Act. Where other environmental laws are in conflict with one another, their inconsistencies must be determined with the conformity to the framework legislation as a standard test.

This chapter must provide for the alternative dispute resolution measures to be used in environmental disputes. The parties to environmental dispute must be at liberty to refer the matter for arbitration, negotiation, mediation or conciliation. Where environmental disputes are referred to alternative dispute resolution procedures, such disputes shall be subject to all laws and relevant procedures applicable to the chosen forum.

The chapter must provide for an appeal procedure from EI compliance orders and other decisions relating to environmental management, compliance and enforcement to the EAC and NET. Any person who is not satisfied with the decisions of the EAC or the NET must have the right appeal to the full bench of the High Court, which shall sit as an appellate court.

The chapter must prescribe the criminal sanctions for failing to comply with the provisions of environmental legislation. The chapter must prescribe maximum terms of imprisonment and maximum monetary fines that can be imposed by the NET or the court. The chapter must prescribe factors which can be considered as mitigating and aggravating circumstances, such as good faith efforts to comply with environmental legislation, environmental harm that has been caused, the nature of the activity, and any financial benefit to the violator as a result of failing to comply with environmental legislation, in meting out appropriate punishment.

This chapter must prescribe civil measures such as interdicts, civil penalties and delictual measures as possible sanctions for failing to comply with the provisions of environmental legislation. The chapter must provide for anyone who is aggrieved by any development or who has suffered any damages as a result of any development or non-compliance with environmental legislation, to seek for appropriate relief through the use of civil measures.

Chapter 9

Environmental policy

Chapter 9 of the Act must provide for the development of environmental policy. The chapter must prescribe a guideline to be used by the decision makers in formulating environmental

policy. Essential policy considerations, such as cooperative environmental governance, cooperation agreements, integration, centralised authorisation processes and public participation, must form the basis of environmental policy formulation.

The chapter must provide a guideline for the consolidation of the environmental policies which existed before the promulgation of the Act, into the Act. The chapter must create a framework for environmental policy and must be applied together with the principles of the framework legislation.

Chapter 10

Compliance and enforcement

Chapter 10 must provide for the compliance procedures necessary for enforcement and implementation of the Act. The procedure for enforcing compliance must be incorporated into this chapter, detailing sufficient information necessary to enable all interested and affected parties to understand the consequences of failing to comply with environmental legislation.

The chapter must provide for the powers of EI in the DEC, as well as the procedures to be used by the EI in monitoring compliance, such as the power to inspect premises, vehicles or vessels, and to search and seize anything found contrary to the provisions of any environmental legislation.

The chapter must grant the EI with the necessary powers to instruct anybody through compliance orders to comply with the provisions of environmental legislation, and failure to comply with such orders without any reasonable excuse must be an offence.

Other offences such as failing to cooperate with EI, failing to produce authorisation permits on demand, providing false documents to EI and giving false information to avoid compliance with environmental legislation, must be prescribed as offences under the Act, and penalties for such offences must be detailed in this chapter.

This chapter must also provide for the referral procedure from environmental officers to the police for further investigation and prosecution of environmental crimes where the police have the power to prosecute, or to the DPP in conjunction with Section 51A of the Constitution of Botswana and Section 35 of the Criminal Procedure and Evidence Act of Botswana, which grants the power to prosecute all crimes on the DPP.

Chapter 11

Environmental impact assessments

Chapter 11 must provide for the incorporation of the Environment Impact Assessment Act (EIA) of Botswana into the provisions of the framework legislation. The authorisation licences required in terms of the EIA must be made pursuant to the provisions of Chapter 7 relating to authorisation processes and procedures.

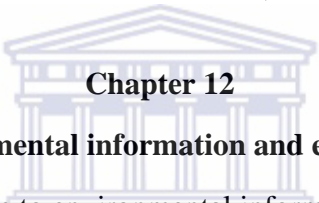
This chapter must provide for the procedure to be used for the conduct of environmental impact assessments, such as applications, scoping, undertaking the authorised activity, screening, and mitigation of environmental harm.

The chapter must prescribe a procedure for the conduct of public hearings during the scoping process of EIA, and the manner for incorporating public opinions into the scoping reports as well as proof of public hearing which may be contained in a prescribed form.

The chapter must prescribe a guideline for the contents of an EIA report which must be adhered to by anyone carrying out an EIA, as well as the consequences for failing to comply with the prescribed procedure in the form of penal measures.

The chapter must prescribe the standard and general terms of reference for any EIA project. The terms of reference must guide the conduct of the scoping procedure and any other terms of reference may be added after the scoping procedure as necessary.

The chapter must prescribe a procedure to be followed in the conduct of EIA for projects of security agents such as Botswana Police Services, Botswana Defence Force, Directorate of Intelligence Services and the Botswana Prisons Services, which may be sensitive to the national security.



Chapter 12
Environmental information and education

This chapter must provide for access to environmental information. The chapter must provide for the accessibility of environmental information by the members of public. This may be achieved through the establishment of a Central Environmental Archives, which must be a public office and must be responsible for disseminating and keeping environmental information of any activity or development within the country.

The chapter must prescribe for exceptions to the provisions of this chapter, particularly to information relating to the activities of the security agents, which may be sensitive to national security or in the public interest to withhold the information from the public.

The chapter must, however, prescribe a procedure for access to environmental information which may be necessary for purposes of investigations and determination of environmental disputes by the courts and designated institutions created under the Act.

The chapter must also provide for the promotion of environmental education and for the adoption of reasonable and necessary measures for promotion of public environmental education. Such measures may include budget considerations for public awareness campaigns, public participation in environmental programmes, and any other methods of public education.

Chapter 13
Making of subordinate legislation

Chapter 13 provides for any other relevant matters necessary for environmental administration, management, governance, compliance, enforcement and implementation, such as the making of subordinate environmental legislation dealing with environmental quality standards, environmental restoration, easements, conservation orders and analysis and records, environmental information, and any other matter.

This chapter may also provide for the financial provisions, environmental audit, general environmental audit offences and transitional arrangements necessary for the implementation of the Act.

Any other elements and characteristic measures for environmental framework legislation necessary for environmental management and governance may be included in this chapter, as a means of adopting reasonable and necessary measures for implementation, compliance and enforcement.



Appendix 1

Botswana Environmental Management Act

Preamble

To provide for cooperative, environmental governance by establishing principles for decision making on matters affecting the environment, institutions that will promote co-operative governance, and procedures for coordinating environmental functions exercised by organs of state; and to provide for matters connected therewith.

Table of contents

1. Definitions

Chapter 1

2. General principles

Chapter 2

3. Environmental Advisory Council

4. Committee for Environmental Coordination

5. District Environmental Committees

6. National Environmental Tribunal

7. Environmental Ombudsman

Chapter 3

8. Cooperative environmental governance

Chapter 4

9. International environmental agreements

Chapter 5

10. Public participation

Chapter 6

11. Integrated environmental management

Chapter 7



12. Authorisation process

Chapter 8

13. Conflict resolution

14. Environmental offences

Definitions

- 1(a) “assessment” means the process of identifying, predicting and evaluating:
- (i) the significant effects of activities on the environment, and
 - (ii) the risks and consequences of activities and their alternatives and options for mitigation with a view to minimise the effects of activities on the environment and to maximize the benefits and to promote compliance with the principles set out in Section 2.
- (b) “authorisation” means an approval, licence, permit or other authorisation by a competent authority in respect of a listed activity.
- (c) “coordination” means a systematic and strategic environmental management, governance and decision making.
- (d) “cooperation” means the working together of relevant stakeholders in the management and governance of environment.
- (e) “environment” means the complex of natural and anthropogenic factors and elements that are mutually interrelated and affect the ecological equilibrium and the quality of life, including:
- (i) the natural environment that is the land, water and air, all organic and inorganic material and all living organisms, and
 - (ii) the human environment that is the landscape and natural, cultural, historical, aesthetic, economic and social heritage and values.
- (f) “environmental management” means the protection, promotion and sustainable use of natural resources for the benefit of the present and future generations.
- (g) “environmental media” means all components of the environment including soil, air, water and all other natural resources.

- (h) “environmental clearance certificate” means an environmental clearance certificate issued for authorising a listed activity to be undertaken.
- (i) “integration” means the adoption of a holistic and integrative perspective of environmental governance efforts by various organs of state that operate in different spheres of government.
- (j) “lead agent” means the Department of Environmental Affairs.
- (k) “Minister” means the Minister responsible for environment.
- (l) “sustainable development” means human use of a natural resource, whether renewable or non-renewable, or the environment, in such a manner that it may equitably yield the greatest benefit to present generations while maintaining its potential to meet the needs and aspirations of future generations, including the maintenance and improvement of the capacity of the environment to produce renewable resources and the natural capacity for regeneration of such resources.

Chapter 1

General principles

2. (1) The principles set out in this section apply throughout the Republic of Botswana to the actions of all organs of state that may significantly affect the environment, and:
- (a) shall apply alongside all other appropriate and relevant considerations, including the State’s responsibility to respect, protect, promote and fulfill the social and economic rights in the Constitution.
 - (b) serve as the general framework within which environmental management and implementation plans must be formulated.
 - (c) serve as guidelines by reference to which any organ of state must exercise any function when taking any decision in terms of this Act or any statutory provision concerning the protection of the environment.
 - (d) serve as principles by reference to which a conciliator appointed under this Act must make recommendations, and
 - (e) guide the interpretation, administration and implementation of this Act, and any other law concerned with the protection or management of the environment.

- (2) Environmental management must place people and their needs at the forefront of its concern, and serve their physical, psychological, developmental, cultural and social interests equitably.
- (3) Development must be socially, environmentally and economically sustainable.
- (4) (a) Sustainable development requires the consideration of all relevant factors including the following:
 - (i) that the disturbance of ecosystems and loss of biological diversity are avoided, or, where they cannot be altogether avoided, are minimised,
 - (ii) that pollution and degradation of the environment are avoided, or, where they cannot be altogether avoided, are minimised and remedied,
 - (iii) that the disturbance of landscapes and sites that constitute the nation's cultural heritage is avoided, or where it cannot be altogether avoided, is minimised and remedied,
 - (iv) that waste is avoided. or where it cannot be altogether avoided, minimised and re-used or recycled where possible and otherwise disposed of in a responsible manner,
 - (v) that a risk-averse and cautious approach is applied, which takes into account the limits of current knowledge about the consequences of decisions and actions. and
 - (vi) that negative impacts on the environment and on people's environmental rights be anticipated and prevented, and where they cannot be altogether prevented, minimised and remedied.
- (b) Environmental management plan must be integrated and acknowledging that all elements of the environment are linked and interrelated, it must take into account the effects of decisions on all aspects of the environment and all people in the environment, by pursuing the selection of the best practicable environmental option.
- (c) Equitable access to environmental resources, benefits and services to meet basic human needs and ensure human well-being must be pursued, and special measures may be taken to ensure access thereto.
- (d) The participation of all interested and affected parties in environmental governance must be promoted, and all people must have the opportunity to develop the understanding, skills and capacity necessary for achieving equitable and effective participation.

- (e) The social, economic and environmental impacts of activities, including disadvantages and benefits, must be considered, assessed and evaluated, and decisions must be appropriate in the light of such consideration and assessment.
 - (f) Decisions must be taken in an open and transparent manner and access to information must be provided in accordance with the law.
 - (g) There must be intergovernmental coordination and harmonisation of policies, legislation and actions relating to the environment
 - (i) Actual or potential conflicts of interest between organs of state should be resolved through Conflict Resolution Procedures.
 - (j) Global and international responsibilities relating to the environment must be discharged in the national interest.
- (5) All sectoral environmental legislation shall be subsumed into this Act, which shall prevail over any environmental legislation in conflict with it.



Chapter 2

Administration and institutional arrangements

3. (1) There shall be an established Environmental Advisory Council which shall be the highest advisory body to the Minister in matters relating to the environment
- (2) The Environmental Advisory Council shall be composed of members whose experience shall reflect the various fields of environmental management in the public, private sector and the civil society.
4. (1) There shall be an established Committee for Environmental Coordination which shall be responsible for the achievement of cooperative environmental governance through integrated and coordinated programmes of environmental use.
5. (1) There shall be established District Environmental Committees in all districts of the Republic of Botswana to monitor and enforce compliance of environmental legislation.
- (2) The Minister shall appoint Environmental Inspectors to conduct inspections in any premises to monitor and enforce compliance and report any findings to the District Environmental Committee.
6. (1) There shall be established a National Environmental Tribunal to hear appeals from institutions under the Act and to review any environmental decision made by the competent authorities.

- (2) The tribunal, in determining environmental disputes, shall be guided by the principles of the Act and must consider the precautionary principle, preventative principle, polluter pays principle, principle of intergenerational equity, and sustainable development principle.
7. (1) There shall be established an Environmental Ombudsman whose office shall be independent from any organisation including the government.
- (2) The Environmental Ombudsman shall conduct investigations against anybody, including the State, in the interest of the public for failing to comply with environmental legislation.

Chapter 3

Cooperative environmental governance

8. (1) Every government department exercising functions which may affect the environment must prepare an environmental implementation plan and environmental management plan within one year of the promulgation of this Act, and at least every four years thereafter.
- (2) The Minister may issue guidelines to assist government departments in the preparation of environmental implementation plans and environmental management plans.
- (3) The purpose of environmental implementation and management plans is to coordinate and harmonise environmental policies, plans, programmes and decisions of the various government departments that exercise functions that may affect the environment for the achievement, promotion, and protection of a sustainable environment.

Chapter 4

International environmental agreements

9. The Minister may make legislative proposals to Parliament which are necessary for giving effect to an international environmental agreement to which Botswana is a party, and such legislation may deal with the following:
- (a) the coordination of the implementation of the agreement,
- (b) the allocation of responsibilities in terms of the agreement, including those of other organs of state,

- (c) the gathering of information, including for the purposes of compiling and updating reports required in terms of the agreement and for submission to Parliament,
- (d) the dissemination of information related to the agreement and reports from international meetings,
- (e) ensuring public participation.

Chapter 5

Public participation

10. (1) The public shall have the right to participate in decisions concerning the development of environmental policies, strategies, plans and programmes, and to participate in the preparation of laws and regulations relating to the environment.

(2) The public shall have the right to be timely informed of the intention of public authorities to make executive or legislative decisions affecting the environment, and of available opportunities to participate in such decisions.

Chapter 6

Integrated environmental management

11. (1) The general objective of integrated environmental management is to:
 - (a) promote the integration of the principles of environmental management set out in Section 2 into the making of all decisions which may have a significant effect on the environment,
 - (b) ensure the consideration of environmental attributes in management and decision-making which may have a significant effect on the environment, and
 - (c) identify and employ the modes of environmental management best suited to ensuring that a particular activity is pursued in accordance with the principles of environmental management set out in Section 2.

Chapter 7

Authorisation process

12. (1) Applications for authorisation for any development under any environmental legislation shall be made to the Department of Environmental Affairs as the lead agent.

- (1) The developer shall be issued with a clearance certificate from the Department of Environmental Affairs after complying with all authorisation processes required under subsection (1).

Chapter 8

Conflict resolution

13. (1) Where there is a conflict in environmental legislation, this Act shall prevail to the extent that such subsidiary legislation is in conflict with it.
- (2) Environmental disputes may be referred to arbitration, mediation or negotiation at the choice of parties to the disputes.
14. (1) Failure to comply with environmental legislation shall be an offence punishable with a term not exceeding ten(10) years imprisonment or a fine not exceeding P10 million.
- (2). A conviction for an offence under subsection (1) does not exonerate any person or body corporate from civil proceeding which may be instituted against him or her or that body corporate.



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