

Chapter 1:

Law, environment, Africa: introducing the imperatives, parameters and trends

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1 The context

Fundamentally we all depend on nature: the ecological infrastructure of the planet that provides the flow of goods and services upon which our livelihoods and economies are built. Yet Africa's ecosystems are changing faster than ever before through the combined impact of global and local pressures. Loss of ecosystem services is compromising future security, health and well-being and effects are being borne disproportionately by the poor.¹

This telling reality highlighted in the Africa Ecological Footprint Report (2012)² is mimicked in several more recent regional reports comprehensively canvassing both the state of the environment in Africa and the range of factors leading to its deterioration. These reports include the African Environment Outlook 3 (2013),³ Climate Change 2014: Impacts, Adaptation, and Vulnerability (2014)⁴ and most recently the Global Environmental Outlook GEO-6 – Regional Assessment for Africa (2016).⁵ Repeating the numerous statistics exhaustively outlined in these reports serves no purpose here as several realities are clearly indicated. The deficit between what the continent's ecological infrastructure can sustain and is being expected to sustain is growing rapidly. The range of factors contributing to the growing deficit is diverse. The current negative impacts associated with the growing deficit on the continents' inhabitants' security, health and well-being are vast and expanding.

Recognising this ecological fragility, Agenda 2063 outlines the continent's development agenda for the next 45 years. It includes a prosperous Africa based on inclusive growth, sustainable development, peace, security, resilience, good governance, democracy, respect for human rights, justice and the rule of law amongst its express aspirations.⁶ Agenda 2063 coincides with the post-2015 global development agenda reflected in Transforming our World: the 2030 Agenda for Sustainable Development,⁷

1 WWF (2012: 6).

2 Ibid.

3 UNEP (2013: 3).

4 Niang et al. (2014: 1199-1265).

5 UNEP (2016).

6 See generally: African Union (2015).

7 UNGA Res. 70/1 (2015).

adopted by the United Nations General Assembly in September 2015. In seeking to fulfil the Agenda 2063 aspirations, African states are also seeking to promote the attainment of the 17 sustainable development goals (SDGs) and associated targets. The SDGs envisage a world, and accordingly an African continent: devoid of poverty, hunger and inequity; ensuring the health and well-being of its inhabitants and the sustainable provision and management of water, sanitation and energy; promoting sustained, sustainable and inclusive economic growth, cities and human settlements resting on resilient infrastructure; governed by peaceful, inclusive, democratic and accountable institutions; undertaking urgent action to combat climate change; and protecting, restoring and promoting the sustainable use of its terrestrial and marine ecosystems.

Realising Africa's desired development trajectory within the constraints of the realities facing the continent's valuable yet fragile ecological infrastructure is a tricky balancing act clearly requiring a multi-disciplinary approach. Within this context, the critical role of law has been increasingly recognised. This role includes the manner in which law constructs and regulates the functioning of key institutions; regulates and promotes the equitable and sustainable use and consumption of natural resources; creates mechanisms to inform and control pollution; constrains environmentally harmful actions; fashions tools to promote sustainable land-use planning and development; and provides processes through which the impacts associated with the foregoing can be prudently considered and mitigated.

In seeking to encourage this role for law in Africa, and in keeping with the spirit of forging African solutions to African challenges, scholars from across the continent formed the Association of Environmental Law Lecturers from African Universities (ASSELLAU) in 2004. Its specific objectives include promoting the generation and dissemination of environmental law research to assist Africa's law and policymakers to craft and implement legal frameworks that achieve the tricky balance referred to above through conferences and symposia. In partial fulfilment of this mandate, ASSELLAU held its 4th Scientific Conference in Yaoundé, Cameroon, from 10-13 January 2018. This book comprises of selected papers presented at the conference. Divided into four parts, its object is to explore, review and analyse several recent issues and developments located at the nexus of law, the environment and Africa.

2 Climate change and energy

Part I of the book focuses on climate change and energy issues and comprises of eight chapters. In Chapter 2 titled "Climate change legislative developments on the African continent", Olivia Rumble discusses the role of law in responding to climate change, the meaning of 'climate change legislation' and the status of this legislation in Africa. She then turns to consider in detail the recent legal reform in two African countries, namely South Africa and Kenya, teasing out possible trends and lessons which may

provide guidance to other African countries in assessing the adequacy of their existing laws to deal with climate change and amending or introducing new laws in response. In Chapter 3, Oluwatoyin Adejonwo-Osho explores the issue from a Nigerian perspective, specifically “Nigeria’s commitments under the climate change Paris Agreement: legislative and regulatory imperatives towards ensuring sustainable development”. Acknowledging the absence of dedicated climate change legislation in Nigeria, she considers the impacts of climate change in Nigeria, provides an overview of the country’s nationally determined contribution (NDC) under the Paris Agreement, and the existing domestic laws and policies of relevance to giving effect to the NDC (including the establishment of a Department of Climate Change and a proposed new bill to establish a National Climate Change Commission). She concludes by exploring key gaps and contradictions in these existing relevant laws and policies and options for reform. Dayo Ayoade builds on this analysis in Chapter 4, titled “Bridging the gap between climate change and energy policy options: what next for Nigeria?”. He specifically focuses on the manner in which Nigeria’s current law and policy addresses climate change and energy issues separately and argues for the need for a more holistic and integrated approach comprising of what he terms a tripartite structure comprising of a Nigerian Climate Change and Energy Policy, a National Climate Change and Energy Act and a Climate Change and Energy Agency.

Oliver Ruppel and Marc Funtch’s Chapter 5 shifts to a more regional perspective focusing on the Lake Chad Basin region. In their chapter titled “Climate change, human security and the humanitarian crisis in the Lake Chad Basin region: selected legal and developmental aspects with a special focus on water governance”, they adopt a transdisciplinary approach in exploring the many factors characterising and fuelling the crisis in the region including: diverse and changing climatic conditions, hydrological cycles and biophysical environments; shifting livelihoods; human security, conflict and migration; water scarcity and regional security; and poor water governance. They conclude that climate change has been a sustaining force for the existing humanitarian crises in the region and that human security predicaments of the Lake Chad Basin region have been exacerbated by environmental shifts. They further highlight that public international, regional and domestic law and policy could more effectively foster the integration of climate change adaptation, water governance and conflict management; with the SDGs, the Paris Agreement and NDCs providing feasibly important entry points.

The following two chapters focus on climate change issues relevant to Cameroon. In Chapter 6, Christopher Tamasang considers “Forests, forest rights, benefit-sharing and climate change implications under Cameroonian law”. He assesses the various forest types extant in Cameroon, the bundle of rights attached thereto, the formula for allocating and sharing benefits under the country’s forestry legislation, and analyses their implications specifically in the context of climate change mitigation. He argues that although Cameroon’s forestry legislation establishes a bundle of rights attached to

each forest type and mechanisms for facilitating benefit-sharing, the forest rights are not adequate for some relevant stakeholders involved in forest management and the mechanisms are plagued with inherent flaws which ultimately undermine their role in contributing to climate change mitigation in the country. In Chapter 7, Daniel Mbarga considers the specific nexus between “Indigenous peoples and climate change in Cameroon”, highlighting the fact that although indigenous peoples are among those who produce the least carbon emissions, they are the most vulnerable to the effects of climate change. He critically reviews the legal measures undertaken in Cameroon to protect indigenous people from the effects of climate change and proposes solutions where they are viewed as inadequate. Continuing the focus on the link between forests and climate change, Chapter 8 explores “REDD+ and benefit sharing: an examination of the legal framework in Uganda”. In this chapter, Hadijah Yahyah begins by exploring the theoretical nexus between REDD+ initiatives and benefit-sharing mechanisms before critically reviewing Uganda’s relevant law and policy framework. She concludes that although benefit-sharing is a vital component of Uganda’s REDD+ programme the necessary legal guidance to implement it is lacking, and proposes several reforms to fill the current legal vacuum.

In the final chapter of this part of the book, Edna Odhiambo shifts the climate change focus to the transport sector and the Kenya context in Chapter 9 titled “Regulatory preparedness on non-motorised transport in Nairobi”. Founded on the premises that if car-oriented planning continues to dominate, a lock into unsustainable carbon-intensive infrastructure will result and exacerbate adverse climate change. The chapter considers the link between global climate change and the transport sector, before introducing the concept and benefits of non-motorised transport. It then turns to investigate whether Kenya’s national and local regulatory framework currently prioritises non-motorised transport as a low-carbon mobility option, concluding that whilst much has been done at the county level, significant options exist for prioritising and implementing non-motorised transport as a climate mitigation strategy in the transport sector at the national level.

3 Natural resource governance

Part II of the book is dedicated to several issues falling under the rubric of natural resource governance. It comprises of nine chapters canvassing a broad array of issues relating to different natural resources including terrestrial wildlife, oil, wetlands and marine resources. In Chapter 10, Patricia Kameri-Mbote considers “Wildlife conservation and community property rights in Kenya”. She assesses the extent to which the contemporary Community Land Act (2016), read together with the Wildlife Conservation and Management Act (2013), jointly support wildlife conservation on community lands in Kenya. This, she argues, is a vital issue given that 66% of Kenya’s total

land mass comprises of community land. She considers the conceptual framework relevant to wildlife conservation and land rights before outlining and assessing Kenya's relevant legal framework. She ultimately concludes that the enabling legal and policy framework is in place to enable and encourage wildlife conservation on community land and that the National Land Use Policy (2017) provides an opportunity to further synergise land tenure and land use. Following the wildlife theme, Marie Nonga considers "Criminal law protection of wildlife reserves in Cameroon" in Chapter 11. She begins the chapter by decrying the current state of the country's biological resources before engaging in an extensive analysis of the nature and efficacy of the criminal remedies prescribed in Cameroon's legal framework seeking to protect these biological resources situated in the country's wildlife reserves. Within this analysis, she highlights concerning ambiguities and outdated provisions and provides options for necessary reform.

Chapter 12 shifts sectors and is titled "Harnessing oil as natural resource wealth: a focus on the legal frameworks of Nigeria and Uganda". In this chapter, Lanre Aladeitan, Robert Wabunoha and Odaghara Therese examine the correlation between the resource-rich state and the content of its law focusing on performance level under three key components in the 2017 Resource Governance Index Report, namely: value realisation; revenue management; and enabling environment. Focusing on the resource of oil, and undertaking a comparative approach, the chapter outlines in detail the relevant legal frameworks of Nigeria and Uganda, before comparing, contrasting and evaluating them against the abovementioned three components of the 2017 Resource Governance Index Report. The authors conclude that their assessment confirms that a governance deficit exists in the decision-making chain in the extractive industry in Nigeria and Uganda, which urgently require legal reform.

Andrew Muma turns to consider "Access and benefit sharing: beyond the Nagoya Protocol and its ideals" in Chapter 13. He analyses the utility of the Nagoya Protocol in the conservation and subsequent sustainable use of biodiversity resources, and argues that one of the causes of what he views as a problematic current state of affairs is that the crusade for private land ownership has led to the neglect of values and principles of communitarianism that were geared toward sustainable resource use. In coming to this conclusion, the author firstly considers an array of conceptual issues relating to community-based participation models in the context of biodiversity conservation, purported misunderstandings of customary tenure, and the link between property rights and biodiversity conservation. He then engages in a thorough critical analysis of the relevant international, regional and Kenyan legal framework of relevance to the issue, concluding by proposing a set of *sui generis* rights which he argues are yet to be given rightful attention in policy-making processes.

In Chapter 14, titled "Ecosystem services: legal issues relevant to Nigeria's wetlands", Erimma Orié provides a comprehensive critical review of Nigeria's legal framework of relevance to wetlands. She highlights the absence of a dedicated legal

framework governing wetlands, the inadequacy of piecemeal complementary laws and regulations on land management to fill the void, and problematic institutional and governance arrangements – proposing a swathe of legal reform options to overcome the current regulatory and institutional vacuum. This is followed in Chapter 15 by a critical review of the “The role of the Environment and Land Court in governing natural resources in Kenya”. In this chapter, Collins Odote reviews the successes of the Environment and Land Court, established following constitutional reform in Kenya in 2010, in improving natural resource governance in the country. In doing so, he reviews the court’s jurisprudence and argues that despite recent court decisions clarifying that court’s status and jurisdiction, and also granting magistrates’ courts powers to determine land and environmental matters, there is a need for reform particularly relating to the appointment of its judges and the nature of its decision-making processes. He also notes that the number of environmental cases brought before the court has been limited with the bulk of the cases relating to land issues.

Jean-Claude Ashukem moves in Chapter 16 to consider whether public participation in environmental decision-making in Cameroon is a myth or reality. Through a comprehensive review of the relevant domestic legal framework, he assesses whether it empowers local communities to effectively participate in environmental decision-making processes; and whether or not their views and aspirations are taken into account in the decisions to emanate from these processes. He ultimately concludes that the rules, procedures and processes governing public participation in Cameroon are flawed and do not often align with governance practices that provide for the effective involvement and participation of local communities during decision-making processes; thereafter providing certain reform proposals to overcome this problematic reality.

Marine resources form the focus of Chapter 17, titled “Utilising Kenya’s marine resources for national development”. In this chapter, Kariuki Muigua discusses how Kenya can take advantage of its rich marine resources to boost national economic development while empowering the coastal communities whose livelihoods mainly depend on these resources. The discourse canvassed in this chapter goes beyond legal and institutional arrangements to offer practical solutions based on principles such as public participation, empowerment, sustainable development and inclusiveness.

The final chapter in this part of the book, Chapter 18, considers whether the environmental Management Act (2017) and natural resource regulation in Malawi provide opportunities for or limitations to effective enforcement in the natural resource sector, particularly relating to forest, fish and wildlife resources. Gift Makanje critically evaluates the enforcement mechanisms provided for in the relevant legal framework, highlighting outstanding barriers to enforcement and opportunities for reform.

4 Water governance, management and use

With water scarcity and insecurity characterising vast parts of Africa, Part III of the book focuses on a broad array of legal issues relating generally to water governance, management and use. It begins with Chapter 19 titled “Pollution of water in South Africa by untreated sewage: addressing the governance issues”. In this chapter, Michael Kidd begins by describing the pervasive problem of the pollution of South Africa’s water resources by untreated sewage over recent years. He describes the country’s governance structure in relation to water treatment, focussing specifically on legal aspects of governance, and evaluates how water governance is failing in the country. Elizabeth Gachenga turns in Chapter 20 to discuss an issue of water governance in Kenya, specifically whether the country’s contemporary water legislation, the Water Act (2016), provides for real devolution or simply the ‘same script, different cast’. She critically analyses the Water Act (2016) to specifically determine the extent to which it aligns with the spirit of devolution enshrined in Kenya’s Constitution (2010). She concludes her chapter with several recommendations on the basic tenets that the water governance framework should address in order to achieve the desired delicate balance between sustainable development of water resources and the principle of subsidiarity so critical to devolved governments.

With vast parts of South Africa currently suffering severe drought, Amanda Mkhonza considers improving the legal protection of strategic water source areas in Chapter 21. Described as the ‘crown jewels’ of South Africa’s water resources, these strategic water source areas comprise only 8% of the country’s landscape, yet provide more than 50% of its surface water. She begins her analysis by briefly outlining South Africa’s current environmental regime with a view to identifying and evaluating possible area-based management measures which could be used to fill the current apparent regulatory vacuum when it comes to managing, conserving and protecting the country’s strategic water source areas. Realising their limitations, she then turns to consider the Australian context, specifically New South Wales’ state laws, with a view to scoping possible legal reform for South Africa’s water legislation relevant to improving the plight of these important areas.

This is followed by three additional domestic legal perspectives focusing on Uganda, Kenya and Ethiopia. In Chapter 22, titled “Institutional and legal challenges to realising clean and safe water for all in Uganda”, Phiona Mpanga interrogates the legislative and institutional frameworks relating to water and sanitation service delivery, recommending a more decentralised approach. In Chapter 23, Nerima Were considers “The Conflict between privatisation and the realisation of the right to water in Kenya”. With the Kenyan Constitution (2010) prescribing the right to water, the author interrogates whether the model of water governance promoted in the Water Act (2016) is adequate to meet the fulfilment of the right. She argues that privatisation as a model of water supply, whether systemic or inadvertent, is not sufficient to guarantee the right

to water and offers a critique of the model and its use in Kenya. Finally, Mekete Tekle grapples with “Policy, regulatory and institutional frameworks relevant to Ethiopian water governance” in Chapter 24. He provides both an extensive overview and critique of the existing relevant legal and institutional regime and identifies options for improved implementation and legal reform.

The final three chapters in this part of the book take a more regional and comparative perspective to water governance. Joseph Ngang addresses “Water resources management and environmental sustainability in west and central Africa” (Chapter 25); Irekpitan Okukpon “Water security and environmental justice in Nigeria and South Africa: achievable concord or discordant alliance?” (Chapter 26); and Emmanuel Kam Yogo “The Lake Chad Basin Water Charter: strengths and weaknesses” (Chapter 27). In each of these chapters, the authors highlight the inherent strengths and fragilities of the relevant regional and domestic legal regimes.

5 Regulating social and environmental impacts

Part IV of the book is dedicated to considering several diverse issues relevant to the role of the law in regulating social and environmental impacts associated with human activity. Godard Busingye begins in Chapter 28 by “Making the case for gender and environmental considerations in the regulatory framework relating to the Uganda-Tanzania crude oil pipeline project”. Using the East African Crude Oil Project undertaken by Uganda and Tanzania as a case study, he reviews the relevant legal framework applicable to the project in both countries and concludes that it is inadequate to forestall the environmental and gender ‘evils’ associated with the construction of the project. In Chapter 29, Orubebe Bello considers the challenges and prospects of “Integrating climate change in the environmental impact assessment process” in Nigeria. Having undertaken a comprehensive analysis of Nigeria’s relevant law and policy framework, he bemoans the fact that climate change impacts are not currently adequately integrated into the environmental impact assessment process and calls for urgent legal reform.

Pamela Sambo then undertakes a review of Zambia’s Environmental Management Act (2011) in Chapter 30, in order to determine whether it provides a basis for the growth of an environmental ethos and good environmental governance in the country. She begins by analysing the historical development of the now repealed Environmental Protection and Pollution Control Act (1990) and its successor the Environmental Management Act (2011). The purpose of this analysis is to identify the key environmental themes that these two laws embody, which she then uses as the structure against which to assess whether the more contemporary legislation has led to the development of an environmental ethos in Zambia. The author concludes that while the Environmental Management Act (2011) ‘gifted’ Zambia a robust and forward-looking environmental

regime, the absence of a constitutionally entrenched environmental right constrains the development of a meaningful environmental ethos in the country.

In Chapter 31, titled “Regulating environmental impacts associated with mining in Uganda”, Emmanuel Kasimbazi critically analyses the effectiveness of the regulatory and institutional framework for the protection of the environment in the mining sector in Uganda. He concludes that while the regulatory framework has been developed, there is a limited level of enforcement which results in mining authorities and companies not adhering to the legal requirements.

The final chapter of the book (Chapter 32) considers the social and environmental impacts associated with the exploitation of timber on indigenous communities in Cameroon. Titled “An analysis of environmental impacts of timber exploitation on indigenous communities’ land in Cameroon”, Esther Njieassam argues that despite the government’s efforts in signing several international, regional and national environmental legal instruments seeking to protect the rights of indigenous peoples, incoherent government policies, weak provisions for ensuring adequate public participation, and inefficient monitoring and enforcement mechanisms have resulted in gross environmental and human rights violations. She argues further that the government in collaboration with multinational extractive companies undermine and ignore indigenous peoples’ right to a safe and healthy environment.

6 Conclusion

The Global Environmental Outlook GEO-6 – Regional Assessment for Africa (2016) highlighted that “Africa faces both enormous challenges in relation to environmental management, and equally huge opportunities for ‘doing this better’”.⁸ Considering the content contained in the chapters of this book canvassing a broad range of legal issues across several jurisdictions, the same appears true for the role of law. The legal challenges are plenty, but the opportunities to improve the laws and governance arrangements equally are plenty. It is hoped that the analysis and solutions proposed in the covers of this book provide some additional and useful food for thought to those engaged in formulating, refining and implementing legal frameworks central to Africa’s tricky quest in attaining its desired development trajectory within the confines of the continent’s valuable yet fragile ecological infrastructure.

8 UNEP (2016: 8).

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