Chapter 26: Instituting an Environmental Court or Tribunal: An Option for Namibia?

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1 Introduction to Environmental Courts and Tribunals

Environmental Courts and Tribunals (ECTs) trace their origin from Australia and New Zealand back in the 1970s. About 350 ECTs were recorded to exist in the year 2000, this number tripled to 1,200 ECTs recorded to be in operational in 2016.[1] The number is estimated to grow as countries realise the importance of establishing specialised environmental courts.[2] The establishment of ECTs depends on the circumstances of each country, including the capacity inherent in the country and its extent of land use, urbanisation, commitment to sound environmental governance, and existence of processes to implementing the principles of sustainable development.[3]

An Environmental Court or Tribunal (ECT) "can be realised through a public body or official in the judicial or administrative branch of government specializing in adjudicating environmental, resource development, land use, and related disputes".[4] These bodies can either exist in a form of a court or a tribunal. Environmental courts (ECs) are defined as specialised bodies designed within the judicial branch of government and mandated to hear, determine and dispose of matters relating to the environment.5 Whilst environmental tribunals (ETs) are specialised bodies established within the executive or administrative branch, mandated to make decisions on environmental matters.[6]

2 Models of ECTs

The models of ECTs include:[7]

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1 By, 2016 The following Countries had operating ECTs: Antigua and Barbuda, Australia, Austria, Bangladesh, Belgium, Bolivia, Brazil, Canada, Chile, China, Costa Rica, Denmark, Egypt, El Salvador, Finland, Gambia, Greece, Guatemala, Guyana, India, Ireland, Jamaica, Japan, Kenya, Malaysia, Malta, Mauritius, New Zealand, Nicaragua, Nigeria, Pakistan, Paraguay, Peru, Philippines, Samoa, South Korea, Spain, Sri Lanka, Sudan, Sweden, Thailand, Trinidad and Tobago, United Kingdom, and United States. See Pring / Pring (2016b:80).

2 See Pring / Pring (2016b).

3 Ibid.

4 Pring / Pring (2016a:2).

5 Pring / Pring (2016a).

6 Ibid.

7 Pring / Pring (2009a).

- Free-standing ECs and ETs;
- formal and informal panels of judges within a court of general jurisdiction normally referred to as green benches/chambers;
- individual judges within generalist courts who have training and expertise in environmental law and to whom environmental cases are assigned formally or informally; and
- ETs housed within another government body such as the environmental agency.

It is trite that there is no existence of a 'one best model or a one-size-fits-all' ECT structure. It has been rightfully noted that the most effective form for a country should be driven by factors that include the type of laws, legal institutions, cultural, and socio-economic conditions prevalent in each national jurisdiction.[8]

In order to improve access to environmental justice in the Namibian legal system, this Chapter proposes the establishment of an ECT. In the amid of institutions involved with enforcing environmental law, courts are recognised to be amongst the most powerful. They are important not only in resolving concreate disputes but also in a larger enterprise of developing principles, substantive rules and legal expertise to enhance environmental justice.[9]

2.1 Free-standing Environmental Court (EC) Model

A free-standing court model refers to a standalone court in the country's judiciary. This model requires the enactment of an enabling legislation, outlining its establishment and functions. Namibia's Labour Court is an example of a free-standing court model, established in terms of the Labour Act of 1992 as reprealed by the 2007 Labour Act. Before establishing this model, a country would require conducting a needs assessment. It is common practice to undertake a needs-based assessment before a new institution is established. A needs assessment measures and demonstrates how the envisaged institution could resolve the problem as well as well as determining all the factors that should be considered before instituting such an established. It aids governments to make an informed decision before establishing an institution and determine questions relating to the sustainability of the court and the type of court model to adopt. The assessment can also be used to determine the case records and volume of the general courts in order to establish the prospect of case load for trial in the assessment. In Kenya, a record of at least one (1) million cases pending for hearing in the general

8 Markowitz / Gerardu (2012).
9 Obtained from McLeod-Kilmurray (2011).

courts were recorded.[10] This case load resolved that a standalone EC, be established in Kenya's judiciary.

A free-standing EC operates with exclusive jurisdiction to hear and determine environmental matters as outlined in the enabling legislation. This type of ECT model requires resources ranging from qualified personnel employed by the court, a building where the EC is to operate from, rules of the court.[11] This type of model exhibits independency of the court, which is a critical factor to access environmental justice, as the more independent a court is of the political process and administrative pressure, the more likely its decisions are to be fair, equitable, unbiased, and perceived as such by government and the public.[12]

Establishing this form of a model in Namibia would require the conduction of a needs-based assessment to highlight issues like geographic location, costs to be incurred, caseload on environmental matters in Namibia, and to source best practices of this model from other jurisdictions.

2.2 Specialised Green Chambers

The term of specialised green chambers refers to the establishment of either a specialised unit, branch, chamber, a panel of judges or a judge operating within in the traditional courts of a country, appointed to hear and dispose of environmental matters. The establishment of a specialised green chamber does not require the enactment of an enabling legislation; its effect can be by a magistrate or the presiding judge of the court.[13] Countries using this model, either have a formally designed chamber in the general court, or one that is set up on an *ad hoc* basis to hear cases pertaining the environment. The presence of this EC model is found in Uganda and India amongst other countries.[14] The hallmark of this model is its flexibility, the flexibility of any court to set up a green chamber when a case relating to the environment is registered. The court remains accessible to the general public as any person wanting to file an environmental case may still file it any of the existing courts of the country. This model also allows the court to manage a caseload especially in instances where the number and complexity of environmental cases fluctuates, while maintaining a workable case load in the court.[15]

Namibia could create specialised green chambers in both its lower and superior courts. This would allow the court to manage its fluctuating caseload in environmental

10 Kaniaru (2012).
11 Pring and Pring (2016a).
12 Ibid.
13 Ibid.
14 Ibid.
15 Ibid.

matters, at the same time slowly creating a pool of specialised skills and expertise in the much-needed field of environmental litigation. The judges and prosecutors appointed to these chambers could be encouraged to attend training on environmental litigation, especially in instances where the applicant lacks knowledge in the field. Although establishing these specialized green chambers may not require a separate budget for its setting, one of the drawbacks of such a chamber could be the lack of flexibility of the court as a general court to practice innovative, creative, problem-solving approach in deciding in environmental cases.[16]

2.3 Green Judges

Green judges or a green judge refers to a single trial, judges and/or prosecutors in the traditional courts of a country, designated to deal with environmental matters. In the absence of environmental caseload, these personnel are assigned to other cases as they may arise. This EC model is suitable to jurisdictions where resources such as caseload, financial and human resources are insufficient to justify either a separate court or chamber of judges specialising in environmental law cases.[17]

Namibia could consider establishing this EC model, perhaps as a *gini pigi* (as a one-step-at-a-time) model in preparation to establish a specialised green chamber model which could expand a standalone EC model through the enactment of respective legislation.

2.4 Tribunals

Environmental tribunals can be defined as judicial bodies other than courts in the judicial branch but still specialised government bodies empowered to make binding decisions on environmental disputes. Tribunals are considered as a first step towards preventing and providing effective redress for environmental disputes.[18] Tribunals may be incorporated as part of a standalone EC model or they can be established under the government authority / ministries designated to regulate environmental matters. There are three models of environmental tribunals:[19]

- Independent tribunals: The creation of an independent tribunal is effected by enabling legislation.

16 Ibid.
17 Ibid.
18 Markowitz / Gerardu (2012).
19 Pring / Pring (2016b:38).

- Quasi-independent tribunals: Refers to tribunals established and operating under the direction of another agency, who's decision they do not review.[20]
- Captive tribunals: Bodies whose members are appointed by, answerable to, and/or housed in the environmental agency whose decisions they are supposed to review.

The establishment of environmental tribunals could be something worth considering in Namibia. The country already has experience in setting up such administrative bodies through the establishment of Labour Tribunals. Independent tribunals could be something worth pursing, but research needs to be invested to establish a clear *modus operandi* drawing, among others, from existing tribunals in Namibia and elsewhere.

3 ECTs in the context of Namibia's Judiciary and the Environmental Management Act

Namibia's judicial powers are vested in the Judiciary as one of the organs of state.[21] The Judiciary is made up of the Supreme Court, the High Court and the Lower Courts [22] with the Supreme Court being the highest court of the country. Decisions of the Supreme Court are binding to all courts of the land. The High Court of Namibia is also known as the Court of appeal and review, which court has inherent jurisdiction to hear all appeals on decisions enforced by the lower courts. Namibia has two high courts, one is based in its capital city (Windhoek), whilst the other court based in the northern part of Namibia (Oshakati). The lower courts consist of the magistrate courts and regional courts; these courts are also known as the courts of first instance. The lower courts are preceded over by the magistrate in terms of the Magistrates Act. The establishment of an ECT in Namibia could bring about judicial decisions as for example required under the Environmental Management Act No. 7 of 2007 (EMA).

For carrying out the provisions of the EMA, environmental officers who may perform duties related to environmental compliance may be appointed by the Minister. Environmental officers are vested with various powers, including the power to entry and inspect premises subject to the authority of a warrant issued by a judge of the High Court or by a magistrate who has jurisdiction in the area where the premises in question are situated. Such warrant may only be issued if it appears from information on oath that reasonable grounds for believing that any material, substance or other things is on or in such premises, and it must be specified, which of the acts mentioned in Section

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20 Ibid:37 refer to New York City Environmental Control Board (ECB) as a classical example of an independent quasi-independent tribunal. The tribunal was removed from within the environmental agency whose decisions it reviews and placed within New York City's Office of Administrative Trials and Hearings (OATH) in 2008.

21 Article 78 of the Namibian Constitution.

22 Article 78(1) of the Namibian Constitution.

19(3) of the EMA may be performed in terms of warrant of the person to whom it is issued. The issuance of such warrant could be part of the functions of a specialised ECT.

The Office of the Environmental Commissioner is set up as a department in the Ministry of Environment, Forestry and Tourism (MEFT). Its functions as outlined in Section 17 of the EMA are wide and administrative duties are at the core. The establishment of an ECT in Namibia will inhibit the issuance of a warrant to an environmental officer by the general courts, rather by a specialised court which will enhance and maintain consistency regarding the issuance of warrants. This section does by no means aver the replacement of the Office of the Environmental Commissioner with ECTs, it rather presents arguments on how ECTs could complement the work of the Office of the Environmental Commissioner in carrying out its duties and functions.

4 Push Factors for Establishing an ECT in Namibia

4.1 Principle 10 of the Rio Declaration

Principle 10 of the Rio Declaration,[23] is cited as a primary progenitor of ECTs in many jurisdictions. The principle recognises that environmental issues are best addressed with the participation of all citizens by recognising three important rights: appropriate access to information, the opportunity to participation in decision making process and effective access to judicial and administrative proceedings including redress and remedy.[24] Jurisdictions have come to realise that establishing a specialised ECTs can fulfil their obligations under this principle that they agreed to.

Principle 10 of the Rio Declaration is part of Namibian law trough Article 144 of the Namibian Constitution. This means that Namibia is obliged to ensure that it respect, promote and fulfil the right to access to environmental justice by providing platforms to access information, platforms to participate in decision making process where appropriate and platforms to access effective administrative and or judicial bodies to seek redress when these rights have been infringed. It is also noteworthy to highlight that EMA promote the participation of all interested and affected parties, the EMA also makes it obligatory for administrative bodies to take into account the interests, needs values of interested and affected parties when making or taking an environmental decision.[25]

23 Rio Declaration Principle 10. At http://www.unep.org/documents.multilingual/default.asp?documentid=78&articleid=1163, accessed 21 May 2020.
24 Kurukulasuriya / Powell (2010).
25 Part II, Section 3(c) of the Environmental Management Act No. 7 of 2007.

4.2 Development Agencies

Development agencies such as the World Bank also have an arm in the proliferation of ECTs.[26] Finance for development projects is provided mostly, if countries have stringent environmental and social safeguard policies in place.[27] Funding agencies require the conduction of detailed environmental impact assessments (EIAs) and strategic environmental assessments (SEAs) with the involvement of all the affected parties and the availability of dispute resolution mechanisms to warrant that the development-impacted people and the public are furnished with accurate information, an opportunity to raise concerns and file complaints against the envisaged development project. Traditional courts often lack the expertise to respond to the public's concerns on the development projects, therefore, governments often establish ECTs to fulfil this requirement.

4.3 The Judiciary

The push to establish ECTs could also be a push by the judges themselves, who realise the gap in the traditional courts to deliver justice to environmental litigation. Judges are becoming increasingly aware of their responsibilities to uphold the rule of law and to promote environmental governance through judgements and declarations.[28] Judges may also recommend the establishment of a ECT because of the backlog of cases that the courts have to decide on. The lack of expertise to adjudicate ECTs may also cause the delay to derive an environmental decision timely. To curb these delays imposed by the traditional courts, ECTs can be issued with preliminary emergency orders to deal with imminent and irreparable harm to the environment, which the general courts may lack or only use at the conclusion of a case.

4.4 Other Factors

A consistent six step pattern leading to the establishment of ECTs regardless of the country and its development status, has been described as follows:[29]

> First, the environmental impacts of non-sustainable development and population growth begin impacting the environment in a major way. Second, civil society and advocacy groups become aware of these environmental impacts and demand laws and institutions to prevent and/or mitigate the environmental damage. Third, laws are passed, which may or may not be adequate, but

26 Pring / Pring (2015).
27 Pring / Pring (2009a).
28 Ibid.
29 Pring / Pring (2009b).

are not rigorously enforced. (For example, many countries have now adopted the right to a healthy environment as a human right and/or sustainable development in their national constitutions and some international laws have created environmental rights of action. Fourth, public dissatisfaction with the laws or their enforcement prompts litigation in the general courts. fifth, this dissatisfaction with the general courts, by both plaintiffs and defendants, leads to a public debate over new options and the emergence of visionary leaders who believe that a well-designed ECT can address the issues. sixth, the general courts then disappoint these advocates by not having the expertise, patience, will, or incorruptibility to adjudicate environmental cases in a way that is – to quote the memorable phrase of one Australian court law – "just, quick, and cheap"; cases may take decades to hear, cost the parties immense sums, expose complainants to monetary liability or intimidation or worse, result in dismissal on technical grounds, and/or produce inconsistent decisions.

5 The Significance of Establishing an Environmental Court / Tribunal in Namibia

When delivering judgements, the role of the Judiciary is to apply and interpret the law in light of the facts of the case. The deliverance of a just judgment requires an understanding of the law, and in environmental law cases, an understanding of the complexity of a specialised field of environmental law. Environmental law is defined as a body of laws, including a system of complex and interlocking statutes, common law, treaties, conventions, regulations and, policies which seek to protect the natural environment which may be affected, impacted or endangered by human activities.[30] Authors on ECTs continue to note the difficulties and challenges faced by traditional courts to stay abreast with all the development of the complex and rapidly changing environmental law.[31]

The lack of environmental legal expertise in the judiciary is a hindrance to achieve environmental justice. Principle 10 of the Rio Declaration calls for the availability of "effective judicial and administrative proceedings, including redress and remedy". The lack of legal expertise on environmental law can be interpreted to mean that the judiciary lack competency to dispose, determine and hear environmental matters. This hinders one of the arm to promote, fulfil and respect environmental justice through the provision of an effective judicial system to seek remedy and redress.

5.1 ECTs as Effective Tool to Enforce Environmental Law Timeously

Evident from the definition of environmental law is its complexity and scientific principles which require expertise to adjudicate these matters. An ECT is desirable because

30 See http://www.unep.org/training/programmes/Instructor%20Version/Part_2/Activities/Interest_Groups/Decision-Making/Core/Environmental_Law_Definitions_rev2.pdf last accessed 22 May 2020.

31 Markowitz / Gerardu (2012).

it paves a way to create a pool of expertise to adjudicate complex environmental cases. An ECT also has a comparative advantage to formulate principles which may have general applicability.[32]

The scientific nature of environmental matters brings about a time-consuming task for judges to prepare themselves to be sufficiently expert to adjudicate the complex issues raised by environmental litigation. The establishment an ECT in Namibia will decrease case backlogs.[33] Currently in its development phase, the growing number of mining and development projects taking place in Namibia, requires a well-equipped and educated judiciary on environmental law. Namibia's judiciary is yet to be presented with complex environmental litigation cases. Before the occurrence of these event, the courts should prepare to ensure that neither of the parties are denied access to an effective judiciary and or administrative proceedings when seeking redress or remedy by delaying adjudicating on matters relating to environmental law. Specialisation presents an opportunity for judges and personnel of the courts to gain more insight in a specific field. ECTs mainly adjudicate matters relating to the environment, land and established principles.

5.2 Option to Operate as a Multi-Door-Court-House

A multi-door-court-house incorporates a wide range of dispute resolution mechanisms. Such court improvises on an array of in-house and external dispute resolution process under one roof. This includes conciliation, mediation, arbitration, evaluation, adjudication of environmental matters and case management. Specialisation facilitates a better appreciation of nature and characteristics of environmental disputes and selection of an appropriate dispute resolution for each dispute.[34] Evidently, Namibia's Labour Court also follows this approach of a multi-door-court-house, by refereeing matters for conciliation, mediation and to arbitration when the parties fail to reach an agreement. The arbitrator awards a binding decision to the parties, subject to appeal and review by the Labour Court.

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32 The ECT of Australia is a notable leader in formulating principles, the court has formulated 43 planning principles. See The Land and Environment Court planning principles at http://www.lawlink.nsw.gov.au/lawlink/lec/11_lec.nsf/pages/LEC-planningprinciple, accessed 27 May 2020.

33 Scott (1973) quoting Judge Wright .

34 Pring / Pring (2016b:21).

5.3 Comprehensive *Locus Standi*

The current courts of Namibia apply a restricted locus standi in that an applicant must demonstrate a direct and substantial interest in the subject matter and outcome of the application before the court can hear the matter.[35] ECTs often liberalise locus standi, strengthening the public's access to environmental justice and making courts accessible to anyone with a substantial environmental claim.

5.4 Improving Access to Environmental Justice

Access to justice includes access to environmental justice. It is recognised worldwide that traditional courts lack the ability to potentially maximise the development of procedures and institutional mechanisms to holistically guarantee access to environmental justice.[36] Principle 10 of the Rio Declaration recognises three access rights in line with environmental justice, access to information, the right to access to justice is now viewed as a standalone right, which also have a fundamental effect to secure other rights. Without doubt, access to justice is closely linked to environmental concerns and as the existence of nature depends upon the wellbeing of the environments. The jest of access to environmental justice is really the ability of persons who are affected or may be potentially affected by a developmental project in a certain environment to participate in, influence, and have rights of review in relation to, the making of environmental laws, decisions about land use, and development and enforcement of environmental laws.[37]

> Access to justice is enhanced in a clearly identified independent judicial court that is easily identifiable by the public, whose decision makers are highly trained in environmental law, and whose decisions are documented and published. Independence is perhaps the most important attribute of an ECT for access to justice. It is fostered by a democratic form of government, an unbiased judicial selection process, protection of decision-makers from political pressure or punitive consequences for their decisions, and institutional separation from the agency whose decisions are being reviewed.[38]

The concept of environmental justice thrust shift the focus from the environment to the people, particularly the local communities. Environmental justice seeks to ensure that environmental protection is planned holistically and not in vacuum and to ensure that environmental goals take in to account social and political realities.[39]

Specialised environmental courts are lauded for their potential to facilitate and promote environmental justice, covering both the substantial and procedural principles.

35 Articles 25(2) and 18 of the Namibian Constitution.
36 Angstadt (2016).
37 Millner (2011).
38 Pring / Pring, (2016b).
39 Kameri-Mbote / Cullet (1996).

These courts have proven to stretches the boundaries of locus standi.[40] ECTs provide a platform especially for environmental litigation. Traditional courts hinder access to environmental justice because of the limited expertise on environmental related issues and limited locus standi that it affords the public. ECTs eliminate all these by stretching the boundaries to locus standi through the principle public interest litigation where any public member may approach the court on a perceived harm that a specific project may have for development.

The components of environmental justice are the right to access information, the right to participate in decision making and the right to access justice. This study suggests that these rights are best enforceable through environmental advocacy, litigation and mediation. Specialized ECTs are well equipped to provide litigation by interpretation of the law and formulating principles. In terms of mediation, these courts are able to conduct judicial review in an independent manner, without any interference from the executive. It is very important that environmental justice is secured because a healthy environment is the *conditio sine qua non* for our existence on planet earth. Therefore, fundamental rights arising out of the civil and political rights as well as the social and economic rights such as the right to life, health, culture, family, depend upon environmental justice.[41] *Locus standi* is a precondition to environmental justice, therefore "if nobody can sue, the environment is unprotected".[42] Including the principles of access to justice explaining them and demonstrating how specialised ECTs can improve access to environmental justice.

ECTs are also a way to reaffirm governments commitments towards environmental protection. It may also have a deterrence factor, especially on environmental crimes. One of the disadvantages of creating any specialised court especially for developing countries may perhaps be an argument that have also been noted as applicable to even developed states. A call for a certain specialized court might create more calls for specialized courts such as water courts, intellectual property rights courts, energy courts etc amongst others. However, proponents believe that there is a more efficient option of creating an environmental court that will consider disputes in the use of natural resources as well as those in the sphere of environmental protection.[43] Another is an argument that was also considered in china before establishing an environmental court, whether the establishment of ECTs will have enough caseloads.[44]

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40 The courts in India are made accessible to the public by provision of public in interest litigation, see Sharma (2008).
41 Millner (2011).
42 McLeod-Kilmurray (2011).
43 Anisimov / Ryzhenkov (2013).
44 Wang / Gao (2010).

5.5 An African Example: The Environment and Land Court (ELC) of Kenya

The advent of Environmental law in Kenya dates back in 1999 from the enactment of Kenya's environmental law framework, namely the Environmental Management and Coordination Act (EMCA).[45] The EMCA provides two avenues for resolving environmental disputes to complement the ordinary courts of law, namely; the Public Complaints Committee, a committee to receive environmental complaints from the public and the National Environmental Tribunal, a tribunal established to hear technical disputes relating to the administration of the Act.[46] Kenya's ordinary courts experienced challenges to determine disputes arising from the technical nature of environmental law, due to lack of expertise by its judiciary to interpret and apply environmental law.[47] In 2010, Kenya adopted a new Constitution through a referendum. The new Constitution creates two new specialised courts, namely (a) the Employment and Labor Relations Court and (b) the Environment and Land Court.[48] The Constitution also includes the right to a clean and healthy environment.

Kenya prides itself with being the first African country to establish an ECT.[49] Kenya's establishment of the Environment and Land Court also affirms the feasibility of establishing ECTs in any jurisdiction, particularly in Africa regardless of the country's economic status of development. Kenya is an example that Namibia may reference prior its decision to establish an ECT. It is worth mentioning that Kenya's ECT model in the amid of Australia, New Zealand, United States of America and India, is classified as one of the best ECT models, especially the operation of its tribunal courts.[50] Kenya's Environment and Land Act[51] was concluded after numerous consultations with various stakeholders.[52]

Kenya's judiciary comprises of five superior courts, subordinate courts, and tribunals.[53] The Environment and Land Court is a superior court granted status of the high

45 The Environmental Management and Co-ordination Act No. 8 of 1999, Kenya.
46 Odote (2013).
47 Ibid.
48 Kenya's Constitution, Section 162(2) reads as follows: "to establish a superior court to hear and determine disputes relating to the environment and the use and occupation of, and title to, land, and to make provision for its jurisdiction functions and powers, and for connected purposes".
49 Established in terms of Kenya's 2010 Constitution and enforced through the Court and Environment Act of 2011.
50 See Pring / Pring, (2016b).
51 Environment and Court Act No. 12 of 2012, Kenya.
52 Consultation between the Ministry of Justice, Environment, and Lands, consultations with the public, meetings with other entities Parliamentary Oversight Committee, Constitution Implementation Commission, and its instituted consultations, Kenya Law Reform Commission, the Office of the Attorney General), and printing by the Government Printer.
53 The Constitution of Kenya 2010: Articles 169-170.

court.[54] The court is granted original and appellant jurisdiction, to hear, determine and dispose of cases relating to the following classes of jurisdiction:[55]

- Environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
- relating to compulsory acquisition of land;
- relating to land administration and management;
- relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
- any other dispute relating to environment and land.

The court also has jurisdiction to determine matters relating to the right to a clean and healthy environment; the enforcement of environmental rights and obligations in respect of the environment.[56] The court is bound to use the alternative dispute resolution (ADR) mechanism as condition precedent to any proceedings before the Court, the Court shall stay proceedings until such condition is fulfilled.[57] Section 18 of the Environment and Land Act, elucidates the guiding principles of the court:

(a) the principles of sustainable development, including –

  (i) the principle of public participation in the development of policies, plans and processes for the management of the environment and land;

  (ii) 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 relevant and not inconsistent with any written law;

  (iii) the principle of international co-operation in the management of environmental resources shared by two or more states;

  (iv) the principles of intergenerational and intergenerational equity;

  (v) the polluter-pays principle; and

  (vi) the precautionary principle;

(b) the principles of land policy under Article 60(1) of the Constitution;

(c) the principles of judicial authority under Article 159 of the Constitution;

(d) the national values and principles of governance under Article 10(2) of the Constitution; and

(e) the values and principles of public service under Article 232(1) of the Constitution.

The foregoing guiding principles of the court are so compressive, covering the aspect of both Kenya's national and international environmental law. The personnel of the court are recruited in the same manner as other judges' other courts. However, an additional requirement of at least 10 years' experience as a distinguished academic or

54 The Environment and Court Act 12 of 2012: Section 4(2).
55 Ibid: Section 13.
56 Article 69 of the Constitution.
57 The Environment and Court Act 12 of 2012: Section 70.

legal practitioner with knowledge and experience in matters relating to environment or land is added.

The establishment of the Environmental Management and Coordination Act No. 8 in 1999, has improved the then used to be rigid locus standi of Kenya.[58] The ELC, has also further improved Kenya's *locus standi*, in terms of Article 13(3) which states that

> nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.

6 Conclusion

Specialised tribunals provide opportunities for innovation, and for development of flexible procedures and remedies.[59] Any specialised court creates an increase decisional quality by judges who have more expertise and experience with the complex issue at hand. It is this process of learning by doing that gradually but surely lead the creation of a pool of expertise in any judiciary. This expertise ultimately increases uniformity and consistency in the interpretation and application of environmental law across the jurisdiction and discourage forum shopping.[60] It is also, argued that environmental courts are more responsive to environmental problems. One of the reasons why this study proposes the consideration of setting up an ECT in Namibia is because, most countries all over the world have come to realize the loop in the traditional courts when dealing with environmental issue caused by the scientific complexity of environmental law and the backlog of cases in the traditional courts.

The protection of the environment in Namibia is a constitutional requirement. This chapter has set out a roadmap towards establishing an ECT that Namibia may adopt in order to establish a specialised court system that deals specifically with environmental matters. The study has also demonstrated the pivotal role that is played by the judiciary in the interpretation and vindication of environmental law. It has been demonstrated how a specialised court is better placed to handle environmental related issues. The existence of ECTs around the world is preceded over by numerous factors including but not limited to Principle 10 of the Rio Declaration, development agencies, the Judiciary, and other factors. Different categories of ECT models have been described which Namibia may choose from.

58 The Environment Management Coordination Act, Section 3(3), states as follow: "any person who alleges that his or her entitlement to a clean and healthy environment is being or is likely to be contravened may apply to the High Court for redress".
59 Carnwarth (2012).
60 Anisimov / Ryzhenkov (2013).

It has been noted that the advocacy for environmental courts is traceable in the debate between the generalist versus the specialist court system,[61] where special courts can develop procedural norms and deliver quality judgement through expert judges bringing about uniformity, consistency and predictability. It can therefore be concluded that establishing an ECT would be beneficial for Namibia, as a judicial body specialised in environmental matters would be efficient and effective in developing decisions, decrease multiple proceedings arising out of the same environmental dispute, reduce costs and delays, and ultimately contribute towards environmental justice.

61 Sharma (2008).