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**LEGAL AND INSTITUTIONAL CONSTRAINTS TO PUBLIC INTEREST LITIGATION AS A MECHANISM FOR THE ENFORCEMENT OF ENVIRONMENTAL RIGHTS AND DUTIES IN KENYA**

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**SUMMARY**

This paper seeks to examine the constraints, both legal and institutional, that impede the effective use of public interest litigation in the protection and enforcement of environmental and natural resource rights in Kenya. Legal constraints are those problems that exist within the legal framework; while institutional constraints are those problems that reflect the lack of capacity, opportunity and resources, whether in the legal profession or within civil society for taking up and prosecuting cases of this nature.

**1 INTRODUCTION**

Both laws and institutional mechanisms for addressing the problem of environmental degradation have been in existence in Kenya since the colonial times. Yet in this long history also lies the major weakness of this framework for the protection of the environment. Because the laws were conceived and introduced during the colonial era, they were informed by the political economy of colonialism; and even when they were adopted by the independence government, they retained major characteristics of their colonial antecedents. They have thus for instance remained sector specific, mostly focused on pollution control and the conservation of nature. This has resulted in a problem by problem approach to environmental policy and law making which ignores the relationships between particular environmental problems, and the systematic connectivity between various components of the environment<sup>1</sup>.

Over the years however, the inadequacy of this system has become obvious, especially when compared with the evolution that has taken place in the area of environmental management elsewhere in the world. The 1972 United Nations Conference on the Human Environment triggered heightened global activity in the area of environmental awareness and management. While a lot remains to be done, there is clearly an appreciation on the part of the Government of Kenya that the management of the environment is an important input into the development process. Both policy and legal initiatives continue to be promulgated to address the problem of environmental management. Part of the framework being considered for this includes the use of public interest litigation to advance the cause of environment and natural resources management.

**2 CONTEXT**

Public interest litigation is a new phenomenon in Kenya's legal system. As recently as 1986, the then Acting Chief Justice observed that the case of *Public Law Institute v. Kenya Power & Lighting Company Limited* was the first public interest case ever lodged in Kenya.

By public interest litigation we mean such suits as are filed in pursuit of the public interest. Such suits may be filed by a public-spirited individual or group of individuals or by a civil society organization whose mission covers the issue in relation to which the action is filed. In the quest for effective environmental stewardship, public interest environmental litigation has proved a major tool in the hands of concerned individuals and groups the world over<sup>2</sup>.

It is clear that successful public interest litigation requires a motivated and capable citizenry with sufficient interest and commitment to the issues at stake; a legal framework with rules that facilitates this kind of litigation as a means of enforcing the rights of citizens; a judiciary that is sympathetic both to this method and the issues pursued thereby and a policy framework that will respond positively to the dictates of courts arising from such actions. We shall examine these factors in turn in the Kenyan context.

### 3 THE LEGAL FRAMEWORK

The major problem with the legal framework lies in its sectoral approach to the management of the environment. It has been observed that this approach has created problems in that some grey areas are not regulated and there are overlaps between mandates of existing authorities. Apart from this, a sectoral approach has resulted in passage of 66 pieces of legislation addressing environmental concerns, each with its own provisions relating to enforcement.

Absent from this framework is any provision for coordination between various organizations and individuals involved in the various aspects of environmental protection. The need for coordination cannot be overstated, as only with coordination can there evolve a uniform application of the law, leading to uniform standards in the management of the environment.

The nature of this legal framework, especially its fragmented and disjointed character is explicable by the colonial background of the legislation. The colonial resource management system and laws were primarily concerned with resource allocation and exploitation, informed by an extractive mentality that sought to maximize what the colonialists would appropriate from the natural resource base. Behind this mentality was the presumption of natural resource abundance; so that the concern of policy and law was restricted to the allocation of access rights, with little or no concern for sustainability. This explains the enactment of separate laws concerned with the use of these resources rather than with sound management for sustainability.

A major constraint within the legal framework relates to the vexing question of standing. *Locus standi*, or standing to sue has been used by courts in Kenya to defeat a number of initiatives aimed at securing the public interest. The Civil Procedure Rules, which govern the process of civil courts, provide by Order 1 rule 8(1) that one or more persons may sue on behalf of a number of people who have the same interest in one suit. A person who files such a suit, known as a representative suit, is enjoined to give notice of the filing of the suit whether directly or by advertisement in the press to all persons interested in the matter. Any person on whose behalf a suit is so filed may apply to be joined as a party.

While this provision appears to provide an opening for the pursuit of public interest litigation, this matter is not so straight forward, especially with respect to public interest environmental litigation. The law suggests that such a representative action is envisaged on behalf of a determinate class of persons "having the same interest in one suit". The nature

of environmental litigation is such that it is hard to be so specific about the class of persons on whose behalf an action would be brought; and this has hampered the use of this rule to facilitate public interest environmental litigation.

It is also possible however, to file what are known as “relator” actions under the provisions of Section 61(1) of the Civil Procedure Act. This type of action is specifically designed to enable citizens to move the courts to act in cases of public nuisance. The section provides that,

“In the case of public nuisance, the Attorney-General, or two or more persons having the consent in writing of the Attorney-General, may institute a suit though no special damage has been caused, for a declaration and injunction or for such other relief as may be appropriate to the circumstances of the case”.

The use of “relator” actions for the enforcement of environmental rights is constrained by the requirement of written consent of the Attorney-General before instituting suit. Apart from the bureaucratic delays inherent in the procedure, the Attorney-General is a political officer and a member of the Executive and has proved singularly incapable of taking action on sensitive issues that involve conflict of interest. The cumulative effect of this is that the Attorney-General will hardly move on his own, while private individuals are discouraged by the need for consent; thus rendering this section virtually useless for the purposes for which it was otherwise intended.

Even though it has been held by the court of Appeal<sup>9</sup> that an aggrieved member of the public can himself seek relief in the courts if the Attorney-General unreasonably or improperly refuses to exercise his powers, or there is insufficient time for him to do so, such a member of the public would still have to show that he has ‘sufficient interest’ which remains undefined by decided cases. It is submitted that the tenor of decisions to date suggest that the courts are likely to define ‘sufficient interest’ in a manner that denies rather than permits actions by individuals in the prosecution of the environment.

That *locus standi* should be such an impediment to public interest litigation in Kenya is evidence that the legal system is tied down with English common law concepts even where the statutes have provisions that if interpreted liberally would advance the interests of Kenyans. The statutory provisions of the Civil Procedure Rules rank hierarchically above the common law concepts to which they are referred.

Perhaps this inadequate legal framework is a consequence of the absence of a constitutional basis for public interest litigation in the protection of the environment. The Constitution of Kenya does not have any provisions guaranteeing a healthy and wholesome environment. It is imperative that as the Constitution is reviewed, this guarantee be built into the Constitution.

#### **4 LEGAL PROFESSION AND JUDICIARY**

Whereas the legal framework clearly constitutes a major constraint to public interest environmental litigation, it is equally obvious that even the best legal framework would not in itself guarantee to the citizens the benefits of protection inherent therein, unless there is in existence within the country a corps of legal professionals, both in the Bar and the Bench that have an active interest in using the legal framework to advance environmental rights.

Professor C.O. Okidi, a leading Kenyan environmental lawyer has suggested that the inadequate legal framework notwithstanding, there is a sense in which the failure of public interest environmental litigation in Kenya is a function of an inept legal profession and

judiciary. Yet it is the advocates for the environment who can activate the lawyers and prompt a change in the attitudes of judicial officers. Okidi submits that “court judgment—may also depend on the cogency of the arguments as well as the quality and the judicial temperament of the courts. Therefore the chances of success may well depend on the creativity, commitment and persistence of litigations”<sup>4</sup>. He further suggests that there has not been a sufficiently strong, persistent and consistent pressure brought to bear on the judicial system to force the environmental agenda into the court process. He observes that “advocates of environmental protection and human rights in Kenya may not have challenged the courts over related matters sufficiently. Courts must be moved and convinced, and once more, the efforts should be creative, committed and persistent”<sup>5</sup>.

For the legal profession and the judiciary to rise to the challenge of public interest litigation in the advancement of environmental rights, it is necessary that capacity be built within the profession for public interest litigation generally, and for environmental litigation in particular. The training of lawyers in Kenya has to date been geared toward producing private practitioners with an eye on commercial activity rather than public service. The lawyers who end up in the public sector are equally constrained by an attitude that puts emphasis on specific client interest. Public interest litigation does not fit well into this mould and attitude. Apart from addressing the curriculum of law schools and university faculties of law as a long term measure, such capacity building should in the short-term be in the form of continuing legal education to qualified and practising lawyers.

## 5 CIVIL SOCIETY

It has to be appreciated however, that the effectiveness of lawyers will depend largely on the mobilization and commitment within civil society to the protection of the environment. The commitment and persistence of litigation called for by Professor Okidi can only be assured by civil society environmental advocates. It is the existence of a strong and committed lobby for the environment, and one that is committed to the use of the legal process in the protection and enforcement of environmental rights, that will in turn create and maintain a capable legal profession.

In the past, the political environment in Kenya, as in much of Sub-Saharan Africa, has not been conducive to the organization of civil society around such issues as environmental rights. In the single-party era, which was characterized by autocratic governance and emasculation of civil society, advocates for environmental rights became targets of intimidation and harassment by government. This has greatly hampered the evolution of serious environmental advocacy groups that would effectively mobilize public opinion and resources in the protection of the environment<sup>6</sup>.

There have however, been significant changes since the early 1990s. The reintroduction of a multi-party political system has reasserted pluralism and civil society organizations continue to emerge, addressing specific interest. Environmental advocacy groups are being created all over Kenya, and public interest environmental law firms are now in the works. These too need training, advice and general capacity building to become effective means for environmental protection.

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## 6 THE POLICY FRAMEWORK

When all is said and done however, it is the political process that will ensure the effectiveness of public interest litigation in the protection and enforcement of environmental rights. The policy framework is a function of the political process, and in the past this has not been conducive to such citizen initiatives as public interest litigation.

A number of changes that have occurred within the political system since the beginning of this decade have, however, augured well for the policy framework. Economic and structural adjustment programs introduced at the behest of international financial institutions and the donor community, have forced the government to become more receptive to ideas and initiatives that emanate from the citizenry. The reforms instituted by these programs have resulted in much leaner governments, with a reduced capacity and presence in natural resource management. As a result it is in the interest of government to allow the effective involvement of the citizenry in environmental protection.

Moreover, the political space created by the greater democratization that has been introduced as part of the reforms in the political system has translated into a more empowered civil society. It has also translated into a government that is more ready to listen to its people as accountability and transparency find root.

These developments provide an opportunity for the strengthening of public interest environmental litigation.

## 7 CONCLUSION

Public interest litigation generally, and environmental litigation in particular, are new phenomena in Kenya. The legal and institutional framework that has existed in the country since colonial times is one that is not at all conducive to the effective use of public interest environmental litigation as a means of securing environmental and natural resource rights. The limited scope of common law remedies available for environmental degradation and the personal nature of those remedies are a major legal constraint to the widespread use of public interest litigation to enforce environmental rights. The absence of a constitutional provision guaranteeing a healthy environment creates a serious gap in the enforcement mechanism. Additionally there is lack of capacity within the legal profession and the judicial system for the use of public interest litigation, and an absence of organized civil society institutions to pursue environmental rights through the courts.

The situation is however changing rapidly as there is increased awareness both in and outside government of the need for environmental stewardship as an input in the development process. Reforms in the legal framework and the governance system are beginning to translate into opportunities for increased use of public interest litigation to advance environmental and natural resource rights.

Nevertheless there is a critical need for capacity-building initiatives to ensure that these opportunities will be translated into benefits for environmental and natural resource governance. Such capacity building should aim at providing resources and ideas, sharing experiences from elsewhere and creating institutional frameworks for public interest litigation within civil society, in government and the entire legal profession in Kenya.

**ENDNOTES AND REFERENCES**

- 1 The word 'environment' is understood throughout this paper to mean the totality of nature and natural resources, including the cultural heritage and the infrastructure constructed by human beings to facilitate socio-economic activities. See Okidi, C.O. 1994. Review of the Policy Framework and Legal and Institutional Arrangements for the Management of Environment and Natural Resources in Kenya. (A Report prepared for the Government of Kenya with the support of the United Nations Environment Program).
- 2 Gleason, Jennifer M. and Johnson, Bern A., 'Environmental Law Across Borders' *Journal of Environmental Law and Litigation*, Vol. 10, 1995, pp. 67-83. See also, Environmental Law Institute, 1992. The Role of the Citizen in Environmental Enforcement. (A Working Paper prepared under the auspices of the Environmental Law Institute's Environmental Program for Central and Eastern Europe).
- 3 Njau, Alfred and 5 Others v. City council of Nairobi (1982-1988) 1 KAR 229.
- 4 Okidi, C. O., 1996. 'The Practice and Principles in Environmental Law for Kenya'. (A Paper prepared for the KNAS/IDRC Public Lectures at the Kenya National Academy of Sciences), page 13.
- 5 *ibid.* page 14.
- 6 Such individual efforts as those of world renowned Kenyan environmental advocate, Professor Wangari Mathai, though commendable, have had limited long term impact on the overall system.