IMPLEMENTATION OF INTERNATIONAL ENVIRONMENTAL AGREEMENTS: THE CASE OF BOTSWANA

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SUMMARY

Botswana has ratified many key multilateral and regional environmental agreements. Although its status as a party to these agreements is indicative of a commitment to environmental protection, the country's status of developing and enforcing national legislation to execute these treaties tells another story. This paper describes the current status of implementation in Botswana and identifies political and legislative causes for the country's weak environmental law.

1 INTRODUCTION

Botswana is party to a number of multilateral and regional environmental agreements these being the Convention on Wetlands of International Importance (Ramsar Convention 1971); the Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES, 1973); the Convention on Biological Diversity (1992); the Climate Change Convention (1992); Kyoto Protocol to UN Framework on Climate Change; Vienna Convention for the Protection of the Ozone Layer (1985); Montreal Protocol of Substances that deplete the Ozone Layer (1987) the UN Convention to Combat Desertification (1994); the Basel Convention on the Transboundary Movements of Hazardous Wastes and their Disposal (1989) the Permanent Okavango River Basin Agreement (1994); the SADC Protocol on Wildlife Coservation and Law Enforcement (1999)[1]. In essence this should demonstrate a strong commitment to compliance with these Multilateral Environmental Agreements by the State.

Botswana is also signatory to a number of international and regional human rights agreements that have environmental protection concerns for instance the International Covenant on Civil and Political Rights (ICCPR) and the African Charter of Human and Peoples Rights (ACHPR). Reference is made here to these agreements in light of the fact that the "right to life" has been applied in the context of environmental protection. The first African country to apply this was Tanzania in the case of Joseph D Kessy v Dar es Salaam Civil Case No 29 of 1998. It is a case in which foul smells and air pollution had caused respiratory problems in area residences exposing them to health hazards. The City Council was ordered to cease dumping garbage in the area and construct a dumping ground where no health hazards would be visited on the residents i.e. they were accorded the right to a healthy environment.[2]

Notwithstanding the above Botswana's compliance has been far from satisfactory. Whilst there are a host of government policies on sustainable resource use such as the National Policy on Natural Resource Conservation and Development (1990); the Tourism Policy (1990), the Agriculture Policy (1991), the National Water Master Plan (1992), the National Settlement Policy (1998) and pieces of legislation related to the same issues of environment and resource management their implemen-

tation is wanting.[3] These policy documents naturally do not have the force of law and so do not assist the environmental normative system. Some of them make direct reference to international environmental treaties

2 IMPLEMENTATION OF INTERNATIONAL AND REGIONAL ENVIRONMENTAL TREATIES

Implementation of international and regional environmental law and compliance to the MEA's in Botswana is fraught with a number of difficulties. The mere existence of a body of environmental law though essential in a basis for action does not in itself provide a solution to environmental problems.[4] Infact legislation on the stature books and policies have had the effect of lulling the public into a false belief that environmental concerns are of great importance in a number of jurisdictions. From a legal perspective Botswana is easily outplaced by most of her contemporaries in the African continent in that she does not have a constitutional environmental constitutional norm as do Namibia, South Africa, Lesotho, Malawi, Uganda etc. Is this a question of different national priorities or the lack of an intention to comply?.

In a celebrated Botswana case the Attorney General vs. Unity Dow 1991 heard by the Court of Appeal the highest court of the land the late Judge President Amissah stated that:

> "A written constitution is the legislation or compact which establishes the state itself. It paints in broad strokes on a large canvass the institutions of the state; allocating powers, defining relationships between such institutions and the people within the jurisdiction of the state, and the people themselves. A constitution often provides for the protection of the rights and freedoms of the people, which rights and freedoms have thus to be respected in all future state action".

Botswana having ratified a number of international and regional agreements should give its people the "right to a healthy environment". In the same judgement Justice Aguda refers to Botswana's international obligations stating that

> "By the law of Botswana relevant international treaties and conventions may be referred to as an aid to interpretation. (p.49) Even if it is accepted that those treaties and conventions do not confer enforceable rights on individuals within the State until Parliament has legislated its provisions into the law of the land the Courts should so far as is possible interpret domestic legislation so as not to conflict with Botswana's obligations under the African Charter or other international obligations".

The African Charter of Human and Peoples Rights which is a regional treaty to which Botswana is a signatory does have such a right in Article 24. Unfortunately even where other African states have incorporated constitutional environmental provisions there has been little interpretation or application of the right owing to various factors such as the lack of public interest litigation, lack of judicial familiarity with such and the failure of governments to set up the machinery to implement their constitutional and international obligations.[5]

We see the lack of a normative basis in Botswana's domestic law to enable international environmental law norms to have their place in the canvass of its constitutional development. Botswana, unlike most of its contemporaries in the developing world, does not have politically and economic instability, endemic corruption and the lack of a functioning State. One would assume that then compliance would be implemented through national legislation, regulations, institutions and other domestic measures.

3 SOURCES OF FAILURE

The key national environmental institutions however demonstrate the source of many of its failures. The most primary institution being the National Conser-

vation Strategy Agency which was established in 1991. It is directed by a Board chaired by the Minister of Environment, Wildlife and Tourism. Its membership includes senior officials from seven ministries, and others from the university, NGO's, mass media and the private sector. Its existence has failed to give leadership to the integration of environmental issues into the constitutional framework of the country. Its accomplishments to date include the initiation of an environmental education program and other policies but it has failed to get government to promulgate a National Environmental Management Act or even an Environmental Impact Assessment Act. These would enable an institutional mechanism by which compliance to MEA's would have been enabled domestically.

The reason for this is the fact that the NCSA lacks a firm political and legislative foundation as a national administrative body. This brings into question the national intent and capacity to comply. If as in other jurisdictions it was established as a legal body with defined legislative functions, powers, duties, responsibilities and its supervisory and co-ordinatory authority was stipulated in law over all other governmental departments on environmental matters this would indeed set the stage for an able environmental management agency.[6] This gives an indication of how low a priority is the environmental agenda with the government of the day and as such issues pertaining to implementation of policies and compliance.

Much of the existing environmental legislation in Botswana is out of line with the environmental policy as laid down in the National Conservation Strategy (1990). Apart from being fragmented into numerous pieces of legislation which are administered through a range of different administrative bodies leading to incoherent decision making there is still a need for environmental management legislation. This would be necessary to bring the environment into a constitutional and policy framework to give it an institutional basis on which to comprehensively co-ordinate management and integrate it into development policies. It would further facilitate effective law enforcement, enhance compliance with environmental management standards and promote and increase public awareness for sound conservation both domestically and internationally.

Where there are statutes in place in Botswana those discharged with implementation either fail or partially discharge their duties making implementation where it exists difficult. Compliance systems as stipulated in MEA's would assist in remedying these issues. MEA mechanism have in them monitoring measure, site visits, review procedures, public awareness mechanisms which enhance the ability of the State to keep up with its obligations under them[7].

Various challenges exist with respect to the level of public awareness of issues related to natural resource utilisation. Deforestation, rangeland degradation, the overuse of veld products and the killing of endangered wildlife species are threats to Botswana's biodiversity yet the public concern with respect to these issues are confined to a small group of dedicated conservationists.[8] There is much degradation from commercial enterprises through the extraction of sand from riverbeds for construction or the dumping of industrial waste in rivers or close to settlements for which affected communities are unaware of any recourse.[9] There is little public understanding of global warming and its potential impact on climate, livestock, wildlife, flora and human population.[10] These are also issues that MEA mechanisms would assist the State address.

Monitoring of natural resource utilisation is equally wanting which compounds the depletion of natural resources. Where monitoring does exist it is fragmented between government departments often without much success. Recently Botswana has with the help of Danish co-operation started a system the Environmental Planning Program to make possible existing data readily available for planning purposes and to identify needs for supplementary data. In addition the government is establishing a system for developing indicators

to monitor environmental trends which will lead to the publication of a State of the Environment Report. This initiative is to enhance sustainable development through the inclusion of environmental considerations in all development planning.[11] The assistance of funds such as the GEF fund under the auspices of UNDP can go a long way to providing manpower, technical and financial assistance to complement government initiatives for compliance with MEA's.

International environmental law is quite obviously the basis on which the new norms established in the MEA's that have been signed can permeate into Botswana's legal system. However these will only be domesticated by the will and intent of the government or State. No State is bound by any treaty unless it has given its consent to do so (pacta sunt servanda "a state is bound by its agreements"). The precise legal effect of such a treaty within a state will depend on the constitutional laws of the country. Compliance with these MEA's only stands to the benefit of the State.

As stated earlier, there are a host of agreements that Botswana has ratified and incorporated into domestic law but it has been the courts that have been most progressive in giving real currency to the obligations found within international law. This in Botswana has been seen particularly in the realm of human rights.both with respect to international and regional treaties. Botswana as mentioned earlier has no provision in its constitution for environmental protection.

One again, due to education and capacity constraints both in the public service, local government and the judiciary a lack of training in environmental law has also hindered the strengthening of environmental law in Botswana with respect to these MEA's. The office of the Attorney General, which deals with all legal matters for government, has for instance no specialist environmental lawyers.

Specialist lawyers are required to draft the laws and advise government on the implications of environmental agreements such as those earlier mentioned of which Botswana is a signatory to. The need for scientific and technological data bases to enable the government to establish appropriate pollution control standards, waste management standards, soil conservation rules etc to inform the legislation is also at infancy.[12] The difficulty in establishing a mechanism for environmental impact analysis of development projects, water apportionment, and air pollution is also a source of concern due to manpower constraints.

4 CONCLUSION AND RECOMMENDATIONS

All being said there is a need for national capacity building with respect to all role players dealing with these MEAs, which would include:

- —Policy makers and senior government officers at both national and local levels
- —Legal officers and legal draftsmen
- —Authorities and agencies and their staff
- —Grassroots organisations especially
- —those representing local communities
- —Non-governmental organisations
- —Private sector
- —Universities
- —Members of judicial bodies at all levels
- —Parliamentarians
- —Law enforcement agencies

5 REFERENCES

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[10] Ibid. p.91.

[11] Ibid. p.92.

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