



**Supporting Inclusive Resource Development (SIRD)
East Africa
TRAINING PROGRAM
2019**



THE CANADIAN
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LAW SOCIETY OF KENYA



Tanganyika
Law Society



UGANDA LAW SOCIETY

What is Environment?

Environment” in the modern context of sustainable development encompasses the physical and social factors of the surroundings of human beings and includes land, water, atmosphere, climate, sound, odour, taste, energy, waste management, coastal and marine pollution, the biological factors of animals and plants, as well as cultural values, historical sites, and monuments and aesthetics.

What is Environmental Law?

Environmental law can be generally defined as the body of law that contains elements to control the human impact on the Earth and on public health.

As for any law, environmental law contains standards and required conduct on humans the violation of which attracts a punishment by the government through fines, imprisonment or compensation.

Development of Environmental Law

Development of Environmental Law spearheaded by strong individuals and CSOs. The publication of *Silent Spring* by Rachel Carson in 1962 warned the world of the dangers posed by the use of DDT;

The 1970 Earth Day March galvanized the U.S. Govt into forming EPA.

The adoption of EIA by courts was a result of civil society organizations filing of law suits against polluters in US courts;

The banning of lead in gasoline was also a result of academics and CSOs efforts;

The passage of Aarhus Convention in Europe also attributed to CSOs efforts

Sources of Environmental Law

Article 38 (1) of the Statute of the International Court of Justice provides four sources of International Environmental Law as:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.”

Branches of Environmental Law

There is national and international environmental law.

National Environmental Law comprises of laws passed in nation covering different facets of the environment including wildlife, water, land, and air quality management, pollution control et cetera.

Countries have passed sectoral legislation and concretized them by passing framework environmental legislation as umbrella environmental law which other sectoral legislation must abide or be in conformity with.

International Environmental Law

- International environmental law is a law developed between sovereign states to develop standards at the international level and provide obligations for states including regulating their behavior in international relations in environmental related matters.
- Treaties and Conventions are where we find most of the international law sources:
- The Convention on Trade on Endangered Species of Wild Flora and Fauna (CITES) passed in 1973 one year After Stockholm Conference;
- The United Nations Convention on the Law of the Sea (UNCLOS) of 1982;
- The Basel Convention on Control of Transboundary Movement of Hazardous Wastes and their Disposal: dumping of toxic substances in Ivory Coast in 2005;
- The Ramsar Convention on Protection of Wetlands

International Treaties ctd

United Nations Framework Convention on Climate Change (UNFCCC);

Convention on Biological Diversity

The Stockholm Declaration of 1972; and

The Rio Declaration on Environment and Development;

Bamako Convention on the Ban of Imports into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa.

National Approaches to Environmental Management

Constitutions;

Sectoral laws;

Framework environmental laws;

Comprehensive codification of environmental laws;

Penal codes;

- Implementation of international environmental legal instruments.

The Environmental Management Act Cap 191 R.E. of 2004

This is Tanzania's principal environmental protection and management framework law.

S. 7 states that its object is to “provide for and promote the enhancement, protection, conservation and management of the environment”

S. 7(2) that the Act provides a legal framework necessary for the coordinating harmonious and conflicting activities with a view to integrating such activities into an overall sustainable environmental management system.

Environmental Management and Protection principles

S. 6 of the EMA enjoins courts, tribunal and all persons exercising authority under to be guided by the following principles

- (a) the precautionary principle;
- (b) the polluter pays principle;
- (c) the principle of eco-system integrity;
- (d) the principle of public participation in the development policies, plans and processes for the management of the environment;
- (e) the principle of access to justice;
- (f) the principle of inter-generational equity and intra-generational equity;
- g) the principle of international cooperation in management of environmental resources shared by two or more states;
- and (h) the principle of common but differentiated responsibilities

Right to clean environment ctd

S. 5(1) Every person may, where the right referred to in section 4 is threatened as a result of an act or omission which is likely to cause harm to human health or the environment, bring an action against the person whose act or omission is likely to cause harm to human health or the environment.

Reliefs ctd

(d) require the person whose activity or omission is likely to cause harm to human health or the environment, to take measures to protect the environment or human health

(e) Compel the persons responsible for the environmental degradation to restore the degraded environment as far as practicable to its condition immediately prior to the damage; and

(f) Provide compensation for any victim of harm or omission and the cost of beneficial uses lost as a result of an activity that has caused harm to human health or the environment

RELIEFS TO BE CLAIMED

Prevent, stop or discontinue any activity or omission, which is likely to cause harm to human health or the environment;

Compel any public officer to take measures to prevent or discontinue any act or omission, which is likely to cause harm to human health or environment

Require that any on-going activity or omission be subjected to an environmental audit or monitoring



INSTITUTIONS INVOLVED IN ENVIRONMENTAL PROTECTION



National Environmental Advisory Committee (NEAC)

S. 11 establishes NEAC made up of members from different fields of the environmental management from the public, private sector and CSOs.

charges it with the duty of advising the Minister or any sectoral Ministry relating to the protection and management of the environment and recommend to the Minister or sector Ministry such necessary action for achieving the objectives of the Act;

Advise the Minister on any matter in connection with restocking and limitation of stock;

Advise the Minister on matters relating to watering, grazing, depasturing and moving stock ;

Make recommendation to the Minister where there is degradation of the environment;

Review and advise on any environmental standards

Receive and deliberate reports from sector ministries on the protection and management of the environment

The Minister

The Minister of Environment is given overall responsibility to articulate policy guidelines necessary for the promotion, protection and sustainable management of environment in Tanzania; (S. 13(1)).

He has got power to issue general guidelines to sector ministries, government departments, the Council, NEAC, Cities, Municipal or District Environmental Management Committee, agency or any other public or private institution necessary for the purposes of implementation of or giving effect to the provisions of the Act. (s. 13(2)).

The Minister is also given the power to approve or disapprove environmental impact statements and issue or refuse to issue environmental certificates (s. 92(1)(a)-(b));

To give an opinion on the strategic environmental assessment;

To direct the Director of Environmental to review the strategic environmental assessment report prepared by the Sector Ministry on projects relating to the mining, energy or water (s. 105(3)

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Director of Environment

S. 14 establishes the office of the Director of Environment. It charges him/her with the following functions:

Coordinate environment management activities being undertaken by different agencies;

Advise the Government on legislative and other measures pertaining to the management of the environment

Advise the Government on international environmental agreements

Director of Environment

Prepare and issues a report on Tanzania's the state of the environment;

Coordinate issues relating to articulation and implementation of environmental management aspects of other sector policies; and

Coordinate issues relating to articulation and implementation of the National Environmental Policy;

Monitor and assess activities being carried out by relevant agencies in order to ensure that the environment is not degraded

National Environment Management Council (NEMC)

S. 16 establishes NEMC as a body corporate with perpetual succession and common seal

It can sue and be sued in its name

S. 17 The object and purpose for which the Council is established is to undertake enforcement, compliance, review and monitoring of environmental impact assessment and in that regard, shall facilitate public participation in environmental decision making, exercise general supervision and coordination over all matters relating to the environment assigned to the Council, under this Act or any other written law.

NEMC is headed by the Director General who is appointed by the President from among person in addition of holding a degree from recognized university in the fields of environmental law, environmental health science, environmental engineering, natural resources management or any other relevant field has at least 10 years working experience in the relevant field. (s.21(1)-(2)).

Serves for five years with a possibility of another 5 year term. (S. 21(4))

NEMC Functions

Carry environmental audits

Undertake and coordinate environmental research, investigations and surveys;

Review and recommend for review EIA;

Identify projects and programmes or types of projects for which environmental audit and monitoring must be conducted;

Enforce and ensure compliance of the national environmental quality standards;

S. 24 gives NEMC power to demand other agencies to carry out enforcement and compliance measures after giving them reasonable notice but in case those agencies fail to perform then NEMC has power to carry out those tasks and claim reimbursement of the costs;

NEMC is also given mandate to carry out environmental audits (s. 101(1))

Environmental Section in Ministries

S. 30 requires the establishments in each sector ministry an environmental section charged with:

--Compliance by the sector ministry of its environmental obligations

Implementation of environmental matters in the sector ministry law and submit a report to the Director of the Environment

Liaise with DoE and NEMC on matters relating to environment and shared resources

Environmental Section in the Sector Ministries

Required to integrate environmental matters into its plans and programmes

Coordinate activities related to the environment in the ministry

Collaborate with other institutions and agencies and evaluate existing or proposed policies and legislation

Promote public awareness on environmental issues

Environmental Protected Areas

S. 47(1) gives the Minister powers to declare any area which is ecologically fragile or sensitive to be an Environmental Protected Area.

Once so declared the area vests into NEMC for its management.

S. 57 (1) prevents human activities of a permanent nature that may adversely affect conservation or protection of ocean, lake shorelines, riverbanks, water dam or reservoir shall be undertaken within 60 meters.

Environmental Appeals Tribunal

Section 204(1) states that:

There shall be established the Environmental Appeals Tribunal which shall consist of:

- a. Chairman who shall be appointed by the President from amongst the persons qualified to be appointed a Judge;
- b. an advocate of the High Court of Tanzania recommended by the Tanganyika Law Society;
- c. one member with high academic qualifications and experience in environmental law; and
- d. two other members who have demonstrated exemplary professional competence in the field of environmental management.

All members except the Chairperson are supposed to be appointed by the Minister.

The tenure of the Chair and members is 3 years and eligible for reappointment for one further term

Functions of the Tribunal

The Tribunal is given appellate jurisdiction in respect of

a) decision or omission of the Minister;

b) imposition of or failure to impose any condition limitation or restriction

C. the decision of the Minister to approve or disapprove an EIS. (s. 206(2)(a)-(c)).

D. Receive request for interpretation from NEMC on matters which are not contentious or likely to be subject to further litigation (s. 206(5))

NB: The appeal must be lodged within 30 days from the occurrence of the event against which he is dissatisfied.

Upon hearing the appeal, the Tribunal has 2 options

A. confirm, vary or set aside the order, notice, direction, decision complained about

B. make such other order as to costs as it may deem fit

The award of the Tribunal is binding and enforceable as the decree of the Court. (s. 208(2))

An award of the Tribunal is appealable to the High Court composed of 3 judges and the High Court decision is final. S. 209(1)-(3)



Origins of EIA

The passage of the National Environmental Policy Act (NEPA) by the U.S. Congress gave the required impetus in dealing with environmental pollution from rapid industrialization, agriculture, population growth and technological growth.

EIA is informed by the fact that natural resources are finite and must be expended in assiduous manner

The aims of EIA

EIA is employed to assess the would environmental social and economic impact of the proposed project. When carried out to include the consequences of the programs, policy and plans it is then becomes a Strategic Impact Assessment (SEA).

EIA also aims at affording the public an opportunity to participate in the project formulation, assessment and review.

We can thus say:

EIA aims at:

Integration of environmental issues into planning and decision-making;

Anticipation and minimization of environmental damage; and

Public participation in decision-making and environmental conservation.

Acceptance of the EIA

Many Conventions and Treaties now recognize and call for the performance of EIAs on all projects with significant environmental impact

They include the Convention of Biological Diversity of 1992; UNCLOS and most famously Rio Declaration whose principle 17 states:

Principle 17

“Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority.”

Thus EIA calls for the no-harm approach to your neighbor or another country as was emphasized by customary international law.

EIA steps

Screening to determine whether a certain project should be subject to EIA;

Scoping to decide which impacts should be taken into account by EIA;

Impact analysis to evaluate the type of likely environmental impacts;

Mitigation and impact management to develop measures to avoid, reduce or compensate for negative environmental effects;

Reporting to catalogue and track the results of EIA for decision makers and other interested parties, including the public;

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EIA Steps Ctd.

Review of EIA quality to examine whether the EIA report includes all of the information required by decision makers and the public;

Decision making to approve or reject project proposals and, if needed, to set the terms and conditions under which a certain project can proceed; and

Implementation and follow-up to ascertain whether the project is proceeding as planned, monitor the effects of the project, and take actions to mitigate problems that arise during the course of the project.

Things that must be observed in the EIA process

Public participation in the entire process;

The project materials are supposed to be in a language that is easily understood by ordinary members of the public;

Project materials are supposed to be availed to the public on time so as to ensure that members of the public make informed contributions;

Legal rights of members of the public i.e. right to land, property, livelihood, benefit sharing, access rights, right to adequate, effective and prompt compensation;

Things to monitor ctd

Incorporation and consideration of the members of the public views in the EIS;

The Review process: Is the Environmental Agency independent and competent enough to review the EIS and make an informed decision?

Right to challenge the EIS administratively and legally;

Monitoring mechanisms arising out of EMP;

Rehabilitation bond and measures

EIA Requirements in Tanzania

Section 81 of EMA states

Any person, being a proponent or a developer of a project or undertaking of a type specified in the Third Schedule to this Act, to which Environmental Impact Assessment is required to be made by the law governing such project or undertaking or in the absence of such law, by regulations made by the Minister, shall undertake or cause to be undertaken, at his own cost, an environmental impact assessment study.

81(2) “An Environmental Impact Assessment study shall be carried out prior to the commencement or financing of a project or undertaking.”

EIA is to be carried out by experts or firms of experts whose names and qualifications are registered by NEMC (s. 83(1)).

NEMC is required to maintain a register of experts and firms of experts authorized to conduct EIA (s. 83(3)).



Environmental Impact Statement

When an EIA is performed the Report produced by experts is known as the Environmental Impact Statement.

Regulation 18(1) of the Environmental Impact Assessment and Audit Regulations of 2005 require the project to submit to the Council the EIS;

Upon its submission NEMC embarks into its review using cross-sectoral technical advisory committees at national level and where appropriate at the local government level . The Advisory committee is composed of not less than 12 specialists;

NEMC is obligated to submit the EIS within 14 days of its receipt to the relevant Ministry and public institution and invite the general public for comments (Reg. 23(1)).

NEMC may carry out site visit and is obligated to consider all comments received and proceed whether to hold or not hold public hearing (Reg. 26(1)).

Public Hearing

NEMC upon deciding that Public hearing is necessary then the same must be presided by a suitably qualified person

The date and venue of the public hearing must be publicized at least one week prior to the meeting;

Must be held in a venue that is convenient and accessible to people who are likely to be affected by the project and be held in a non-adversarial manner

The proponent must be given an opportunity to make presentation.

On the conclusion of the public hearing the presiding office is required to compile a report of the views presented.

Upon completing the review, NEMC is supposed to prepare a report on the review and submit to the Minister

Approval or disapproval of the EIS

Regulation 31(1) requires the Minister to give his decision on the EIS within 30 days after receiving recommendations from the Minister. Decision must be in writing and must contain reasons.

The decision must be communicated to the developer and a copy thereof shall be made available for inspection by the general public at the Council's office

Section 95 states that :Any person who is aggrieved by the decision of the Minister to approve of disapprove and Environmental Impact Statement may appeal to the Environmental Appeals Tribunal.

Cancellation of the EIS Certificate

The Minister is given power to cancel an EIS Certificate upon receiving advice from NEMC under section 100 (2) of EMA where:

- A. the holder contravenes the conditions set out in the EIS certificate;
- B. there is a substantial change or modification in the project or in the manner in which the project is being implemented
- C. The project poses an environmental threat which could not be reasonably foreseen before the environmental impact assessment certificate
- D. it is established that the information or data given by the developer or proponent in support of his application for an environmental impact certificate was false, incorrect or intended to mislead. (Regulation 38(1))

After all these what else?

ASANTENI SANA

