ENVIRONMENTAL LAW: A TOOL IN PEACEFUL RESOLUTION OF CONFLICT

By: Kenneth Kakuru[1]

HISTORICAL BACKGROUND: (*Natural Resources ownership use and Management*)
The determining factor in history is in the final instance is the preservation, production and reproduction of immediate life. On one side the production of means of existence, of food, clothing and shelter and the tools necessary for that production on the other side production of human being themselves, the propagation of species.

The social organisation under which the people of a particular historical epoch and a particular country live is determined by both kinds of production, by the stage of development of labour on the one hand and the family on the other.

The earliest social economic system commonly known as *primitive communalism* is said to have first emerged about two million years ago, and only ended between seven and nine thousand years ago.

This mode of production first consisted mainly of appropriation of natural products. Later transferring into a reproductive economy. In the first stage production was by subsistence, gathering fruits, and grain and vegetable foods and by hunting. Stones and sticks were the main tools of labour, later supplemented by the stone axe, bows and arrows. Later man learnt to harness and later make fire. This enabled him to have better food, make more implements, and live in colder climates. Later gathering led to the emergence of arable farming, as man was able to grow grain and other foods. With fire man was able to make clay pots and cook food without roasting or burning it. Hunting developed into livestock keeping and breeding as certain animals became domesticated. All this facilitated population growth.

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The increase of production in all branches, cattle raising, agriculture, domestic handcrafts, better tools, weapons and other implements gave man the capacity to produce more food than was necessary for his existence and maintenance. As a result therefore division of labour emerged between groups of people. Those who settled in one place and engaged in cultivation of crops who were formerly gatherers and those who domesticated animals and became pastrolists, who were formerly hunters. These two groups engaged in the first major trade in favour of exchange of commodities.

On the other hand there was increased industrial achievements at this stage, mainly the smelting of metal ones and working of metal into labour tools such as hoes, axe and the plough and making hunting weapons such as spears, arrowheads, which later rapidly turned into weapons of war.

The increase in the daily amount of work to be performed by each individual, family or community became unbearable. The only solution to this was to recruit new labour force; reproduction being too slow a process war was waged instead. War provided not only prisoners of war as free labour in form of slaves but also herds of domestic animals and qualities of tools and weapons. What began as process of survival slowly turned into a process of subjugating nature and natural resources and subsequently into a process where man subjugates man in order to use him to exploit nature. This process has continued to date albeit in more complex forms.

Slave economy possessed no internal mechanism of self-production of its labour force. The supply depended largely on foreign conquest. The decrease in the number of slaves resulted into and corresponded to an increase in wars in the Roman Empire around 1000 AD. When the slave mode of production declined with it came decay in commerce, handicraft arts and agriculture. Old large-scale slave farms were replaced with pasture for sheep and oxen since this type of farming required less labour. Country slave estates fell into disuse due to lack of labour. They were divided up into smaller estates and leased to tenants for a fixed sum. The freed slaves surrendered themselves to patronage of these landowners who in turn entrusted their land to them for life.

The landowner became the feudal lords hence the reference to this mode of production is feudal mode of production. Its economic basis was the ownership of land with agricultural production being the main economic activity. Products were mainly consumed in the locality within which they were produced. Later with better implements, wide spread use of iron, better ploughs, better harness, loon mills, this mode of production was bale to produce more surplus, which was appropriated by a feudal hierarchy land of Lords, Bishops, Kings, Emperor and The Pope.

COLONIALISM

Development in the past has always meant the increase in ability to guard the independence of a social group and that group's ability to infringe upon freedom of others. Colonialism was a legal and political system under which a powerful country by force occupied and subjugated another and imposed on it legal and political system specifically for exploitation. Therefore colonialism brought with it new forms of land ownership replacing the customary land system that had existed before its advent.

Under article 15 of the Buganda Agreement of 1900, about 9950 square miles of land in Buganda was granted to the Kabaka, regents, colonial chiefs, members of the Buganda Royal family and about 1000 other colonial collaborators most of who had assisted the British colonialists in fighting and defeating Omukama Kabalega of Bunyoro. This was indeed very ironical because all the land in Bugandabelonged to the Kabaka in trust for all his people, how then could an Englishman grant the Kabaka, land he already owned?

A part from being a factor of production, land is of great cultural significance in Buganda since its people trace their ancestry from it. Terms like *Butaka* – land…. *Abataka* clan leaders and *Ssabataka* the head of all *Bataka* who is the Kabaka are all derived from land." (Law Review pg. 108)

The Buganda clan leaders also hold land in trust for clan members – Each clan traces its origin from a specific land or part of Buganda. Each family or group of related families'

own commercial land as burial grounds known as ***Ebigya***. This land is considered sacred and usually has a caretaker. Suffice it to mention that other natural resources such as forests, rivers, swamps wetlands, open water sources, under ground water minerals and salts were all commonly owned, individual ownership only restricted to use.

The colonial land tenure system brought with in several problems. Private ownership of land was unknown and the new land law imposed land use tax – inform of rent (Busulu) and tribute (Envujjo). Hundreds of thousands of people found themselves as 'tenants' on their own land of absentee mailo owners. Although the Busulu and Envujjo law of 1928 tried to regularise this land tenure system and to create some security of tenure for the Bibanja holders –tenants, the basic problem remained.

The second major problem was that, under the Buganda Agreement three large counties of Bunyoro that is Bugangaizi, Bugahya and Buyanja had been annexed to Buganda after the defeat of Kabalega by the British Colonialists at the end of the 19th Century. Land on which Banyoro people lived and considered it their own had on paper been transferred to Buganda, and Buganda Chiefs and other collaborators had been granted mailo (free hold) titles over the land. The Baganda landowners never in reality had any attachment to this land, it was not their land it was not Buganda. The Banyoro on the other hand always considered it their land, the law and politics not withstanding.

The Colonial Government also introduced leasehold and freehold land tenure systems. The Governor had powers under the crown land ordinance of 1903 to make grants in leasehold and freehold as all the rest of land and all other natural resources had been vested into Her Majesty's Colonial government. This remained so until 1962-Independence constitution, which vested land in the kingdoms and District Land Boards.
This briefly establishes the background for conflict over natural resources, between individuals, between communities, between government and communities and government and individuals.

Another phenomenon was the restriction of acquisition of land by foreigners non-Africans. It seems the British seeking support of Buganda to fight Bunyoro had to assure the Baganda that their land was not under threat from white settlers. The British too realised the strong cultural attachment of the Baganda to their land, hence they opted to colonise Uganda as a protectorate and not a colony like Kenya. Because of this, Uganda had no white settlers and therefore no large displacement of people from the land. The Asians too were restricted by this policy from acquiring large trunks of land.

The result was that the communities with money remained in urban areas and little capital was invested in large-scale agriculture. Production of food and cash crops was left almost solely in the hands of small-scale peasant farmers except in the tea plantations in Toro, Mityana and the sugar cane plantations mostly in Busoga. This restriction still largely persists. Then there was the policy of government direct exploitation of natural resources. All forests, minerals, water bodies, wildlife, wetlands and other natural resources remain in the hands of the state. The state has forcefully excluded human settlement or even presence in these restricted areas such as national parts, or forest reserves.

In many instances people were evicted from these areas, where they had lived for centuries. This policy allowed government to issue permits or concessions to anyone else to exploit the natural resources. These included– forest permits, hunting permits, trapping of crocodiles etc. This was done without any policy requiring the exploitation to be sustainable. This again was and remains a source of conflict. Another source of conflict was the Ankole, Masaka Singo Ranching Schemes, American sponsored ranching project in which a few wealthy individuals were given five or more square miles of commercial land which had with the help of US donor funds, had fully developed infrastructure and were fully stocked with exotic cattle breeds.

THE EARLY CONFLICTS 1890 - 1962

The earliest conflicts were Bunyoro's resistance to colonial rule, The Buganda religious wars notably the battle of Mengo, The discontent of *Bibanja* holders in early 1900 –

1920, later the *Bataka* movement and the agitation for independence of the 1940 and 1950s, The Lango land riots of 1950's and the Buganda crisis of 1953 – 1955.

At the time of independence, the ground was already very fertile for conflict. Although this has always manifested itself as political conflict, in actual sense it has always been a conflict over resources.

THE LATER CONFLICTS: 1962 – 1985

The major conflicts over land natural resources during this time were briefly the following;

- The continuation of the issue of lost counties – culminating into the controversial referendum that saw their counties returned to Bunyoro. Kabaka of Buganda, President of Uganda refusing to sign the transfer into law of the decision of the referendum paving way for the 1966 political and constitutional rights crisis.
- The 1967 Constitution confiscating land belonging to the Kabaka and the Royal family
- The 1969 Nakivubo pronouncements of the "move to the left" and nationalisation of major foreign concerns.
- The 1972 Economic war of President Idi Amin and the expropriation of properties belonging to all Asians and Europeans.
- The 1975 nationalisation of land under the Land Reform Decree and the scrapping of security of tenure of *Bibanja* holders, abolition of mailo and freehold tenure
- The 1978 annexation of the Kagera sarient by Uganda Armed Forces under Idi Amin sparking off the 1979 liberation war, which ousted Idi Amin from power.
- 1979 looting of major towns and confiscation of property belonging to Muslims, Nubians and others thought to have been close to Idi Amin's regime, including land, farms etc..
- 1983 expulsion of people of Rwandese origin from Mbarara District, confiscating their land by the Uganda People's Congress functionaries.
- 1984 Creation of Lake Mburo National Park and expulsion of pastoralists from the park and confiscating land and cattle, belonging to mainly Hima pastoralists.

- 1985 expulsion of none Baganda from Bugerere and other areas on account of their support for Obote government.

THE RECENT CONFLICTS: 1986 – 2003

The conflicts in this period relate mostly to reclaiming property lost in the earlier periods under Obote I and Obote II and also new conflicts emerging between communities and foreign investors and between government and communities over protected areas.

- Massive re-possession of properties lost by Asian and non-African Ugandan citizens during the 1972 Exodus.
- The return of the People of Rwandese origin who had been expelled from western Uganda.
- The re-gazzeting of Lake Mburo National Park with reduced boundaries.
- The eviction of large populations from gazetted protected areas of Mabira forest, Kibale forest, Bwindi.
- Degazetting Namave forest reserve.
- The restructuring of Ankole Masaka Ranching scheme also ranches in Kabale, Singo and Ssembabule.
- Escalation of Karamajong cattle raids into Teso,Katakwi,Pallisa and Sebei.
- Butamira forest reserve conflict.
- Kibale-Bakiga settlers conflict with Banyoro.
- The developments in and around wetlands in Kampala.
- The Teso wetlands conflict.
- The conflicts over fishing zones in Lake Victoria.

As already indicated above, these conflicts almost always manifest themselves as political or social conflicts. The methods and means of resolving them have largely remained social-political. I think this has been a mistake.

EXISTING METHODS OF CONFLICT RESOLUTION

Constitutional law

Administrative law

Public law
Land law
The law of tort
Customary law
Law of trusts.

The above still remain the laws available for resolution of natural resources-based conflicts. They are grossly inadequate in doing so. They are specifically made and tailored to resolve conflict arising out of ownership of private individual property, whether such property is movable or immovable in dealing with individual rights freedoms, duties and obligations. For example under Constitutional law the rights were to individuals and they alone could enforce them. The notion of collection rights is only a recent innovation enshrined in Article 50 of the 1995 Constitution the interpretation an approach of which is still debatable – *Rwanyarare –vs- Attorney General*. See judgment of Manyindo DCJ
Greenwatch –vs- Golf Course Holdings Ltd, HCCS 834 /2000.
Byabazaire –vs- Mukwano, HCCS 466 of 2000..
Attorney General vs Tinyefuza, C.A. No. 1/97 (SC)

In administrative law the issue of *locus standi* is central in determining cause of action, whether in tort, or contract sec Auto *Garage and others Vs. Motokov 1971 E.A. 514*. Customary law, which would otherwise have been better place to resolve some of these conflicts, has always been limited in application by judicature statutes past and present.

There is no available and legal avenue for peaceful resolution of conflict between communities between groups of individuals and individuals and between government and countries over natural resources. This seems to stem from the law, which does not recognize group, community or tribal ownership of land and other natural resources.

The principles of environmental law submitted it is here offer by far the best alternative method of dispute resolution. They address issues and give answers which are not provided for or available in other branches of the law.

ENVIRONMENTAL LAW AND RESOLUTION OF CONFLICTS

THE PRINCIPLE OF SUSTAINABLE DEVELOPMENT

There is no doubt that conflict escalates with scarcity of food and or resources. There is therefore less likelihood of conflict where there is plenty.

As noted earlier, natural resources are not inexhaustible, not even in vast resources such as high seas. Increased population has inevitably led to increased scramble for less and less resources, even in areas which previously had abundant resources.

The notion of Sustainable development requires that resources are used in a manner that is equitable and sustainable. That they are managed in such a way as to meet the needs of the present and the future generations.

The National objectives and Directive principals of state policy set out in the 1995 Constitution in regard to environment, state,

> " xxvii *(i) the state shall promote sustainable Development and public awareness of the need to manage land, air, water resources in a balanced manner for the present and future generations.*
>
> *(ii) The utilization of Natural Resources of Uganda shall be managed in such a way to meet the development and environmental needs of the present and future generations of Ugandans and in particular the state shall take all possible measures to prevent or minimize damage and destruction to land, air and water resources resulting from population pressures and other causes."*

The above principles are not contained in the body of the Constitution and are therefore not enforceable as such leaving it to government or whoever is in authority to take a subjective decision as to how they are to be applied.

The same principles are repeated even in more detailed in S. 3 (2) of NEA. Whereas, Art. 39 of the Constitution recognizes a right to a clean and healthy environment, and s. 4(1) of the NEA does the same, the authority to ensure that the above principles are observed is vested in NEMA under S. 3(1) of the NEA. And whereas the duty to maintain and enhance the environment is imposed upon every person, under S. 4(2) of the NEA the specific right to enforce compliance is only expressly given to NEMA and the local Environment court under S. 4(4) of the NEA, debatable as this may be.

It is submitted that whereas the constitution and the law recognizes the fundamental importance for sustainable development, both fail to set the necessary legal mechanism to ensure it. The people themselves should have been given express authority to ensure the observance of the principle of sustainable development both under the constitution. In this way, they would have been provided with a peaceful avenue, for instance courts of law, within which to have conflicts relating to natural resources resolved. Leaving the resolution in the hands of the Executive escalates conflicts because decision making by the Executive is more influenced by politics than reason. Examples of these include: Butamira Forest Reserve conflict, Kibaale settlers conflict, developments in Kampala's wetlands and others mentioned earlier.

INTERGENERATIONAL AND INTRA-GENERATIONAL EQUITY:

This is a principle in environmental law that ensures sustainable development. In simple terms, intra-generational equity requires that exploitation of natural resources must be such that, it meets the requirements of the user and others. In other words, resources may not be depleted by one group to the detriment of others. That the resources must be used sparingly if they are exhaustible or must be replenished if possible.

Inter- generational Equity requires that the present generations exploit or use natural resources in a way that will enable the next /future generations to use the same resources. "See the preamble to the Constitution of Uganda (1995).

See also MSc 3 of 2002, Arising from Constitution Petition No. 7 of 2002, Attorney *General versus Dr. James Rwanyarare & 9 others.*

No provision again is made in the law to enforce the above. The rules of *locus standi* seen to be too limiting at present to allow it. The people as individuals, families, communities or as ethnic groups remain with no option but to scramble and exploit as much as they can now and keep the rest for their own future generations. This is a complete reversal of the above stated principles which the Constitution sets out to promote. Examples of these conflicts are:

- Over fishing in Lake Victoria;
- Depletion of forest cover
- Landslides in Mbale and Sebei
- Draining of wetlands.

THE DOCTRINE OF PUBLIC TRUST:

This is basically that the state or such other authority holds in trust natural resources for all the people. It is a recognition of the fact that natural resources are not owned by individuals, but yet are used by each individual directly or indirectly. Air, light, warmth, wind, energy, the sea, even rivers and forests cannot be owned by individuals. And even in cases of resources which are capable of being owned by individuals /privately it is not desirable to allow such ownership because of greater public interest.

This principle is set out in Art. 237(b) which provides:

> *" the government or a local government as determined by Parliament by law shall hold in trust for the people and protect natural lakes, rivers, wetlands, forest reserves, game reserves, national parks and any land to be reserved for ecological and touristic purposes of the common good of all citizens."*

This provision is re-enacted in S. 45 of the Land Act. However, either because of the colonial history where the state was a predatory and survived on plunder of natural resources, the government to date still finds it difficult to act as a trustee for its people. It still looks at natural resources as a source of income and wealth and therefore has been unable to fulfill its role as a trustee.

This has increased conflict between the people and the state. When the government wants to remove or stop people from using or exploiting natural resources, it applies the doctrine as was the case in evictions from Mabira, Kibaale forest reserve, Mountain Elgon but discards the doctrine when it wants to exploit the resources it self. Such was the case of degazetting Namanve, Butamira and Bugala Forest reserve.

It is submitted that this trusteeship should be vested in other representatives of the people such as traditional / cultural leaders. It is submitted that the past conflicts in Uganda which mostly related to land would have been averted if all land in Buganda was for example vested in Kabaka. This is again illustrated by examples of Butamira Forest Reserve conflict.

THE PRINCIPLE OF PUBLIC PARTICIPATION

This is an important principle in environmental law that the public must participate in decision making at all levels. Again, we have to look at our colonial past and see that the colonial state that would never by its nature allow the participation of the people in decision making. They were simply subjects, not only were they considered unknowledgeable, but the policies of the colonial state were in almost all cases against the interest of the colonized people and as such they could not be involved in decision making. This colonial legacy has continued. To this date, government still finds it difficult to fully involve people in decision making.

It is submitted that the majority of conflicts especially those involving natural resources would be solved simply by encouraging public participation in decision making. For

example the Proposed Hydro power Station at Bujagali, Kibaale, Namanve, Ankole-Masaka ranch restructuring scheme, fishing on Lake Victoria, and land tenure systems.

Even when the government consults the people or allows their participation, it takes decisions that are in conflict with their views and aspirations. This escalates conflicts even more.

Public participation must not be a mere formality but must be for the purpose of incorporating the views of the people in decision making. This it is submitted, would resolve many unnecessary conflicts.

ACCESS TO INFORMATION

This is another major principle of environmental law that information regarding management and use of natural resources ought to be freely accessible. If this is not so, it would be futile to apply all the other principles enumerated above. Public participation in decision making would be a mockery without access to information.

Many conflicts arise and have arisen because of mis-information or inadequate information or complete lack of information. Bujagali Hydro electric power project is the case in point. See the case of **Greenwatch vs UEDCL and the Attorney General and Zachary Olum vs Attorney General.**

THE PRECAUTIONARY PRINCIPLE

This principle requires that decisions regarding use and management of natural resources must not be taken in haste. That decisions must only be made after all the necessary information has been received and evaluated and if found wanting, precaution must be exercised. (See S. 72 of the NES) and the case of the water hyacinth and Bujagali Hydro power project.

Decisions hastily made are not only detrimental to the environment but also encourage conflict. E.g. Butamira case and degazetting of Lake Mburo. On the other hand, decisions made after applying this principle are a sure way of resolving conflict.

ACCESS TO JUSTICE

This is by far the most important principle in conflict resolution, that an avenue must always be available for peaceful resolution of conflicts. People resort to violence and other means because the law provides no recourse for them to resolve their conflicts.

The laws that are in place are specifically made to resolve conflicts over private property or public property in a sense that it is owned by government, as would a private individual. But the conflicts that involve natural resources in Uganda are such that no legal avenue is provided for their resolution. There is no legal avenue to resolve the dispute between the Bakiga and the Banyoro in Kibaale or between the Karamajong and the Iteso or even between the government of Uganda and Baganda over land. Expanding the traditional rules of standing would go a very long way in resolving these conflicts.

See TEAN Vs. BATU and Attorney General, see also Mtikila Vs Attorney General

There are other impediments to access to justice such as prohibitive legal costs, lack of information and simply the fear of confronting the state. These barriers to justice promote conflict as the parties seek to resolve the issues through other means, usually political violence.

If all the above principles were to be applied as envisaged, if they were to be complied with as required, if they were to be given the necessary effect as desired, it is submitted that environmental law would be the most appropriate method of resolving conflicts and in turn enhancing sustainable development.