Rethinking law to reach a collective consensus-based approach

Niel Lubbe
Premise of this paper

- Environmental legislation is technical in nature and reaction to new challenges should revert back to the basics
  – (Verschuuren and Oudenaarden 2004)
The idealistic AU legal environment

- Idealistic symbiotic relationship between different levels
  - In accordance with the distinction made by Dworkin:
The realistic AU legal environment

• Factors
  – Unequal distribution of capacities/resources etc
  – Differential priorities
  – High regard for sovereignty

• Result?
  – Legal instruments too vague because of political compromise
  – Legal instruments containing binding provisions not in force
AU law

- **African Charter**
  - Article 24 - right to a satisfactory environment
  - No transfrontier provisions

- **Treaty of the AEC**
  - General environmental provision for harmonisation
  - No transfrontier provisions
  - Establishes RECs (SADC)

- **African Convention of Nature and Natural Resources (1968)**
  - Sustainable development
  - Article 2 – higher responsibility on states with high levels of endemism
  - No provisions for transfrontier conservation
  - Convention has no COP nor secretariat
• **Revised African Convention (2003)**
  - Transfrontier provisions (establish interstate commissions)
    • Water
    • Wetlands
    • Waste
  - Procedural rights
    • Participation, access to information
  - COP and Secretariat
  - Provisions for dispute settlement
  - Only 8 ratifications since 2003 (needs 15 to enter into force)
Key elements needed for transfrontier governance

• **What is governance?**
  – *the interactions among structures, processes and traditions that determine how power and responsibilities are exercised, how decisions are taken, and how citizens or other stakeholders have their say* (IOG 2003)

• **We need:**
  – Collective/common concern
  – **Consensus**
  – Cooperation
Rethinking AU law making

- Understanding the changing legal environment
  - Modern vs post modern law
    - Governance vs government
- Understanding disparities between member states
  - Sovereignty
  - Developmental goals
  - Poverty
- Understanding the common concerns
  - Dependence on environment for survival
  - Understanding connectivity
Facilitating collective consensus in the AU

• **Collective consensus is the key to adoption**
  – Evident from the AU legal framework

• **Adoption alone not enough**
  – Create effective laws to harmonise national approaches

• **How do we do this?**
  – The basics
The importance of supra national principles

• A normative framework should form the basis for new challenges
  
  Working out the principles of a legal system to which one is committed involves an attempt to give it coherence in terms of a set of general norms which express justifying and explanatory values of the system
  
  (McCormick 1979)

• Principles are flexible and open ended
  – Easier to reach consensus
  – Creates room to recognise disparities

• Steering mechanisms
  – May steer new legal development

• Sets the parameters for harmonisation

• Well suited to the notion of governance
Current governance result...
Conclusion

- Current legal frameworks do not facilitate collective consensus-based approaches
- The basics are missing for new challenges
- Ad hoc solutions to new challenges lacks a normative basis
- No benchmarks for harmonisation