Rethinking law to reach a collective consensus-based approach

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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
• **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

Diagram:

- Ideals
- Principles
- Rules
  - Harmonisation
The importance of supra national principles

• A normative framework should form the basis for new challenges
  
  \textit{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