Rethinking law to reach a collective consensus-based approach

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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:

  - Ideals
  - Principles
  - Rules

  Harmonisation
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

Diagram:
- Ideals
- Principles
- Rules
- Harmonisation
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