Colloquium on Integrating Environmental Law Training in Judiciaries in Africa

Venue: Indaba Hotel & Conference Centre, Fourways

Johannesburg, South Africa, 25-27 January 2017

KEY CONTENT OF JUDICIARY ENVIRONMENTAL TRAINING MANUALS

B. STEPHEN TIROYAKGOSI

PANELLIST

KEY CONTENT OF JUDICIARY ENVIRONMENTAL TRAINING MANUALS

International Environmental Law is an exciting area of law to teach. It is a dynamic field that allows professors and students to engage in discussions of current issues and solutions, many of which will affect people globally. In the process it also becomes necessary for courts and other institutions to appreciate the development of environmental law. Is actually quite interstng that even in areas of corporate governance environmental reporting has become a key component as envisaged under the King III Report on Corporate Governance.

Global environmental problems are real and urgent. Increasingly, it is necessary to look at environmental issues and the possible ways in which to curtail the problems and adapt to the effects of the changing environment. These global environmental problems ranging from climate change to pollution to overfishing to deforestation affect people on a global scale, and addressing these problems will require creative actions from a variety of disciplines, including law.

In my view three fundemantal concepts need to go into the manual. These are:

1. Understanding what one may call the “grundnorm” of environmental law, namely the Declaration of the United Nations Conference on the Human Environment
2. Understanding the obligation to control and manage any behaviour or conduct that one is in control of and the use of the property in an environmentally sensitive manner- application of the sic utere tuo principle..
3. Understanding the expansivie nature of the concept of locus standi in judicio in relation to environmental cases.

The **Declaration of the United Nations Conference on the Human Environment**, or **Stockholm Declaration**, was adopted June 16, 1972 by the United Nations Conference on the Human Environment at the 21st plenary meeting as the first document in international environmental law to recognize the right to a healthy environment. In the declaration, the nations agreed to accept responsibility for any environmental effects caused by their action.

The reason why this is important is that most Constitutions do not per se recognise the right to a healthy environment in clear and unequivocal terms, hence the likelihood is that a court confronted with a claim of a right to a healthy environment will not easily recognise that as a right, let alone a constitutional right.

It is thus important in my view that any teaching of the concepts of environmental law must deal with this Declaration in detail.

Understanding the key message as well as the Principls set out in the Decalaration is essential for both environmental law practitioners and courts seized with environmental matters, whether civil or criminal in nature.

On the sic utere tuo principle, the courts have to mindful of the fact that the principle is essentially an extension of the dealing with the clash of interests and rights and that in either instance the claim of right of use of one's property against the right of another party's to a healthy environment.

the problem can be more severer in the case of transboundary harm in particular and

When the International Law Commission (ILC) "adopted a series of *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities*",[18] a fundamental problem was in defining nations as states, which was the result of applying the existing U.S. model of inter-state environmental laws to an international conflict. The Draft Articles contained a collection of provisions that focused on six points:[18]

- prevention of transboundary harm,
- cooperation to prevent significant harm and reduce risk,

- the exercise of regulatory control by states of activities on their territory through prior authorizations,
- environmental impact assessment,
- notification, and
- consultation

In this regard the old case, The **Trail Smelter dispute** a trans-boundary pollution case involving the federal governments of both Canada and the United States, eventually contributed to establishing the No Harm and the polluter pays principles in the environmental law of transboundary pollution.

One of the key concepts that need to be incorporated in the teaching of environmental law is the concept of locus standi in judicio. This concept has been aptly described in the old English Case. One may say why teach such a simple legal concept. A quick scan of most legislation that seek to establish locus standi, would be cast in the following terms; “any person aggrieved by anything done in contravention of this Act… “ the question is always who is “any person” , is it any busy body, does such a statement open the flood gates for meddlesome interloppers to flood the courts with petty and non-substantial causes?

In law, **standing** or ***locus standi*** is the term for the ability of a party to demonstrate to the court sufficient connection to and harm from the law or action challenged to support that party's participation in the case. Standing exists from one of three causes:

The party is directly subject to an adverse effect by the statute or action in question, and the harm suffered will continue unless the court grants relief in the form of damages or a finding that the law either does not apply to the party or that the law is void or can be nullified. This is called the "something to lose" doctrine, in which the party has standing because they directly will be harmed by the conditions for which they are asking the court for relief.

The party is not directly harmed by the conditions by which they are petitioning the court for relief but asks for it because the harm involved has some reasonable relation to their situation, and the continued existence of the harm may affect others who might not be able to ask a court for relief.

Under some environmental laws in the United States, a party may sue someone causing pollution to certain waterways without a federal permit, even if the party suing is not harmed by the pollution being generated. The law allows them to receive attorney's fees if they substantially prevail in the action. This demonstrates the expansive and liberal application of the concept.

Australian courts have had a very liberal interpretation of the concept as well as dealing with the question of “opening the flood gates to meddlesome interlopers and busy bodies. Australia has a Common law understanding of *locus standi* or standing which is expressed in statutes such as the Administrative Decisions (Judicial Review) Act 1977 and common law decisions of the High Court of Australia especially the case *Australian Conservation Foundation v Commonwealth* (1980).[12] At common law, the test for standing is whether the plaintiff has a 'special interest in the subject matter of the action'.[13] Under the Administrative Decisions (Judicial Review) Act 1977 to have standing the applicant must be ‘a person who is aggrieved’, defined as ‘a person whose interests are adversely affected’ by the decision or conduct complained of. This has generally been interpreted in accordance with the common law test.[

There is no open standing unless statute allows itor represents needs of a specified class of people. The issue is one of remoteness.

Standing may apply to class of aggrieved people, where essentially the closeness of the plaintiff to the subject matter is the test. Furthermore, a plaintiff must show that he or she has been specially affected in comparison with the public at large.

Also, while there is no open standing per se, prerogative writs like certiorari, Australian courts also recognise amicus curiae (friend of the court), and the various Attorneys Generals have a presumed standing in administrative law cases.