

**IMPROVING ENVIRONMENTAL PROCEDURAL RIGHTS
IN UGANDA**

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I. Introduction:

It is now an indisputable fact in modern environment discourse that the promotion of environmental protection and sustainable development is fundamentally enhanced through the adoption of strategies and practices that secure citizen's rights to access information, public participation and access to justice.

The link between participation and effective protection of the environment has long been recognised. Indeed, the first major United Nations Conference on the Human Environment recognised that “*Man has a fundamental right to freedom, equality, and adequate standards of life, in an environment of quality that permits a life of dignity and well being and he bears the solemn responsibility to protect and improve the environment for the present and future generations.....¹” The recognition that the right to an adequate standard of life in an environment of quality that permits a life of dignity is the responsibility of man laid the foundation for collective action and therefore participation in environmental protection and management.*

Twenty years later in 1992, the United Nations in its Conference on Environment and Development held in Rio de Janeiro reaffirmed² the Declaration of the United Nations Conference on the Human Environment, adopted at Stockholm on 16th July, 1972. It asserted that it did seek to build on the Stockholm declaration with the goal of establishing a new and equitable global partnership through the creation of new levels of co-operation among states, key sectors of societies and the people³.

The period between and after these two major UN Conferences has seen a growing recognition and elevation of environmental procedural rights. The best example of the elevation of access to information, public participation and access to justice is the Aarhus Convention⁴ which grants the public rights and imposes on party states and public authorities obligations regarding access to information and public participation. It backs up these rights with access to justice provisions that go some way into providing the community with an opportunity to enforce the right to access to information and public participation.⁵

It is important to note that up until the advent of the Aarhus convention, Access to Environmental Information, public participation and Access to Justice were not always recognised as rights. Indeed earlier environmental treaties did not generally contain formal obligations for public participation.⁶ In latter years, especially after the Stockholm

¹ Principle 1 of the Stockholm Declaration adopted by the United Nations Conference on the Human Environment, on the 16th June, 1972 in Stockholm, Sweden

² See Preamble to the Rio Declaration on Environment and Development , June, 1992, Rio de Janeiro, Brazil

³ Preamble to the Rio Declaration op.cit

⁴ UNECE Convention on Access to Information, public Participation and Access to Justice in Environmental Matters, adopted at Aarhus, Denmark on the 25th June 1998, entered into force Oct. 30, 2001. The convention is commonly referred to as the Aarhus convention

⁵ See Articles 4 to 9 of the Aarhus Convention

⁶ The Harvard Environmental Law Review vol 21 1997, no.2 p.537

and Rio Declarations, most international environmental instruments imposed positive obligations on states to take measures to improve public education and awareness on environmental matters.⁷ These commitments were characterised by positive obligations they placed upon states to act in a particular manner, rather than by creating rights or entitlements for legal and natural persons.⁸ However, the adoption⁹ of the Aarhus Convention with an option for non-ECE countries to accede to the Convention means that an irreversible trend with global implications has been set for securing environmental procedural rights. Indeed, the Secretary-General of the United Nations Mr. Kofi A. Annan has noted that;

*“ Although regional in scope, the significance of the Aarhus Convention is global. It is by far the most impressive elaboration of principle 10 of the Rio Declaration, which stresses the need for citizen participation in environmental issues and for access to information on the environment.... Further more, the convention will be open to accession by non ECE countries giving it the potential to serve as a global framework strengthening citizens environmental rights ”*¹⁰

As the world prepares for the World Summit on Sustainable Development due later this year in South Africa to assess how far states have gone in fulfilling their commitments ten years after the Rio summit, Environmental Procedural Rights continue to be at the centre stage of the discourse on Sustainable development.

However, environmental procedural rights are not only important because states have made international commitments for their implementation. As the text of principle 10 of the Rio declaration and other international instruments show, the application of environmental procedural rights is national. Accordingly, it is in the interest of states even independent of international commitments to enact laws that implement environmental procedural rights in order to achieve sustainable development.

Therefore, what this article sets out to do is to analyse the extent to which Uganda has progressed in promoting and securing Environmental Procedural Rights for its citizens. It will assess the environmental procedural regime in the country and propose recommendations for its improvement. As is appropriately noted in the guide to the Aarhus Convention,¹¹ environmental procedural rights cover matters so enmeshed in varying social and legal systems and traditions, which makes their implementation a huge challenge. The fact that different countries have different political systems and are at different levels in terms of their capacity to implement environmental procedural rights

⁷ e.g the 1987 Montreal Protocol on Substances that deplete the Ozone Layer, which calls upon parties to co-operate in promoting public awareness of the environmental effects of emissions of controlled substances and other substances that deplete the ozone layer; 1992 Climate change convention Article 4(I)(I); Biodiversity Convention Article 13.

⁸ Sustainable development and good Governance p.185

⁹ The 55 member states of the UNECE include the nations of the West, central and eastern Europe, the newly Independent States of the former Soviet Union, Israel, Canada, and the United States

¹⁰ Foreword to the Aarhus Convention

¹¹ Introduction to the Aarhus Convention, in: The Aarhus Convention: An implementation Guide UNECE/UN Publication 2000

means that the successful implementation of environmental procedural rights in any country will depend to a great extent on not only public pressure from advocacy organisations and the political will of that country but also on the resources both human and financial at disposal.

Nevertheless, it is the contention of this paper that regardless of the challenges faced by different countries at any one particular time, it is important for states to recognise and implement environmental procedural rights in order to achieve sustainable development. The focus on Uganda and case studies from other countries in this paper will show the extent to which the recognition and implementation of environmental procedural rights plays a vital role in achieving environmental protection and sustainable development.

The paper will consist of four parts. Part one will examine the concept of Environmental Procedural Rights. Part two will investigate the global context within which these rights have emerged and how they have been provided for in international and regional Instruments. This will be followed by select case studies to elucidate how environmental procedural rights have been implemented especially in the European Union, which by far has the most advanced system on access to information, public participation and access to justice. The above framework will lay the foundation for an analysis of the Policy and Legal Framework for Environmental Protection in Uganda and the extent to which Procedural rights have been promoted and implemented. The final section of the study will consist of recommendations for improving Uganda's Environmental Procedural Rights regime.

II. The concept of environmental procedural rights

Environmental Procedural rights as preferred in this paper basically refer to the three rights of Access to Information, public participation and Access to Justice. These three rights provide for practical and realistic ways to promote environmental protection and to achieve sustainable development. In so doing, procedural rights establish the linkage between practical, easily understandable rights, such as those relating to information and decision making, and the harder to grasp complex rights included in the right to a healthy environment.¹² Accordingly, procedural rights strengthen the linkage between the development of one set of human rights, in particular those relating to the basic conditions of life, including the environment, and another set of human rights, those relating to human self fulfilment and expression.

Environmental procedural rights rest on the view that environmental protection and sustainable development cannot be left to governments alone but require and benefit from notions of civic participation in public affairs already reflected in existing civil and political rights.¹³

¹² The Economic Commission for Europe: The Aarhus convention; an implementation Guide. P.29.

¹³ Birnie and Boyle P. 261. Indeed, the concept of environmental procedural rights has been said by some scholars to have its origins on much the same basis as the theoretical basis for international human rights in the period after the Second World War. In that period, the United Nations in particular embraced the concept of Human rights. The United Nations Organisations Charter committed all member states to Universal respect for and the observance of Human rights and fundamental freedoms to fulfil in good faith

It is important to note that as observed by Birnie and Boyle,¹⁴ the argument for environmental procedural rights should not be confused with eco – anarchist theories, nor with policies of radical political decentralisation. It merely assumes that governments which operate with openness, accountability, and civic participation are likely to promote environmental justice, to balance the needs of present and future generations in the protection of the environment, to integrate environment considerations in governmental decisions, and to implement and enforce existing environmental standards than are closed, totalitarian societies governed in a rigid centralised fashion.¹⁵

Therefore, environmental procedural rights are generally a rethinking of the process of implementing and enforcing environmental governance norms.

1. The Right to Access to Information

“Information is power and a people who mean to be their own governors must arm themselves with the power that knowledge gives”

James Madison

The right to access to information is considered first in time among the procedural rights because effective public participation in decision making depends on full, accurate, up to date information.¹⁶ Accordingly, access to information is considered to be at the heart of sound environmental protection and sustainable development. It enables citizens to obtain information about the state of the environment and human health, factors affecting or potentially affecting the environment such pollution, proposed projects that could impact on the environment, laws, policies and international agreements potentially affecting the environment as well as learning about threats to the environment and how to respond to them.¹⁷ Access to information therefore, enables citizens to participate meaningfully in decisions that directly affect their livelihood thus promoting accountability and transparency in environmental decision making.

the obligations assumed by them in accordance with the Charter and to take joint and separate action in co-operation with the UN for the achievement of Universal respect and observance of Human Rights. On the 10th December 1948, the United Nations General Assembly signed the Universal Declaration of Human Rights, declaring that every one is entitled to all the rights set forth in this declaration, without distinction of any kind, such as ...national origin,,,and no distinction shall be made on the basis of the country or territory to which a person belongs. (For a detailed discussion on this, see Environmental and Planning Law Journal Vol. 13. August 1996)

¹⁴ Patricia Birnie and Alan Boyle : International Law and the Environment 2nd Edition 2002 Pg. 261

¹⁵ Birnie and Boyle note that empirically, this is difficult to demonstrate save by reference to countries with a disastrous environmental record such as the former soviet union where the environmental cost of totalitarianism appear to have been a significant factor in the countries democratic in the countries democratic revolution. However; they further note that the same point can equally be made of non totalitarian states, in so far as affected groups such as indigenous peoples are excluded from participation in decision making.

¹⁶ Economic Commission for Europe: The Aarhus Convention; An Implementation Guide

¹⁷ Carl Bruch: Regional Opportunities for Improving Environmental Governance through Access to Information, Public Participation and Access to Justice. April 2000

However, the right to access to information does not mean that a citizen may obtain unlimited access to all information¹⁸. The government is generally permitted to withhold carefully circumscribed types of information in order to protect individual privacy, recognised trade secrets and particularly sensitive national security information.¹⁹

The right to access to information is directed at two situations. The first deals with the public's right to seek information from public authorities and the obligation of the public authorities to provide that information. The second covers the right of the public to receive information and the mandate on the public authority to collect and disseminate that information without any specific request. The former right of access to information is often referred to as passive while the latter active.²⁰

It is important to note that access to information is not an end in itself; in order for environmental information to be meaningful, it must be accurate, affordable, accessible, timely, comprehensive and available across state boundaries. In addition, the information must be user-friendly and the mechanisms set in place to access that information must not impose financial or administrative obstacles that would frustrate the public's ability to obtain environmental information.²¹

2. The Right to Public Participation

“Democratic strength is not merely a function of electoral process. A true Democracy must additionally feature transparent and participatory decision making and a government that is in constant dialog with its citizens to shape and direct its fundamental policies. It is pluralistic decision making that is at the heart of democracy, and there must exist a public space within which citizens learn from and debate each other, and where the government is informed about the public will”.

Ramon Daubon²²

The right to public participation has gained importance in recent years. This importance is grounded in recognition of the fact that better decision making will flow from involving the public in development processes. It has now been generally agreed that environmental problems cannot be solved and sustainable development achieved by solely relying on some technocratic bureaucratic monopoly of decision

¹⁸ Tulane Law Review

¹⁹ Popovic, N., The right to participate in decisions that affect the Environment (1993) 10 Pace Environmental Law Review. 683, 695

²⁰ The Aarhus Convention, An implementation guide Ibid.

²¹ Popovic Ibid

²² Presentation to opening Plenary, Montevideo Conference on Public Participation in Sustainable Decision Making (August 1996)

making.²³ An institutional arena of public discourse and civic participation is essential to arrive at the desired outcome of environmental protection and sustainable development.²⁴

Public Participation in decision-making is important because it allows the public to express their views on key government policies and laws concerning the environmental conditions in their communities. This in turn enables government to pass policies and enact laws that are relevant to communities and take into account their needs. Participation enables the participating communities to hold public authorities accountable for implementation thus improving efficiency, and credibility to government processes.

Public participation should be understood to include the full range of options that engage and integrate the public into the process of making or implementing a policy choice. Participation includes processes by which citizens can engage in public deliberation effectively and with technical competence. This can be enabled through education and training as well as through access to information. Representative institutions are also important in ensuring participation. This means that states should be able to provide representation for the public at both local and national level in order for them to influence policy dialogue and provide oversight to the policy formulation and implementation process. Additionally, public participation should include mechanisms by which the public can communicate with government and with each other in order to effectively participate in developing and implementing sustainable development policies. This can include public hearings, notice and consultation rule making, access to information, citizen advisory boards, citizen ombudsmen, judicial review mechanisms and even the right to organise and operate NGOs in a responsible and accountable manner.²⁵

3. The Right to Access to Justice

“The Quality of Mercy is not strained. It blesses he that gives and he that takes”

William Shakespeare

The right to access to Justice and environmental protection have been separate fields for the majority of their existence. However, in the past decade, the interconnection between the right to access to justice and environmental protection has been increasingly recognised.²⁶

²³ J. Baden and R. Stroup (eds) have discussed the failings of such approaches in great detail in the “ The Environmental costs of Bureaucratic convenience (University of Michigan Press, Ann Arbor, 1981.

²⁴ The Politics, T.A Sinclair trans.(Penguin, Harmondsworth, 1981 pp.197-198) Contemporary writers have championed the importance of public participation. See generally, Benhabib, Models of Public space: Hannah Arendt, the Liberal Tradition, and Jurgen Habermas in C.Caloun (ed) Habermas and the public Sphere (MIT Press, Cambridge, 1992, pp.73-98)

²⁵ Eric Dannemaier: Democracy in Development: Toward a Legal Framework for the Americas. In Tulane Environmental Law Journal Vol. 11, Winter 1997, Issue 1 at Pg. 13 and 14.

²⁶ Tam Hunt and Kerin Lunde: Access to Justice and Environmental Protection: International and Domestic Perspectives. The Journal of Environment and Development Vol.7 No. 4 Dec. 1998

Access to justice as a procedural right is concerned with that area of the law that deals with the enjoyment of legal claims. It sets out the form of action a claimant may invoke in order to enforce his or her legal rights. Procedures define the regime of rights and duties of value to those that invoke them. They provide for the right for a particular procedure and the obligations to facilitate it.²⁷

At an elementary level, public participation will have little meaning if citizens lack the right to seek legal redress through effective access to justice. Access to justice serves as a mechanism for civil society to challenge government actors who fail to follow the rules that govern how the public should be consulted, thus enforcing access to information and public participation. Access to justice is also in some cases a way for citizens to challenge other private parties or businesses that have failed to comply with the laws, such as public health and environmental laws, that assure that development will be sustainable.²⁸ Therefore, access to justice enables citizens to assist government in the enforcement of laws and in ensuring respect for environmental rights.²⁹

Access to justice also includes advocacy and association rights for example freedom of Assembly which protects the right of the people to come together to advocate their interests through public interest and community based organisations.³⁰

III. The Global Context within which Procedural Rights Have Emerged:

1. The International Level:

The context within which procedural rights have emerged at the International level can be located in the commitments that governments have made over the years relating to access to information, public participation, and access to justice. By advocating democracy and governance, these commitments generally advanced³¹, and set the foundation on which the corollary environmental Procedural Rights are based.

1.1 The Stockholm Declaration on the Human Environment

The watershed event in International Environmental Law to which the development of environmental Procedural Rights can be traced is the Stockholm Conference on the

²⁷ Okoth Ogendo. Through the Interstices of Procedure: A paper presented at the East African Workshop on Environmental Procedural Rights No. 2001, Entebbe, Uganda

²⁸ Eric Dnnenmaier Op.cit at 31

²⁹ Carl Bruch: Regional Opportunities for Improving Environmental Governance through Access to Information, Public Participation and Access to Justice. April 2000

³⁰ Adam Babich, Citizen Suits: *The Teeth in public Participation*, 25 *ELR* 101418 (March 1995) at 10429

³¹ The first of these Instruments in which procedural rights can be traced is the Universal Declaration on Human Rights. It has succinct provisions on access to information, public participation and access to justice The International Covenant on Civil and Political Rights reaffirmed the commitments made by states under the Universal Declaration of Human Rights and provides for access to information, public participation and access to justice in equal measures. See Carl E: Bruch and Roman Czebiniak: