

CHAPTER ONE

1.1 Background to the study

The substantive ends of environmental law are for guiding human conduct to consider consciously and to act to maintain the natural systems of the biosphere that sustains human life¹⁰. Accordingly, the ultimate concerns of environmental law can be said to be twofold: to provide a regulatory framework for those human activities which may undermine the vital natural assets that support normal economic and social life; and to provide appropriate legal theory to explain and guide the path of the law in environmental management¹¹.

Human beings today live in a major economic and social crisis, which generally originates from atmospheric pollution, depletion or destruction of biological resources, contamination of water and soil and noise pollution. As a result of this, current generations are damaging the natural resources base that supports their own welfare and begrudging the future generation the benefit of the natural resources from which to make a good life for themselves.¹²

The gravity of this crisis brings into question the legal and administrative arrangements which exist and which provide for the management of the environment and the extent to which they provide for public participation in environmental decision making on such crucial matters that have very

¹⁰ Robinson.N, *Comparative Environmental Law: Evaluating how legal systems address sustainable development* (Presentation for the Elizabeth Haub Colloquium, Wiesbaden Germany, April 1997).

¹¹ Ojwang J.B, "The Constitutional basis for Environmental Management" in Calestous Juma and J.B Ojwang (eds), *In Land we Trust: Environment, Private Property and Constitutional Change* (1996) 39.

¹² Ibid.

significant and far reaching consequences for the very survival of the human race.

Environmental legislation is among the most pervasive elements of cross-sectoral importance in environmental management for sustainable development. The environment touches upon most sectors of development related activity, for instance water management, soil protection, agriculture development, livestock management, mineral activity, transport, energy generation and distribution, industrial development, forestry, fisheries, wildlife utilisation, tourism, management of human settlements and other activities.

In addition to having an important contribution in each of these individual sectors and in their interrelationships and integration, the development and implementation of sound and effective environmental laws may involve interaction with legislation and administrative practices and institutions beyond individual sectors. Thus a sound and implementable legislative and institutional regime at the national level, which is country specific, is indispensable for effective management for sustainable development. This is particularly important to ensure that the network of national environmental legislation and related institutions are substantively adequate and implementable and also that the implementing agency/agencies have the capacity in terms of human and material resources to carry out their functions effectively¹³. The complexity of environmental problems for any given country require that a well-designed

¹³ Kaniaru D. and Karukulasiriya L, "Capacity Building in Environmental Law", in Sun Lin and Karukulasiriya L (eds), *UNEP's New Way Forward: Environmental Law and Sustainable Development*, 171-184.

scheme of environmental management, with clear policy, law, implementation and policing machinery should be in place.¹⁴

Environmental management strategies are expected to establish a precedent for effective cross-sectoral coordination that includes the participation of all stakeholders. The strength of an environmental management system should be considered from at least four perspectives:¹⁵ the quality or strength of interdepartmental cooperation; the consequence of institutional objects; the political commitment of leaders; and the *leaders' capacity to effectively link up and communicate with grassroots groups through acceptable participation methodologies.*

The formulation and implementation of environmental management laws and policies is normally within the context of overall national development. However, the existing institutional machinery is often inadequate especially with regard to laws and regulations enabling public participation in environmental decision making. The shortcomings normally stem from conflicts between traditional and new management systems especially with respect to underlying values and responsibilities; institutional jealousies between departments and agencies that implement environmental projects; and a general lack of management skills needed to interact effectively with other

¹⁴ Environmental management as understood in this thesis means measures taken to balance natural resources. The measures may be of two kinds: one aspect may be to ensure balanced utilisation so as to prevent over-exploitation or to restore those that have been utilised to strenuous levels. The other aspect may be measures taken to prevent the introduction of any substances of energy, which might immediately or in the long run cause deleterious consequences to the natural resources. This second aspect is also known as pollution control. This second aspect can also be expanded to include more than just pollution and encompass all the deleterious effects by products of human intervention such as soil leaching due to imperfect agricultural practices, plant and animal poisoning through toxic substances etc. Environmental management refers to both quantitative and qualitative strengths of natural resources.

¹⁵ Calestous Juma and J.B Ojwang, Above n 11.

ministries, departments, NGOs, the private sector and the general public on cross-sectoral issues.¹⁶

Accordingly, what this study sets out to do is to examine the legal and institutional framework within which the right to public participation in environmental decision making and natural resources management is implemented. In particular, the thesis will examine the participation of indigenous peoples in the conservation and management of protected areas to illustrate the importance and complexity of implementing public participation in environmental decision making and natural resources management. The study is a comparative one examining the participation of indigenous peoples in environmental decision making in Australia, which is a leading environmental management jurisdiction with several years experience in the participation of indigenous peoples in environmental management, and in Uganda, which is in the process of developing its public participation mechanisms in environmental management especially as they relate to indigenous peoples.

1.2 Justification for the study

The reason for focusing on public participation in this thesis stems from the recognition that, while public participation in environmental decision making and natural resources management may seem to be such an obvious priority for democracies as an essential feature of good governance and for achieving sustainable development that it hardly needs any more discussion, there is still continuing criticism about governments everywhere not doing enough to

¹⁶ Ibid.

promote and enhance the right to public participation.¹⁷ Accordingly, the call for enhancing and promoting public participation has continued to dominate a great deal of the discussion on environmental decision making and natural resources management. Indeed, most of the international environmental agreements and conventions that have been adopted and passed by the international community in the past decade have at least some sort of provision for public participation in the decision making process.¹⁸ Promoting partnerships for development and public participation were the buzz words for the World Summit on Sustainable Development and these have since continued to dominate international environmental discourse in almost all areas ranging from biodiversity conservation to climate change.

The problem is not that consultation and public participation never happen, they do. These efforts, however, are too often focused on very few issues and tend to ignore or exclude the more substantive environmental issues that the public would like to engage in more actively. The consultation also tends to be mere 'window dressing', meant to simply legitimise certain public processes and often times, exclude the more marginalised communities like indigenous peoples.

¹⁷ The Access Initiative findings indicate that most countries scored highly on providing citizens with access to information, rated lower at providing opportunities to participate in decisions that affect the environment and lagged on the provisions of access to justice. Access Initiative is a global coalition of 25 civil society organisations that in 2001-2002 measured the public's ability to participate in decisions about the environment. The Access Initiative focused on laws and public experiences in nine countries: Hungary, Chile, India, Indonesia, Mexico, South Africa, Thailand, Uganda and the United States of America.

¹⁸ The best example of this is the Aarhus Convention. There are also other initiatives at international and regional level recognising the right to public participation within the Americas under the NAAEC, within Asia under ASEM and within Africa under the East African Community.

Therefore, given the high priority attached to promoting public participation at both international and national levels in the ongoing discourse on environmental decision making and natural resources management, what this thesis has set out to do is establish the extent to which public participation is being implemented; whether it has any meaningful benefits for the participating public; is it mere rhetoric; and what the real challenges and opportunities are for implementing public participation in environmental decision making. The study will also examine whether, and in what ways, the public itself (in this case the indigenous peoples) are using the right to participate to influence environmental decision making.

In particular, the thesis will examine the legal and institutional framework within which public participation is implemented, and determine whether this framework actually allows for the realisation of the public's right to participate in environmental decision making in Australia and Uganda.

The right to public participation does not exist in a vacuum, but is firmly located in a long history of democratic theory, and has emerged through a long, and deliberate process within the international legal framework to take its present position of prominence in environmental discourse. Thus the thesis includes a discussion on the democratic theory within which the right to public participation is located, and the international framework within which it has emerged.

The study will not limit itself, however, to a *theoretical* analysis of the legal and institutional framework for the implementation of the right to public

participation or the democratic theory and international framework within which it has emerged. It will use a study on the participation of indigenous peoples in the conservation and management of protected areas in both Australia and Uganda to illustrate in the most practical and vivid way, the realities of what actually happens at the national and community level in the implementation of the right to public participation.

The two studies on indigenous peoples are important as they allow for a thorough examination of participation rights beyond the usual theoretical context within which they are often presented.. The focus on indigenous peoples in the conservation and management of protected areas is also intended to demonstrate, in the most poignant way, the practical realities and complexities of the implementation of the right to public participation for an often ignored and marginalised section of the public. It is therefore intended to give some 'ground truthing' to the often largely theorised discussion on public participation in environmental decision making.

The focus on the participation of indigenous peoples in the conservation and management of protected areas is based on the fact that the plight of indigenous peoples has, for the past 11 years, been examined through the *Working Group on Indigenous Peoples* at the United Nations and the *UN Permanent Forum on Indigenous Issues*. Both discussion forums have highlighted, as one of their key concerns, the right of indigenous peoples to own, use, develop and control lands, territories and resources that they possess or have acquired by reason of traditional ownership or other traditional occupation or use. The forums have been calling on the member states of the

United Nations to engage more with indigenous peoples in environmental decision making and natural resources management.

Indeed, the greater part of advocacy work for indigenous peoples both at the international and national level has also focused on reclaiming their ancestral lands as first peoples and being given an opportunity to participate in their conservation and management and to share in the benefits therefrom. The discussion in relation to benefit sharing has also encompassed the protection and recognition of indigenous knowledge.

Therefore, it was deemed appropriate that the study should focus on the participation of indigenous peoples in the conservation and management of protected areas, an issue of great relevance and ongoing importance for indigenous peoples at the international and local level. The *Declaration on Indigenous Peoples* that was passed on the 29th June 2006 by the Human Rights Council of the United Nations clearly demonstrates that the issues of participation in environmental decision making and natural resources management and the recognition of indigenous land rights, most of which are covered by protected areas, are still a high priority for indigenous peoples.

1.3 Significance of the study

The significance of the study will be in providing a comparative analysis of the legal and policy framework between Australia, a developed country with an internationally recognised track record in the participation of indigenous peoples in environmental decision making and natural resources management, and Uganda, a developing country, which is attempting to implement

environmental management legislation that includes the participation of the community including indigenous peoples.

The Australian comparison is not only meant to provide lessons and examples on the participation of indigenous peoples in environmental decision making and management but also to contribute to the body of knowledge in this area which is very scarce both academically and at the practical policy level. As has been aptly noted by Professor Nicholas Robinson:

“Environmental law evaluated across nations through the techniques of comparative law is at once a foundation for sustainable development in terms of Agenda 21 and serves as an indicator of the success or failure of a nation’s measures to attain and maintain sustainable development. The systematic analysis of environmental law in this area is in its infancy, and much more attention has been devoted to international environmental law”¹⁹

Professor Nicholas Robinson goes on to observe that “*the comparative analysis of environmental law can contribute much to an understanding of how law can further sustainable development*”. He further notes that “*in every country, there is a substantial body of legal experiences suited to comparative legal study of how different nations are addressing the comparable environmental or developmental issues*”.²⁰

¹⁹ Robinson Nicholas, above n 10.

²⁰ Ibid.

Therefore, this study will contribute to the growing body of information and knowledge on comparative environmental law across jurisdictions and in different political and ecological contexts. It will cover the importance of public participation as a process and value related to the social, economic and cultural rights of indigenous peoples in protected areas.

1.4 Rationale for the methodology

The decision to conduct a comparative study in this thesis is predicated on the realisation that the complexity of the modern state has given rise to administrative systems that share much in common. The administrative state in the realm of environmental protection is such that environmental ministers meet at ministerial level in all regions and globally through the United Nations system. The same sort of permits, financial incentives, norms and standards, monitoring and baseline data analysis, environmental impact assessment and compliance and enforcement are used by the administrators in many jurisdictions. Administration of environmental protection has tended to use similar means, not surprisingly since similar scientific guidance and similar technological problems or innovations provide the foundation for these means. In addition, the globalisation of the economy through rapid transmission of news, the internet, travel between continents and increased volume of trade between regions has also facilitated collaboration worldwide by environmental protection movements. When citizens from different jurisdictions all over the world ask for public hearings, planning procedures, environmental education,

publication of environmental data or enforcement of environmental laws, they are pressing forward with very comparable priorities.²¹

It is therefore very appropriate that, given the serendipitous outcomes of the globalised world, this study will undertake a comparative examination of the legal and institutional approaches to recognising and implementing the participation rights of indigenous peoples in the conservation and management of protected areas in Australia and Uganda. The comparison between Australia and Uganda is further aided by the fact that both countries are common law jurisdictions.

1.5 Methodology for the study

The basic methodology that has been used to conduct this study is library research. An in-depth examination of various textbooks, journals and articles related to the subject of this study as well as relevant pieces of legislation and cases in both Australia and Uganda has been undertaken. In addition, the internet has been used as a supplementary study tool.

It was judged impracticable to employ quantitative methods for a study that covers two jurisdictions so set apart physically and which involves a huge range of issues and potential informants. The interview and questionnaire methods as instruments of data collection also have their limitations in relation to the nature of the study. Moreover, as noted in the background, the environment touches upon most sectors of development and it was impracticable to attempt to conduct interviews and issue questionnaires for all

²¹ Ibid.

such sectors directly and indirectly related to the environment in both Australia and Uganda.

Accordingly, the thesis draws upon legal and institutional information in the public domain and focuses on the key legal framework processes to compare their effect on indigenous peoples' participation in the conservation and management of protected areas.

1.6 Synopsis of the study

Chapter one will consist of a general overview of the study highlighting its background, significance, justification and methodology.

Chapter two will provide the context for the study. It will examine the nature, importance, relationship and inter-linkages of the right to public participation in environmental decision making and natural resources management. The thesis will also examine the rationale for the rise in the importance of the right to public participation in environmental decision making and natural resources management. The chapter will conclude with an examination of the theories of democracy and the role of public participation.

Chapter three will examine the international and regional context within which the right to public participation has emerged.

Chapter four will set the context for the case studies in chapter five and six on the participation of indigenous peoples in the conservation and management of protected areas in Australia and Uganda. Accordingly, the chapter will

commence with an exposition of the concept of indigenous peoples in its varying complexities and intricacies. The chapter will then proceed to examine the eclectic history of protected areas which will include a discussion of the classic and new paradigms and categories for protected area management. A discussion of the rationale underlying the emergence of the new paradigms follows. The chapter concludes with a detailed discussion of the international framework for the participation of indigenous peoples in the conservation and management of protected areas.

Chapter five will provide the first case study on the participation of indigenous peoples in the conservation and management of protected areas by examining the participation of Aboriginal people in the conservation and management of world heritage listed Purnululu National Park in Western Australia. Thus the chapter commences with an overview of the legal and institutional framework for the participation of indigenous peoples in environmental decision making and management at the national level (Commonwealth level) in Australia. The chapter covers a detailed analysis of the implementation mechanisms for the participation of indigenous peoples in environmental decision making and management in the conservation and management of Purnululu National Park in Western Australia. Participation strategies used by indigenous peoples in the conservation and management of protected areas will be highlighted.

Chapter six comprises the second case study on the participation of indigenous peoples in environmental decision making by examining the participation of the Batwa in the conservation and management of the world heritage listed Bwindi Impenetrable Game Park in western Uganda. It will start by examining

the general legal and institutional framework for public participation in environmental decision making and natural resources management at the national level in Uganda. Like the Australian case study, this chapter will focus on the participation of indigenous peoples (the Batwa) in the conservation and management of protected areas. It covers a detailed analysis of the implementation mechanisms for the participation of the Batwa in environmental decision making and in the conservation and management of Bwindi Impenetrable Game Park in Uganda.. The chapter will conclude with an examination of the lessons learnt from the Batwa case study.

The participation of indigenous peoples in the conservation and management of protected areas will be used to critique the right to public participation in environmental decision making and management in both Australia and Uganda. Chapter seven draws on the case studies to carry out a comparative analysis between Australia and Uganda on the participation of indigenous peoples in the conservation and management of protected areas. The comparative analysis will focus on the legal, institutional and implementation mechanisms for the participation of indigenous peoples in the conservation and management of protected areas. The analysis will also include an examination of the extent to which Australia and Uganda have implemented their international obligations with regard to the participation of indigenous peoples in the conservation and management of protected areas.

Chapter eight of the thesis will provide a summary and conclusion on the right to public participation in environmental decision making.

CHAPTER TWO

LINKING THE RIGHT TO PUBLIC PARTICIPATION WITH ENVIRONMENTAL DECISION MAKING AND NATURAL RESOURCES MANAGEMENT

2.1 The right to public participation

The right to public participation has evolved as part of a group of democratic rights that are regarded as fundamental for safeguarding the environment.

Ramon Dauobon has observed that:

“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 dialogue 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.”²²

The right to public participation is a political process in the public sphere in which all citizens have an equal right to take part in and determine the decision making process at all levels. It has developed as part of a group of fundamental rights that guaranteed political participation and has been extended to encompass participation in social and economic decision making. The

21. Opening remarks by Ramon Dauobon at the opening Plenary, Montevideo Conference on Public Participation in Sustainable Decision Making (August 1996).

extension to cover social and economic participation in decision making arose out of the realisation that people cannot realise their economic and social rights if they cannot exercise their right to participation in decision making around these issues. Accordingly, while economic and social rights are seen as positive freedoms as they enable citizens to realise their political and civil rights, participation as a right can be seen as a positive freedom, which enables citizens to realise their social rights.²³ The right to public participation is thus a right to claim other rights.²⁴ Public participation represents an expression of human agency in the political arena which broadly enables the public to act as its own agent. Human agency is central to the conceptualisation of individual members of the public as autonomous purposive actors capable of choice in which individual actions and choices constitute a process of self-development oriented towards their personal plans and needs. Human agency in relation to public participation is therefore not just about the capacity to choose and act but is also about a conscious capacity that is important to the individual's self-identity.²⁵

According to Gaventa and Valderama,²⁶ participation viewed in terms of human agency therefore provides the direct way in which the public influence and exercise control in governance. The rise of the good governance agenda and the recasting of public participation as a right facilitating individual human agency has led to the growing recognition of the importance of the public

²³ See Generally; Ferguson 1999; DFID 2000; Viet 1998; Lister 1997.

²⁴ IDS Policy Briefing Issue, *The Rise of Rights: Rights Based Approaches to International Development*, (17 May 2003) 2.

²⁵ Lister R, *Citizenship: Feminist Perspectives* (1997) 38.

²⁶ Gaventa J. and Valderama C, *Participation, Citizenship and Local Governance*, Background Paper for workshop on 'Strengthening Participation in Local Governance', Mimeo (Institute of Development Studies, Brighton 21-24 June 1998) 5 www.ids.ac.uk/particip.

voice. Thus, public participation, as a right, is about the direct ways in which the public influence and exercise control in governance. This, in practical terms, means the direct intervention of the public in activities and accountability of the state and other responsible institutions.²⁷ It is not surprising therefore that the right to public participation has gained importance in recent years because there has been a recognition of the fact that better decision making usually flows from involving the public directly in the development process.

Accordingly, it is now generally agreed that environmental problems cannot be solved and effective natural resources management achieved by solely relying on some technocratic bureaucratic monopoly of decision making.²⁸ An institutional arena of public discourse and civic participation is essential to arrive at the desired outcome of environmental decision making and natural resources management.²⁹

It is also 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 public participation.

²⁷ For a detailed discussion see; Goetz and Gaventa 2001; Barnes 1999, Cornwall 2000; Blair 2000, Newell 1999.

²⁸ 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).

²⁹ T.A Sinclair, *The Politics*, (Penguin, Harmondsworth, 1981) 197-198. Several 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) *The Public Sphere* (MIT Press, Cambridge, 1992) 73-98.

2.2 Public participation, environmental decision making and natural resources management

The link between participation, environmental decision making and natural resources management 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 wellbeing and he bears the solemn responsibility to protect and improve the environment for the present and future generations....³⁰”

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 natural resources management.

Twenty years later in 1992, the United Nations in its Conference on Environment and Development held in Rio de Janeiro, reaffirmed³¹ the *Declaration of the United Nations Conference on the Human Environment*, adopted at Stockholm on 16th July, 1972. It sought to build on the Stockholm Declaration with the goal of establishing a new and equitable global

³⁰ Principle 1 of the Stockholm Declaration adopted by the United Nations Conference on the Human Environment, on the 16th June, 1972 in Stockholm, Sweden.

³¹ See Preamble to the Report of the United Nations Conference on Environment and Development, (Rio Declaration on Environment and Development), June 1992, Rio de Janeiro, Brazil.

partnership through the creation of new levels of cooperation among states, key sectors of society and the people³².

The period between and after these two major UN Conferences has seen a growing recognition and importance given to public participation in environmental decision making and natural resources management. The best example of the elevation of public participation is the *Aarhus Convention*³³, which grants the public rights and imposes on party states and public authorities obligations regarding public participation. It backs up these rights with access to justice and information provisions that go some way towards providing the community with an opportunity to enforce the right to public participation.³⁴

It is important to note that, up until the advent of the *Aarhus Convention*, public participation was not always recognised as a right. Indeed earlier environmental treaties did not generally contain formal obligations for public participation.³⁵ In latter years, especially after the Stockholm and Rio Declarations, most international environmental instruments imposed positive obligations on states to take measures to improve public education and awareness on environmental matters.³⁶ These commitments were characterised by positive obligations placed upon states to act in a particular manner, rather

³² Ibid.

³³ 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.

³⁴ Ibid Articles 4 to 9.

³⁵ See (1997) 21 (2) *The Harvard Environmental Law Review*, 537.

³⁶ 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* Article 4(I)(I); *Biodiversity Convention* Article 13.

than by creating rights or entitlements for legal and natural persons. However, the adoption³⁷ of the *Aarhus Convention* with an option for countries that were not members of the United Nations Economic Commission for Europe (UNECE) to accede to the Convention, means that an irreversible trend with global implications has been set for securing the right to public participation. Indeed, the Secretary General of the United Nations, Mr Kofi 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.... Furthermore; the Convention will be open to accession by non-UNECE countries giving it the potential to serve as a global framework strengthening citizen’s environmental rights”³⁸

It is therefore clear that the right to public participation as enshrined in the Aarhus Convention has a far reaching impact in terms of international standard setting in this area in addition to the opportunity it offers non-UNECE members to accede to it.

It is also important to note that the right to public participation, as examined in this thesis, is considered within the broader context of environmental procedural rights which also include the corollary rights of the right to access

³⁷ 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.

³⁸ See, above n 33, foreword to the Aarhus Convention.

to information and the right to access to justice. Together, the three rights of access to information, public participation and access to justice provide for realistic and practical elements that are necessary to achieve sustainable development. In so doing, they establish 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.

The right to public participation viewed from the general perspective of environmental procedural rights rests on the view that environmental protection and sustainable development cannot be left to governments alone but require and benefit from civil participation in public affairs already reflected in existing civil and political rights.

It is important to note, as observed by Birnie and Boyle, that the argument for environmental procedural rights should not be confused with eco-anarchist theories, nor with policies of radical political decentralisation. Rather, it is based on the belief that governments which operate with openness, accountability, and civic participation are more likely to promote environmental justice, to balance the needs of the present and future generation in the protection of the environment, to integrate environmental considerations in government decisions, and to implement and enhance existing environmental standards than are closed, totalitarian societies governed in a rigid centralised fashion.³⁹

³⁹ Birnie and Boyle: *International Law and Environment* 2nd Edition, 2002, p.261

The right to access to information within the context of environmental procedural rights is important because effective public participation in environmental decision making depends on full, accurate, up to date information. This is fundamental to the realisation of the right to public participation because it enables citizens to obtain the information that they need and respond to it. In order to effectively complement the right to public participation, access to information must be meaningful, 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 could frustrate the public's ability to obtain environmental information for effective participation in environmental decision making.⁴⁰

At an elementary level, the right to 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 the public to challenge government actors who fail to follow the rules that govern how the public should be consulted, thus, enforcing the right to public participation. Access to justice is also a way for the public to assure development will be sustainable by challenging other private parties or businesses that have failed to comply with environmental laws

Within the broader context of environmental governance, the link between public participation, environmental decision making and natural resources

⁴⁰ Popovic, N., "The Right to Participate in Decisions that affect the Environment" *Pace Environmental Law Review* Vol. 10 pp.683,695 (1993)

management is located within the general governance norms of good governance which include accessibility, predictability, transparency in decision making and accountability, all of which are crucial components for effective environmental decision making and natural resources management and call for the active participation of all stakeholders.

2.3 The value of public participation in environmental decision making and natural resources management

The rise in importance of public participation in environmental decision making and natural resources management has not occurred in a vacuum. It has happened as a result of the many dimensions and values that public participation is presumed to add to the process of environmental decision making and natural resources management. This section of the thesis examines some of the reasons for the rise in importance in public participation in environmental decision making and natural resources management. These reasons are:

1. Upholding the supremacy of the people

Public participation in environmental decision making is premised on the idea that the pursuit of the public interest should not be the exclusive preserve of a professional bureaucracy.⁴¹ One of the most important values of public participation is to bring the voice of the ordinary people to bear upon the decision making process. Public participation in environmental decision making and natural resources management is important because it upholds the centrality of the primary users of natural resources. Whatever the ultimate

⁴¹ Joseph Sax, *The People, Environment and Bureaucracy*, 19, 1971.

purpose of an environmental or natural resources or sustainable development process, it is important to ensure that the needs and wishes of the people are allowed to underpin the key decisions and actions relating to the process. Public participation is not about including people as and when it suits the bureaucrats and policy makers, it is about putting people at the centre stage of planning and management throughout the development process. Real life experiences show that communities that have the right to manage their own resources and are given a stake in the outcome of their conservation efforts can be very successful at managing ecosystems. They see and understand the tangible benefits in complying with the natural resource management plan and are more likely to make the plan work. India provides many examples of communities that have adopted self-imposed restrictions on how to effectively and efficiently manage natural resources. For example, the people in the village of Bhaonta-Kolyala and other villages in the Arvari River basin in the Indian state of Rajasthan are regulating natural resource management as a parliament because they understand just how essential the forests are for water, fuel and fodder. They try to manage the area using ecological rather than administrative boundaries because they view development, land use, cultural and other processes as interconnected.⁴²

2. Controlling conflict and enhancing consensus building

Conflict in natural resources management and environmental decision making is inevitable. That conflict arises because of plural values (among which there may be conflict), multiple parties (whose desires can not all simultaneously be

⁴² Kothari A, "Conserving Nature with Communities: Lessons From Real Life Experiences in Southern Asia" (A paper presented at the 2nd World Conservation Congress of IUCN, Amman Jordan, 3-11 October 2000) 5, 9.

met), and limits to the natural world (which sets the bounds to what is feasible).⁴³

The only ways in which conflict could be eliminated would be to either; converge on a single social belief and policy goal toward nature, consumption, population and sustainability, or; find an infinite amount of natural resources so that nothing in nature is limiting. Since neither of these is possible there is a need to find a different cognitive framework from which to operate. ⁴⁴

A participatory framework provides one of the most efficient choices for conflict management⁴⁵. A participatory framework provides the ability to learn to function in an environment with multiple perspectives and possibilities, and not attempt to either shirk from or acquiesce to them.⁴⁶

Improvements in the ways parties manage a conflict situation constitute progress. Therefore, conflict management can be thought of as 'making progress'. As part of improving the situation, progress can include such ideas as developing mutual gains, learning, resolving a dispute, achieving agreement, and laying a foundation for future negotiations. Progress is a way of thinking about a conflict situation that recognises that conflicts are inevitable and ongoing, and that the competent management of those conflicts comes from continual improvements in areas of substance, procedure and relationships.

⁴³ See T. Bruce Lauber and Barbara A. Knuth, *Citizen Participation in Natural Resource Management: A Synthesis of HDRU Research*, Human Dimensions Research Unit, Department of Natural Resources, Cornell University (2000).

⁴⁴ Ibid.

⁴⁵ Management can be defined as the generation and implementation of tangible improvements in a conflict situation.

⁴⁶ Kothari. A, above n 42.

Constructive conflict management, then, involves making progress on three fundamental dimensions of a conflict situation: substantive, procedural and pertaining to relationships. These dimensions all work most appropriately in a participatory framework, which provides the arena for efficient and effective public participation in environmental decision making and natural resources management by allowing for consensus building.⁴⁷ It may also involve recognising values held by some people and groups that are so fundamental that they will not compromise.

Given that we live in an imperfect world with limited resources at our disposal, we have to be prepared for the fact that consensus among people, be it global or local in scope, international or familial, is in general difficult to attain. In a world of pervasive disagreement, there is a need to take recourse to damage control. It is important to bring to the frameworks of social interaction the realisation that collaboration is possible despite diversity and that it is possible to facilitate cooperation in the face of differing interests by various stakeholders in the natural resources and environmental decision making framework. In the setting of issues regarding social interaction, public participation can and should prove positive and constructive. In the setting of issues regarding knowledge and inquiry it can, properly configured, lay the basis for contextualistic rationalism and lead to a meeting of minds among the various stakeholders involved in natural resources management and environmental decision making.⁴⁸

⁴⁷ Ibid.

⁴⁸ Ibid.

It is also important to note that while conflicts over natural resources are overtly about substantive matters, progress on them often hinges on the quality of the relationships that exist among the conflicting parties.⁴⁹ Participatory mechanisms allow for the building and nurturing of relations that are essential for the management of conflict in natural resources management and environmental decision making. These relationships ultimately allow for the reaching of consensus in environmental decision making or a reduction in the scope of conflicts (range of issues) which will make them more manageable.

While participation may not always bring consensus, it does allow for the crafting of institutions and processes that are pragmatic and tolerant and so reduce the potential for conflict in natural resources management and environmental decision making. This need for pragmatism comes from the need to have effective and efficient policy especially in a process that requires interaction with people with differing worldviews; articulating values and goals persuasively, but not defensively; crafting solutions that represent quality public policy; and being sensitive to the impact of the decision on groups who will be negatively impacted by it, or who were advocating for an alternative outcome. Sirkka Hautajarvi, has noted that:⁵⁰

“Conflicts have always been a part of human life. Without conflicts, there is rarely any progress. It is our task to face, cope

⁴⁹ The relationship dimension includes the parties in the conflict and their history with one another. It also includes the 'intangibles' of any conflict situation, such as trust, respect, and legitimacy. The questions that may be used to help assess and build the relationship may include who are the parties, do any of them have unique status like indigenous people, what are their stated positions, interests, concerns and values, what are their incentives to participate, is trust sufficient, can it be built, what skills are needed to work together and several others.

⁵⁰ Finland's Minister of Environment speaking at a conference on conflict management and public participation in Land Management (1997) 1.

with and manage conflicts. Avoiding conflicts by covering up or hiding plans and projects generally leads to greater conflicts in the end. Not only will the economic costs be higher, but also citizens will lose faith in the decision making process, and in the decision makers themselves. Ultimately, mistrust can destroy the best conflict management.”

In agreement with these sentiments, Mike Dombeck notes further that⁵¹

“Most resource issues today are less dependent on technical matters than they are on social and economic factors. If we are to maintain the land's health, we must learn to balance local and national needs. We must learn to better work with the people who use and care about the land while serving their evolving needs. We must be catalysts in bringing people together.”

Bringing people together involves engaging people in dialogue, through participatory activities that "are made up of a balance of community interests, environmental interests, and the general public." ⁵²

Both Hautjarvi and Dombeck recognise that environmental decision making and natural resource management is as much a people-craft as a biological science. The finest grazing plan, the most elegant conservation strategy, the most profitable forestry and rural development projects all risk failure if they

⁵¹ Mike Dombeck Chief of the USDA Forest Service at a conference on conflict management and public participation in Land management (1997) 3-4.

⁵² Ibid.

are not also grounded in the body politic. Both academics and practitioners increasingly stress the importance of people working together as part of the development of sound policy. This is certainly vital in the environment and natural resource arena. For example, as agencies increasingly embrace ecosystem management as a natural resource management orientation, they must "recognise resource planning as a forum for public deliberation on the shape of a common future... planning needs to combine diverse viewpoints, ranging from perspectives of those who use natural resources to views of those whose culture is shaped by them."⁵³ People can work together and deliberate through participatory processes.

Accordingly, it is now being realised that public participation approaches may be the best and only chance to influence the direction of environmental and natural resource policy".⁵⁴ This is because, while science and technology can answer questions about what kinds of management actions are most effective in protecting and restoring ecological integrity, it cannot tell us how best to resolve conflicts between local communities and logging companies over the fate of a forest. Atmospheric science can model how quickly greenhouse gas emissions must be reduced to stabilise their build up in the atmosphere and avoid catastrophic changes in the global climate system, but it cannot tell us how responsibility for reducing emissions should be distributed. This involves the balance of ethical and moral concerns, social and economic goals and the

⁵³ Ibid.

⁵⁴ Ibid.

capacities of natural resources and therefore requires the participation of all stakeholders involved.⁵⁵

Similarly, economic analysis can provide valuable advice on questions about the most efficient methods for achieving various ecosystem management objectives, for example subsidies and taxes to encourage electricity producers to build more efficient power plants, or encourage polluting factories to reduce their emissions, but it cannot tell us how best to respond to community concerns over the sighting of those power plants and factories. It involves considering such issues as what is fair, what is the right balance and who benefits and bears what consequences, what is effective and what is efficient in the real world of competing interests. Answering and dealing with all these questions and the several others that may arise will require the participation of all the stakeholders: scientists, economists, policy makers, the community, the business community and the general public that may have an interest in general in the environmental issues being dealt with.⁵⁶

Public participation ideally provides a forum whereby the scientific and economic information and values of the public can be integrated so that the final decision is viewed as both desirable and feasible by the broadest portion of society. It can make environmental and natural resources decision making processes transparent, and allow the public to see the extent to which the decision makers have taken a hard look at issues. Imposing decisions from above in total disregard of the public interest can result in conflict and often

⁵⁵ World Resources 2002-2004: *Decisions for the Earth, Balance, Voice and Power*: World Resources Institute (2003) 14-15.

⁵⁶ Ibid 15.

with disastrous consequences. This is especially true when local communities disagree with the national governmental strategy and feel excluded from participation in its design. A South African example illustrates the importance of public participation in reducing conflict over natural resources and ensuring sustainability. When the South African authorities declared a section of South Africa's coast a protected area and barred mussel harvest without community participation in the decision making process, the harvesters began to harvest the mussel secretly at night damaging the mussel beds in the process. Similarly, throughout the 1990s local fishermen in the Galapagos Islands fought harvest regulations on spiny lobster, sea cucumber and sharks that were meant to protect the ecosystem. Frustrated by the government's management process that totally excluded public participation and angered by restrictions on access to the marine resource, the fishermen ransacked research stations, harassed tourists and killed giant tortoises.⁵⁷

3. Tapping local knowledge and skills

In addition to putting people at the centre stage of development processes and controlling conflict, public participation allows for the use and tapping of local people's knowledge and skills. Local knowledge is a useful resource that is often neglected in natural resources management processes and yet provides valuable insights on which to base effective and efficient policy and management decisions. Making use of local knowledge and skills is also important because it helps create an understanding of the environment in which the development process is to take place thus reducing the potential for conflict between the decision makers and the local communities that are the primary

⁵⁷ Ibid 96.

users of the natural resources which are the subject of a development process. Lastly, tapping the local knowledge and skills of the public helps develop and strengthen their capabilities, which is important for sustainability of any natural resources development process. For example, several Indian villages involved in joint forestry management projects with the state have resisted government proposals to create commercial forest monocultures of single tree species. They believe a monoculture will not benefit nature or provide the diverse non-timber forest products they rely on throughout the year.⁵⁸

4. Enhancing political and moral education

Coupled with tapping of local knowledge and skills, public participation can enhance the process of political and moral education. Wengert notes that public participation in environmental decision making and natural resources management is an education in responsibility and that responsibility can only be developed by wielding it. In politics, it is only by practical experience in decision making that the individual and the society at large can manage their own affairs. Managing ones own affairs is in turn held to be part of what it is to be a human being and a humane society will be one which maximises the opportunities for participating in the decisions which affect ones life. Participation stretches the individual forcing him/her to develop his latent qualities⁵⁹

⁵⁸ Ibid 11.

⁵⁹ Wengert, *Citizen Participation, Practice in Search of Theory* (1976) 16 *Natural Resources Journal* 28.

5. Empowering marginalised groups

Public participation is also important because it empowers often marginalised groups in society; women, indigenous peoples and other minority groups who are most often the primary users of environmental natural resources. Through public participation, it is possible to improve minority and gender inequalities by providing a means by which women, indigenous and other marginalised groups take part in the decision making process. This affirmative action in favour of women, indigenous and other marginalised groups can be transformative and lead to changes that allow for their voices to be heard in the decision making process thus improving efficiency and effectiveness in natural resources management and leading to continuity and sustainability of the development process. Studies have found that access to participation in environmental decision making and natural resources management is especially lacking among the poor and vulnerable for a number of reasons including a low ability to organise for political action, a reluctance to take on government officials or business interests with political clout and also a dearth of information about local natural resources and environmental problems and their effects. The poor often complain of being demeaned and express the desire for greater respect from government service people and institutions⁶⁰. Therefore, providing access to decision making for the poor and vulnerable through participatory mechanisms builds their capacity and empowers them thus making them better able to protect their natural resources and to hold government agencies and private businesses accountable.⁶¹

⁶⁰ See Above n 55, 17.

⁶¹ Providing access to decision making for the poor may in the beginning require specifically targeting them in participatory exercises such as rural needs assessments that build their capacity to participate. It may also require improving legal aid and disseminating information on legal procedures so that the poor know their rights. Promoting decentralisation that devolves

6. Promoting public ownership of processes

Related to empowering marginalised groups is the role public participation plays in encouraging the public to take ownership of the process by responding to the positive actions resulting from their participation. Public participation and ownership of any natural resources management process contributes to continual learning, which develops along with the people's abilities. The continual learning process through public participation in natural resources management process allows for flexibility and spontaneity in the management process thus ensuring continuity and efficiency.⁶²

Public participation is not a new idea; the public voice has been heard in natural resources and environmental decision making for decades. In some countries⁶³ natural resource management legislation mandates guidelines for public participation. What these practices and others have taught us over the years is the importance and value of public participation in environmental decision making and natural resources management.

real control over natural resources to rural residents can also be a powerful tool to empower the poor as well as bring government services closer to the communities. See generally, IFAD 2001:11; World Bank 2001: 9-10.

⁶² It is important to note that sometimes participation will not always lead to more active participation by marginalised groups like women as the community will choose representatives who are not necessarily women so it is important to make the participatory process deliberately inclusive in order for all the marginalised categories of people within the minority community to be included in the process.

⁶³ Such as the United States of America's the *National Environmental Policy Act* of 1969, the *National Forest Management Act* of 1975, and the *Federal Land Management and Policy Act* of 1976).

7. Enhancing accountability

Public participation plays an important role in enhancing accountability in natural resources management.⁶⁴ There are many types of accountability, but all involve the ability to sanction the decision makers or responsible parties in some way or the ability to punish or bring pressure to bear. For example, elected officials can be voted out of office at the next election if constituents are dissatisfied with their natural resources management policies or performance. Companies can be fined for exceeding pollution limits. Withholding money is also one of the most common means of holding officials or agencies accountable. Multilateral agencies such as the World Bank can also be held accountable by legislatures through their roles in appropriating funds. For example, many of the environmental policies and procedures that the World Bank adopted in the early 1990s were prompted by threats from the US congress to withhold a portion of bank funding.⁶⁵ Alternatively, courts can restrict or re-define the authority of government agencies or impose remedial actions against agencies if it finds them environmentally remiss. At a broader level, investors and consumers can use the market place to punish or reward corporations through their decisions about which companies to finance and which buyers to buy from. Indeed, reputation is now a powerful leverage point for accountability. The desire for a positive public image is now a major incentive for government and private corporations to improve their environmental practices. For example, unhappy with their growing international reputation for tolerating illegal logging in tropical rainforests,

⁶⁴ Accountability as used here refers to the way in which public and private sector decision makers are held responsible for their decisions. It also covers what recourse is available when public officials or agencies fail to fulfil their mandate to protect ecosystems.

⁶⁵ See Bowles and Komos, *Environmental Reform at the World Bank: The Role of the U.S Congress*. (1995) 35 *Virginia Journal of International Law*, 791-808.

countries such as Indonesia and Cameroon have recently made public commitments to crack down on this practice.⁶⁶

All these levels of accountability depend on the ability of the public to participate in the decision making process and to receive the information they need for this purpose. Without the participation process allowing for access to information to determine what decision was made, who was responsible and what the intended outcome of the decision was, accountability in the natural resources management process cannot be effectively and efficiently achieved.

8. Checking corruption

Closely linked with the need for accountability is the need to combat corruption in the management of natural resources. Natural resources offer a rich opportunity for corruption. Indeed, environmental crimes like illegal logging, theft of public funds, diversion of oil revenues or other illegal appropriation of public assets is a modern growth industry that is frequently facilitated by corruption. Natural resources often have high commercial value making them a prime target for plunder. Natural resources management and exploitation is often governed by complicated and lengthy laws and regulations that require special permits for exploitation and export. It is therefore common practice to find government officials accepting a bribe to favour an applicant's request for a concession, speed the approval process or grant more favourable concession terms or a higher harvest level.⁶⁷ Corruption is further exacerbated

⁶⁶ Forest Watch Indonesia (FWI) and Global Forest Watch (GFW), *The State of the Forest, Bangor Indonesia* (FWI) and Washington DC, GFW (2002).

⁶⁷ For example in Cambodia where a robust illegal logging trade flourished since the 1990s, payments to government officials in the form of bribes are estimated at 200 million dollars in

by the low risk of exposure for environmental crimes. Most natural resources exploitation takes place far from public view, in remote regions where monitoring and public scrutiny are far away. Moreover, by their nature, environmental crimes are difficult to quantify even though evidence suggests that the dimensions of natural resource corruption are large. For example, the global timber trade is plagued by high rates of illegal logging in many nations, abetted by corrupt officials. It is estimated that illegal timber comprises 80 percent of all harvested timber- some 25.5 million of a total of 30 million cubic meters in the Amazon region of Brazil.⁶⁸

It is therefore clear from the foregoing that the magnitude of corruption in natural resources management is grim, although since the early 1990s public recognition of the problem has grown. Perhaps the biggest manifestation of the magnitude of the corruption problem is exemplified in the signing of the *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*. The Convention⁶⁹ makes it a crime to bribe foreign officials and outlaws the practice of money laundering that often accompanies bribery. It also forbids the practice of deducting the cost of foreign bribes as business expenses on tax returns, a common practice in many developed countries until a few years ago.

1997 alone. That is more than 13 times the 15 million dollars in revenue that the Cambodian Government took in from legal forest operations that year.

⁶⁸ See above n 55. According to IBAMA the Brazilian Environmental Agency. It is also reported that in Indonesia, estimates of the percentage of illegal logging range from 50 to 70 percent. In the 1990s, 84 percent of Indonesian timber concession holders were not in compliance with forest laws. In Russia it is estimated that 20 percent of the timber is harvested in violation of laws.

⁶⁹ Which had as of October 2002 been ratified by 34 nations.

It has now become clear that one of the most effective ways to reduce corruption in natural resources is through greater public participation in natural resources management. Combating corruption in the natural resources sector cannot be done without the participation of all the stakeholders involved in the sector. It needs the participation of governments, which need to improve public administration and natural resources laws and regulations;⁷⁰ and it needs participation of the media, the surrounding communities that are the primary users of the resources, as well as the general public, which includes voluntary watchdog organisations like non governmental organisations.⁷¹ Therefore, public participation in environmental decision making and natural resources management plays an important role in combating corruption.

2.4 Criticisms associated with public participation in environmental decision making and natural resources management

It is important to note that, in spite of the value and benefits of public participation as described above, it is not an unalloyed good. Allowing individuals and groups to participate in environmental decision making processes comes at a financial cost. It requires more financial and human resources to reach the necessary stakeholders for an effective participatory environmental process to be fully undertaken. Attempts have been made by

⁷⁰ For example in Singapore, severe economic penalties against foreign bribes have contributed to the nation's successful clean up campaign. In 1996, prosecutors convicted a middleman for paying nearly 10 million dollars in bribes on behalf of five large international companies. The government banned these companies from bidding on government contracts for five years. It also banned any new firm the companies might set up to circumvent the penalty. See Hawley 2000:18.

⁷¹ For example, the NGO Global Forest Watch through analysis of satellite imagery, government documentation and on the ground investigations; has produced maps with overlays comparing actual changes in forest cover to the legal status of forests such as boundaries of protected areas and of legal logging concessions. The information that has been widely circulated including being posted on the internet has allowed public monitoring of illegal logging.

several scholars to highlight the high costs associated with specific participation processes. For example, Ewing reports that expenses for holding a citizen jury of 16 participants for five days costs about 20,000-40,000 Euros while expenses for holding three community advisory groups of 16 people over six months costs between 200,000-300,000 Euros in Ireland ⁷².

It is therefore often argued that, given the cost of facilitating participation, interest groups and individuals should find the funds to participate in public processes. Voluntary participation in this regard is argued to be the only legitimate form of participation. Government payment of participation fees is criticised as wasteful. In practice, however, it is difficult to imagine how non-profit organisations could resource extensive involvement without public funding. While it is acknowledged that the level of government funding is invariably modest and that further funds will be necessary from the NGOs themselves, government cannot be completely precluded from funding public participation processes.⁷³

In addition to being costly, public participation in environmental decision making is also often perceived by its critics as a time consuming, lengthy process. In this instance, for a hurried bureaucrat or company executive whose interest payments mount while a permit application is pending, the time consumed in public participation may be perceived as a delay.⁷⁴ However, the inefficiency arguments relating to time spent on long winded participation

⁷² See generally, Michael K. Ewing; *Public Participation in Environmental Decision Making*, (Sept 2003) at pg. 10 <http://www.gdrc.org/decisions/participation-edm.html>

⁷³ David Robinson, "Public Participation in Environmental Decision Making" (1993) 10 *Environmental and Planning Law Journal* 232

⁷⁴ Thomas O. MacGarity *Public Participation in Risk Regulation* (2003)[5] <http://www.pircelaw.edu/risk/vol11/spring/mgcarity.htm> at 8 August 2006.

processes normally apply when inappropriate models of participation are applied. It is therefore important that the scope and timeframe for public participation is made appropriate for each issue. Participation needs to be efficient and the level of participation must reflect the importance of each case which means that a flexible approach is more desirable as it takes into consideration the peculiarities of each environmental issue due for public participation⁷⁵.

Also, there is a need for better legislation to establish the quality of participation appropriate for each issue and particular case. Participation must be included in the regulatory framework. It is often unregulated and *ad hoc* participatory processes that cause delay.⁷⁶

To the extent that participation requires a two way exchange of information, it can be inconsistent with a regulatee's interest in protecting valuable trade secrets and financial information. This clash of interests becomes particularly acute in environmental regulation where health and safety data concerning certain chemicals are critical to effective participation by environmental groups, but can also yield undeserved commercial advantages to competitors.⁷⁷

Moreover, it is often argued by the critics of public participation that members of the public are not experts and so they can add no value to any environmental decision making processes. However, environmental decision making is not just about technical and scientific analysis. Environmental decision making is

⁷⁵ David Robinson, Above, no. 73

⁷⁶ Ibid.

⁷⁷ Thomas O'Macgarity above, no. 74

also about reflecting the values of the communities that will be affected by the decisions. Therefore, where expertise is involved, the answer may lie in appropriate education of interested members of the public rather than in erecting walls on issues of public concern for the exclusive domain of people coming within one arbitrary paradigm of expertise⁷⁸.

It is often argued that allowing individuals and groups to challenge environmental decisions as part of enforcing their right to participate forces government and private companies to expend resources to defend themselves that might otherwise be spent on pursuing their statutory and company missions.⁷⁹ For this reason, it has been stated that public participation is inappropriate in adjudicative proceedings.

Further to that, public participation is often challenged on the ground that adjudicative proceedings are deemed to be a matter of private law, and so, they should not be made subject to public participation in the form of public litigation. Those opposed to public participation in environmental decision making that involves adjudicative proceedings argue that because it is a matter of private law, public interest applicants should not have legal standing and if they are given legal standing, they should provide security for their costs and that they should generally not be given leave to challenge decisions that have already been made by government and its other administrative agencies. In order to further reinforce their opposition to public interest litigation, the critics

⁷⁸ David Robinson, above. n 73, 326.

⁷⁹ Ibid.

have also in some jurisdictions taken to bringing strategic litigation against public participation (SLAPP) suits against them⁸⁰.

However, it is important to note that there is an increasing recognition that the issue of private rights is no longer applicable as justification for barring public participation in environmental adjudication because of the public nature of the environment. This is because public participation can help serve to balance a system in which developers have undue weight in regulatory and adjudication authorities.

In addition, the overlap of judicial and administrative adjudication responsibilities and policy formulation and implementation also means that the argument of private rights cannot be valid. This is because while participation is most appropriate in deciding broad policy issues, adjudicative rights can be loaded with discretionary elements. Where there is discretion, public involvement is legitimate.⁸¹

On a more dialectical level, the critics of public participation argue that it is not practical or realistic because the theoretical values on which it is founded are flawed. Participation is based on the assumption that people actually do want participation in the decision making process and that they actually do have the capacity to participate. In addition, it is assumed that the values held by those who wish to participate in the decision making process will support environmental decisions that lead to sustainable development.

⁸⁰ See Generally G.W Pring, "SLAPPS: strategic lawsuits against public participation", (1989) 7 *Pace Environmental Law Review* 4-21.

⁸¹ David Robinson, above n 73.

In reality, this is not always the case. The two case studies from Australia and Uganda on the participation of indigenous peoples in the conservation and management of protected areas show that the people do not always have the capacity to participate in the decision making process. In addition, the Uganda case study demonstrates that, for poverty reasons, the public is not always interested in environmental issues or sustainable development and that they will be more apt to advocate for unsustainable environmental use than wise use in order to meet their most immediate basic survival needs.

Also, the development ethic in participatory theory is that citizens will achieve personal fulfilment through participation in public life and that society is improved through participation;⁸² this has been criticised by the critics of public participation as too open ended, non specific and unable to be measured. However, it has been argued in favour of participation that the difficulty in measuring results is indicative of poor measurement methods more than a problem of participation itself. In addition, while the results of participation may not be amenable to quantitative analysis, or costs and benefits measured in monetary terms, this does not mean that the developmental benefits do not take place as discussed above.⁸³

Furthermore, in relation to the participation ethic, it is assumed that governments and their agencies in functioning democracies actually want the public to participate in the decision making process because it fosters good

⁸² David Robinson, above n 73, 325

⁸³ Ibid.

governance and leads to sustainable development. However, as the critics of public participation note, this is not always the case especially in autocratic states. Accordingly, what is normally found are empty rituals of supposed public participation that have no impact whatsoever on the decision making process.

In recognising this problem and attempting to overcome it, Arnstein explains that there is a critical difference between going through the empty ritual of participation and having the real power needed to affect the outcome of the process. He states that participation without redistribution of power is an empty and frustrating process.⁸⁴

He therefore goes on to propose eight different levels of participation with each level corresponding to the degree of citizen participation. Ranging from manipulation at the lower end of the ladder to citizen control at the top of the ladder, Arnstein demonstrates that it is actually possible to have meaningful public participation but it must be within the top echelons identified within the ladder.⁸⁵ So, according to Arnstein, the problem is not that participation cannot be meaningful; it depends on how participation is implemented.⁸⁶

⁸⁴ Arnstein S., "A Ladder of Citizen Participation", (1969) *ALP Journal*, 216-223

⁸⁵ Arnstein's ladder of citizen participation is a typology of eight levels of participation that helps in the analysis of the level and effectiveness and meaningfulness of public participation. The eight types are arranged in a ladder pattern with each rung corresponding to the extent of citizen's power in determining the outcome. At the bottom of the ladder are (1) manipulation and (2) therapy which are considered levels of non participation, followed by (3) informing; (4) consultation; (5) placation which are degrees of tokenism and the (6) partnership; (7) delegated power; and (8) citizen control, at the top of the ladder which are considered the highest degrees of citizen participation.

⁸⁶ Ibid.

Accordingly, within this ladder of public participation, it is possible to have meaningful participation in cases where there is a partnership between the decision controllers and the public. In this case, there would be shared planning and decision making responsibilities through structures such as policy boards and planning committees or through other mechanisms resolving impasses.⁸⁷ It is also possible to have meaningful participation within Arnstein's ladder when negotiations between citizens and officials result in citizens achieving dominant decision making authority over a particular plan or program. At this level, the ladder has been scaled to the point where citizens hold the significant cards to assure accountability of the program to them.⁸⁸

Critics of public participation question the legitimacy of public interest groups and whether they do really represent the public good and not their own self interests. For this reason, it is proposed that there is no reason for the continued existence of these kinds of public interest groups where it cannot be clearly determined if they are representing their own self interests or those of the public. However, in spite of this criticism being labelled at public interest groups, it is clear that public interest groups continue to play an important part in promoting the right to public participation in environmental decision making and they continue to attract a large public following and support. It is therefore important to balance the views of these public interest groups in the participatory processes.

⁸⁷ It is important to note however that partnerships can only work effectively if there is an organised power base in the community to which the citizen leaders are accountable; where the citizen group has the financial resources to pay its leaders reasonable honoraria for their time consuming efforts and where the group has the resources to hire and fire its own technicians, lawyers and community organisers.

⁸⁸ Arnstein S, above n 84.

Despite the above criticisms of public participation, it is clear that there exists a sufficiently large variety of vehicles for channelling public participation in environmental decision making processes to enable the advantages of public participation to outweigh the disadvantages.⁸⁹

2.5 The rationale underlying the rise in importance of public participation: a dialectical exposition

The last few years have witnessed a quantum growth in the level and quality of discourse on public participation. Among the many reasons that can be cited for this trend are:

- the decline in traditional mediation and consensus building institutions
- the rise of the bureaucratic estate
- growth in information technology and connectivity
- complexity in production processes
- increasing democratisation of political systems around the world
- the growing acceptance of good governance norms.

Each of the above points will be discussed in turn. In addition, the rapid growth of non governmental organisations such as environmental groups and other public interest advocates has also helped thrust public participation onto the centre stage of discourse on public participation in environmental decision making and natural resources management.

⁸⁹ Thomas O'Macgarity, above n 74.

2.5.1 Decline in traditional mediation and consensus building institutions

The alienating conditions of modern bureaucracy and the consequences of mass industrialised society have been clear since the analyses of Max Weber, Emile Durkheim and Ferdinand Tönnies.⁹⁰ Mediating institutions such as the church, political parties and fraternal organisations have helped to reconcile individuals to them for decades. In this capacity, these institutions helped to sustain pluralism, develop consensus and provide social mobility. However, in the past several decades, the influence of these mediating institutions has declined significantly and this has led to erosion in the traditional source of consensus making. As a result, it is now difficult to build consensus during a period in which a multitude of critical choices must be made. In response, public participation is often viewed as an alternative means to building consensus. Whether or not public participation really facilitates consensus and if so, under what conditions, are unresolved questions. Nonetheless, public participation today serves as an experimental alternative to compensate for the decline in traditional consensus making institutions.⁹¹

2.5.2 The rise in bureaucratic institutions

In contrast to the decline in the traditional mediating institutions, there has been a corresponding rise in the bureaucratic institutions. The bureaucratic arm of government has become increasingly difficult to understand and control. In the first place, it covers an enormous range of government activities so that it is impossible to study bureaucratic decision making in all fields. In the second place, the role of the executive has changed. This arm of government

⁹⁰ Stuart Langton (ed), *Citizen Participation in America: Essays on the State of the Art* (1978) 6.

⁹¹ Stuart Langton, above 90, 6.

traditionally made implementation decisions based on directives and guidelines contained in legislation. The making of policy, which determined social choices and goals, was the province of the legislature with a popular mandate.⁹²

In practice, the separation of powers is far from complete. The expanding role of administrative discretion has led to a combination of legislative and administrative powers being exercised by a non-elective body. Administrative law has had to grapple with how these hybrid powers can be controlled, as the modern democratic systems did not intend to give open-ended power to the administrative arm of government. It has also become important for administrative agencies to justify their role in the system so that their decisions retain authority. This requires a form of accountability in decision making.⁹³

Population growth, technology and affluence have also created a complex set of problems that have placed immense regulatory and service demands upon all levels of government. In meeting these demands, an enormous growth of government bureaucracy has taken place and today, government agencies are required to make a vast array of demonstrative decisions. This has led to the assumption of tremendous discretionary power in decision making among the agencies, and as a result, the civil service has practically become the fourth estate of government.⁹⁴

The rapid rise of technological change has increased the complexity of decision making. In addition, administrative bodies claim to have expertise and skills

⁹² Donna Craig, *Citizen Participation in Environmental Policy Decisions* (LL.M Thesis, York University 1982) 155.

⁹³ Ibid 156.

⁹⁴ Ibid 7.

which are most appropriate for determining decisions.⁹⁵ Jack Lively describes the relationship between technology and the development of bureaucracies:

“Modern technology leads to the increasing division and specialisation of labour and in turn to the growth in complexity and size of organisations. The larger the scale of organisation and the more technically demanding its functions, the greater the need for clear articulation of an organisational hierarchy, precise delimitation of the tasks and power of each level, clearly established lines of responsibility upwards; in a word, the greater is the need for bureaucratic organisation.”⁹⁶

Andre Gorz⁹⁷ describes the effect of bureaucracies on public participation. He sees the institutional activities of the state through bureaucratic institutions as being associated with the destruction of civil society⁹⁸ and thus public participation. According to Gorz, bureaucratic government means that people lose the ability to make basic decisions about their needs and how to achieve them. The public no longer determine their needs, but act as consumers/clients who are entitled to services and facilities.⁹⁹ The problem with this is that there is no institutional check on democratic theory or practice for the excesses of bureaucratic governance. Accordingly, once bureaucracies have operated for a substantial period, they become self-fulfilling, leading to further alienation of

⁹⁵ Ibid 156.

⁹⁶ Ibid.

⁹⁷ Gorz, *Ecology as politics* (London: Pluto Press, 1980) 38.

⁹⁸ Ibid, 36. By civil society, Gorz means the web of social relations that individuals establish amongst themselves within the context of groups or communities whose existence does not depend on the mediation or institutional authority of the state. It includes all relations founded upon reciprocity and voluntarism, rather than on law or judicial obligation.

⁹⁹ Ibid 38.

the public. The problem becomes intractable, as there is nothing to replace it with from within society at that point. It becomes 'rule by default' rather than by design¹⁰⁰.

This decline in public participation is even more disturbing when there is little to ensure that the freedom given up by the public will get a reciprocal return when it is entrusted to bureaucratic institutions. The public is losing the opportunity of regulating their own social relations and this has an effect on interrelationships within communities and their commitment to community goals. It is therefore important that, at the community level, people are given freedom from existing constraints and bureaucracies and allowed to regain some powers of self-regulation beyond sporadic expressions. This is not to suggest that individual members of the public should take over the powers of the bureaucracy in every aspect, however, it is important that the public gains the capacity to exercise power in a democracy rather than simply adopt the consumer role.¹⁰¹

The discussion on the emergence of bureaucracies has created two important issues. First, there is an ever-present danger that administrative agencies may exceed or abuse their discretionary power. In this sense, the regulators need regulating. Although legislators have responsibility for doing this, they cannot do it in a practical manner. They have too much legislative work and the administrative bureaucracy has grown too large for them to monitor. Therefore,

¹⁰⁰ See Donna Craig, above n 92, 161. It is important to note that this phenomenon rarely occurs in its pure form because there are always dissident and diverse elements in society who refuse to give up their autonomy.

¹⁰¹ Ibid.

public participation has developed as an alternative means of monitoring government agencies.¹⁰²

Secondly, government agencies are not entirely comfortable with their discretionary power. Bureaucrats know they are paid by taxpayers and are overseen by elected officials. Therefore, they are reluctant to make unpopular and controversial decisions. Unfortunately, this is not always possible and as a result, justification and support for difficult decisions becomes a matter of critical importance to them. So, to reduce the potential of unpopular or questionable decisions, agencies frequently use public participation as a means of improving, justifying and developing support for their decisions.¹⁰³

The two points illustrate a significant polarity in the meaning of public participation in decision making. On the one hand, public participation can be a control mechanism where the public performs a monitoring or watchdog function on government bureaucracies. On the other hand, public participation can provide an assistance function regarding agency decisions.¹⁰⁴

It is clear from this historical vignette that public participation is a multifaceted phenomenon that performs many functions. It is used as a means to build consensus, to monitor administrative agencies, to assist administrative agencies in decision making and to initiate government reform. All these functions have grown in response to historical needs related to administrative bureaucracies that have become more intense in recent years. It is therefore clear that public

¹⁰² Ibid, 7.

¹⁰³ Ibid.

¹⁰⁴ Ibid.

participation will continue to grow in importance as a means of preserving and improving democratic practice in the administrative process.¹⁰⁵

2.5.3 The rise and influence of information technology

Another factor that has stimulated the growth in public participation is the rise in the influence of information technology and connectivity. Due to the communication revolution, today more information is available to more people in more ways and at more times than ever before. As a consequence, abuse of power, error or poor performance by government agencies or officials is rapidly communicated to the public in many forms. Therefore, to many officials, it seems we live in an era of 'government by fishbowl'.¹⁰⁶ There is a growing trend among governments to use the internet as a tool for providing information to the public. This trend toward 'e-government' has led to an increase in transparency of government policies and actions. For example, in the Indian state of Andhra Pradesh, online property registration has reduced the time it takes to obtain a certified copy of a registered land title from days to a few minutes and has shortened the entire process of official valuation and registration of land parcels to a few hours. Greater transparency in the process has helped discourage corruption and has increased state revenues from land registration by nearly 20%.¹⁰⁷

The communication revolution has stimulated a heightened degree of public participation by making more people aware of more problems associated with government. This has resulted in a greater degree of public action at all levels

¹⁰⁵ Ibid.

¹⁰⁶ Ibid.

¹⁰⁷ See above n 55, 35.

and a broadening of the franchise for government reform to an ever-expanding group of the public. In this sense, the use of information technology has sponsored another function of public participation – to serve as a means of government reform. Whether or not there are excesses and unanticipated consequences of this movement still remains to be seen. Whatever the case, given the dominance of information technology in our society and the ever-growing number of problems that government must address, it is doubtful that the push for government reform among the public will abate.¹⁰⁸

New technology has also enhanced the power of maps in environmental decision making and natural resources management. New mapping tools let researchers; advocacy groups and government agencies combine specific land use or pollution data with geographic data to graphically portray environmental trends and impacts. The NGO Global Forest Watch (GFW) has carried this power of imagery one step further by combining it with electronic networking of public interest groups concerned about forest loss. Through analysis of satellite imagery, government documentation and on the ground investigation, GFW produces maps with overlays comparing actual changes in forest cover to the legal status of the forest, such as boundaries of protected areas and legal logging concessions. Posting this information on the internet provides a powerful tool for reform of forest policy and practice, when, as is often the case, significant discrepancies between government claims and actual practices are revealed.¹⁰⁹

¹⁰⁸ Ibid, 8.

¹⁰⁹ Ibid, 39.

2.5.4 Growth in the complexity of modern industrial processes

Related to the explosion in information technology is the quantum growth in the complexity of modern industrial processes. It is generally assumed that modern industrial societies provide material and physical wellbeing. This is particularly reflected in the unprecedented material wealth of modern society. However, it is also now recognised that the cost of modern industrial processes has increased to the point that further expansion threatens to decrease material and physical wellbeing, as well as the environmental, social and psychological wellbeing of individuals.¹¹⁰ The consequence of the continuing expansion and multiplication of industrial processes is therefore likely to be, not continued physical and material wellbeing of society, but rather the opposite.¹¹¹ It has therefore been suggested that the solution to this problem of complex industrial processes is simplification. Only if the processes, which provide commodities and services, are brought within the scope of individual comprehension can collective control become possible and reliable. Unfortunately, the basic tendency of modern industrial societies is in the direction of increasing complexity not simplicity. As Ivan Illich has observed:

“It has become fashionable to say that where science and technology have created problems, it is only more scientific understanding and better technology that can carry us past them. The cure for bad management is more management. The cure for specialised research is more costly interdisciplinary research,

¹¹⁰ For a general discussion on this, see for example E.J. Mishan, *The Costs of Economic Growth* (Harmondsworth: Penguin 1967) 82 -143. See also Ivan Illich, *Tools for Conviviality* (New York: Harper and Row, 1973) especially chapter 2.

¹¹¹ For a detailed discussion on the probable consequences of increased industrial processes see John Brummer, *The Sheep Look Up* (New York: Harper and Row 1972).

just as the cure for polluted rivers is more costly non polluting detergents. The pooling of stores of information, the building up of a knowledge stock, the attempt to overwhelm preset problems by the production of more science is the ultimate attempt to solve a crisis by escalation.”¹¹²

But because the escalation intensifies the fundamental problem of societies whose processes are already complex beyond comprehension or overall control, it can at best temporarily and superficially deal with the apparent problems of society. And as the problems multiply, it becomes more and more obvious that solutions lie not in the addition of compensating technologies or in additional layers of interpretation and explanation, but rather in the simplification of social processes so that they fall within the scope of human comprehension and control¹¹³.

Thus, simplification is not only needed if individuals are to be enabled to participate in the decisions affecting their lives, it is also needed if their material and physical wellbeing is to be assured. The simplification required by the participatory strategy will entail a reduction of the often frivolous abundance which has been equated with material wealth in modern industrial societies. Furthermore, much of the material wellbeing of individuals in modern industrial societies can be more equitably, efficiently, reliably and simply produced and provided in a participatory manner. ¹¹⁴

¹¹² Ivan Illich, *Tools for Conviviality* (New York: Harper and Row 1973) 9.

¹¹³ See P.S Elder (ed), *The Value of Participation in Environmental Management and Public Participation*, 2.

¹¹⁴ Ibid.

It is important to note that participatory simplicity does not mean a denial of science and technology. It does not entail a return to primitive tools. As Illich explains:

”Scientific discoveries can be used in at least two opposite ways. The first leads to specialisation of functions, institutionalisation of values and centralisation of power and turns people into the accessories of bureaucracies or machines. The second enlarges the range of each person’s competence, control and initiative, limited only by other individuals’ claims to an equal range of power and freedom.”¹¹⁵

Advanced technology could thus become identified with labour sparing, work intensive, decentralised productivity. Natural and social science can be used for the creation of tools, utilities and rules available to everyone, permitting individuals and transient associations to constantly create their mutual relationships and their environment with freedom and self- expression.¹¹⁶

Therefore public participation does not deny nor threaten technological advancement as a basis for material and physical wellbeing of individuals in a modern society. Rather, it provides a means for reorganising and redirecting the application of scientific knowledge in productive processes in a way which does not place these processes beyond human comprehension and control.

¹¹⁵ Illich, above n 112, 36.

¹¹⁶ Ibid.

Indeed, far from endangering physical and material wellbeing, public participation encourages more egalitarian relationships in the production process and more equal distribution of the products, thereby ensuring that the quality of life is not merely improved, but improved equitably.¹¹⁷

2.5.5 Contradictions in capitalism

At a more dialectical level, one of the reasons that led to the rise in the discourse on public participation is the failure of capitalism to meet the expectations of the public. With the collapse of Communism and other forms of hierarchical systems of government, that had clearly failed to address environmental issues because of the inherent contradictions within the systems, it was assumed that capitalism would provide the solution to the environmental problems that have beset the planet. However, there is growing doubt among the public about the ability of corporate capitalism to meet public expectations especially with the growing degree of inequality between the haves and the have-nots. The basis for this doubt is the existence of a contradiction within capitalism, the result of which cannot be indefinitely avoided.¹¹⁸

Capitalism reproduces inequality and consumer consciousness and must do so to go on operating. But its increasing ability to produce goods and leisure has as its obverse its increasing need to spread them more widely. If people cannot buy goods, no profit can be made by reproducing them more widely. This dilemma of capitalism is much more intense now than it was in the nineteenth

¹¹⁷ Elders, above n 133, 32.

¹¹⁸ C.B. McPherson, *The Life and Times of Liberal Democracy* (1977) 105.

and early twentieth century when capitalism had the big safety valves of continental and colonial expansion. This dilemma, in conjunction with the changing public awareness of the cost/benefit ratio of the system, puts capitalism in a rather different position from the one enjoyed in Mills and Marx's day.¹¹⁹

Capitalism today is experiencing economic difficulties sometimes of near crisis proportions. Keynesian remedies successful in the early years of capitalism have now evidently failed to cope with the underlying contradictions. The most obvious symptoms of this failure is the prevalence, simultaneously, of high rates of both inflation and of unemployment in many economies around the world – two things which used to be thought alternatives. For wage earners, the erosion of the value of money earnings along with insecurity of employment is a serious matter. It has led to increased working class militancy in various forms; in some countries increased political activity and a growing strength of left wing parties; in others, increased participation in trade union and industrial activity. There is an increased participation of the working class in political and industrial action generally.¹²⁰

In addition to the increased contradictions in capitalism, more and more people are reconsidering the cost/benefit ratio of our society's worship of the expansion of gross national product (GNP). They still see the benefits of economic growth but they are now beginning to see some costs they hadn't counted on before. The most obvious of these costs are air, water and earth

¹¹⁹ Ibid, 106.

¹²⁰ Ibid.

pollution. These are costs largely in terms of quality of life. This awareness of the quality of life is a move away from being satisfied with just quantity to being able to have a quality life in a decent environment. Increasingly being noticed also is the extravagant depletion of natural resources and the likelihood of irreversible ecological damage. This awareness of the costs of economic growth has led to a public interest consciousness that is not being considered by private interests or by political elites thus compelling individual members of the public to take a more active role in public affairs.¹²¹ This is so especially as there is increasing awareness of the costs of political apathy. It is now becoming increasingly realised that non participation or low participation or participation only in routine channels allows the concentration of corporate power to dominate our neighbourhoods, jobs, security and quality of life at work and at home.¹²² All this awareness has contributed to a quantum rise in the level of discourse on public participation in environmental decision making and natural resources management.

2.5.6 Increasing democratisation of political systems around the world

In addition to the rising consciousness among the public of the cost of modern industrialisation and economic growth, increasing democratisation of political systems around the world and the growing acceptance of good governance norms have opened the door to public participation in environmental decision making in a manner never possible before. At the same time, the rapid growth of non governmental organisations such as environmental groups as well as

¹²¹ Ibid.

¹²² Ibid.

other public interest groups has enabled their greater participation in environmental decision making.¹²³

Over the last thirty years, the world has witnessed a significant trend toward democratisation – the adoption of democratic principles of governance and public participation. It is estimated that while in 1973 only 81 countries could be considered democratic, by 2003 the number had risen to 144. These numbers translate into a total population of two billion living under fully or partially democratic regimes in 1973 compared to four billion in 2003¹²⁴

The relationship between democratisation and environmental decision making is complex. The more citizens are able to know about the environment, to express their opinions, and to hold their leaders accountable for their performance, the more likely they will be able to prevent gross environmental mismanagement. For example, after 1989, the trend towards democratisation in the countries of the former Soviet Union helped bring to light severe contamination of the landscape with radioactive and other toxic substances and the exposure of unwitting citizens to extreme health risks.¹²⁵

¹²³ See above n 55, 24.

¹²⁴ Freedom House 2003: *Liberty Expansions in a Turbulent World: Thirty Years of the Survey of Freedom "Freedom in the World 2003. The Annual Survey of Political Rights and Civil Liberties.* Cited 12May2003. On line at <http://freedomhouse.org/research/freeworld/2002/wedessay2003.pdf> 2-3.

¹²⁵ See above n 55, 29. It is important to note however that partial democratisation may worsen environmental outcomes in the short term. For example, there has been an increase in the disposal of public forest land in Kenya in periods leading up to national elections as the governing party rewards supporters with land that is supposed to be held in the public trust.

2.5.7 Strengthening of global norms on good governance

Coupled with the formal changes in political systems, evolution and strengthening of global norms¹²⁶ of good governance has also emerged as a significant form of democratisation that has fuelled the rise in the discourse in public participation. In the realm of environmental governance, emerging norms include decreased tolerance for corruption, and increasing expectations for transparency and public participation in decision making. Corruption is an important driver of environmental natural resource degradation around the world. Corruption occurs when public officials abuse their regulatory authority, or appropriate public assets, land, timber, minerals or other resources for private gain. For a share of the profits, corrupt officials look the other way when corporations flout environmental protection laws or may even directly participate in the illegal appropriation of natural resources managed by the state.¹²⁷

Thus it is significant that over the last ten years, the international community has lifted the taboo on discussion of corruption and has recognised the role that the public can play in monitoring and combating corruption. The public role is being complemented by national governments. For example, the action taken by the Organisation for Economic and Cultural Development (OECD) countries in the 1997 agreement criminalised bribery by corporations in their international operations. On the other hand, the corporate community is also responding to changing norms of behaviour related to its role in promoting sustainable development. For example, 224 corporations are now participating

¹²⁶ Norms are standards or practices that may not yet be codified in formal law, but nevertheless influence the behavior of individuals, corporations or governments.

¹²⁷ See above n 54, 34.

in the global reporting initiative, an effort to standardise corporate disclosure of information about the social and environmental impacts of their operations.¹²⁸

2.5.8 Influence of civil society organisations

Finally, the increasing number and influence of civil society organisations has led to a quantum rise in public participation in environmental decision making. The number of NGOs recorded by the Union of International Associations has more than doubled since 1985 to over 47,000.¹²⁹ At the United Nations, 2,143 NGOs held consultative status in 2003¹³⁰ compared to 928 in 1992 and just 222 in 1952.¹³¹ Also, civil society organisations have been increasingly effective in demanding 'a seat at the table' in both the national and international policy arenas. The Rio Earth Summit represented a quantum leap in NGO participation in setting the agenda and influencing the negotiations of a multilateral forum. Following the Earth Summit, civil society organisations have taken their place alongside government officials and business representatives in multi-stakeholder forums such as the National Council for Sustainable Development and the World Commission on Dams.¹³²

¹²⁸ Ibid.

¹²⁹ Union of International Associations (UIA), *International Organisations by Year and Type 1909-1999. Year Book of International organisations*. On line at <http://www.unia.org/stastics/organisations/ytb299.php>; Union of International Associations *Year Book of International Organisations 2001-2002*, (New York, Sauer 2001) 1519.

¹³⁰ See *United Nations Economic Department of Economic and Social Affairs* (DESA). Economic and Social Council: Non Governmental Organisations Section: On line at <http://www.un.org/esa/coordination/ngo/ngosection.htm>.

¹³¹ Willets P(ed), *The Conscience of the World: The Influence of Non-Governmental Organisations in the U.N System* (1996) 38; See also, Willet P, *The Growth in the Number of NGOs in consultative status with the Economic and Social Council of the United Nations*. On line at: <http://www.staff.city.ac.uk/p.willets/NGOS/NGO-GRPH.HTM#data>.

¹³² See above n 55, 34.

2.6 Theories of democracy and the role of public participation

While the reasons underlying the rise in importance in the right to public participation in environmental decision making and natural resources management vary as discussed in section 2.5, the conceptual foundations on which the right to public participation is founded are as old as time and human civilisation itself.

2.6.1 The classical theory

The right to public participation is grounded in the classic principles of democratic governance. In the classic theory of democratic governance in Rome, the concept of citizenship represented the highest degree of societal and political status. This status was similar to the Greek concept of citizenship, which Aristotle described in his politics. What was most distinctive about citizenship status was that it included the conferring of such rights as holding office, jury duty and holding property. These rights accordingly conferred on the citizen the right to participate in the life of the community in which they lived. With the establishment of the *Constitution Antoniniana* under the emperor Caracalla, these rights of citizen participation were conferred on all inhabitants of the Roman Empire, thus giving birth to the concept of a universal right of citizens to participate.¹³³

What is particularly significant about the development of these rights of citizens to participate in the political life of their communities was their adoption by modern western nations exemplified by their adoption by the French and American Revolutions with their unprecedented demand for the

¹³³ Stuart Langton, above n 90, 19.

unalienable rights of liberty and equality which included the right to participate in decision making. The French Declaration of the Rights of Man asserted for example:

“Law is the expression of the general will. All citizens have a right to take part, personally or by their representative, in its formation...All citizens, being equal in its eyes, are equally eligible to all public designations, places and employment, according to their capacities, and without other distinctions than those of their virtues and talents.”¹³⁴

Following the French Revolution, the American Declaration of Independence with its emphasis on unalienable rights and the Bill of Rights also granted extraordinary and revolutionary rights of participation to the citizens. The Declaration of Independence went so far as to proclaim that it is the right of the people to alter or abolish it, and to institute a new government. ¹³⁵

The history of citizenship makes it clear that important normative dimensions have accrued to it such as the right to be active and have substantial participation, the freedom to participate or not to, an obligation to participate in limited but legally stipulated activities, and equality of individual rights under the law. What is also important in the development of the right to participate is that it stresses the person rather than the state in the participatory relationship. The right to public participation as a normative value of citizenship is broader in context and therefore more embracing because it embraces all people

¹³⁴ Ibid.

¹³⁵ Ibid 20.

included as 'the public' whether or not they possess the rights and obligations of citizenship. Public participation is also broader than its normative derivative, citizen participation, because it can include taking part in any public institution of society or the state. Therefore, public participation includes citizen participation as well as other forms of social participation.¹³⁶

The classical principles of democratic governance have, over the years, shaped the contemporary discourse on democratic governance and the right to public participation. While there is no disagreement between the classical and contemporary theorists on the core values of democratic governance, which include the normative value of the right to public participation, there is great divergence among the different democratic governance theorists over the degree to which the values of democracy are compatible with the right to public participation and the stability, efficiency and authority of the state.

Under classical theory, there are two major democratic values of practical importance to the right to public participation. These two values are equality and sovereignty. Political equality is the essential first principle of democratic governance under classical democratic theory. Political equality under classical theory does not only refer to equal influence over government decisions but also to the ability of all citizens to have an equal opportunity to exert influence through political activity if they choose to do so. Through political equality, the full diversity of interests and values bearing on a problem can be brought into the policy debate and can be incorporated into the final decision. The essential corollary to the equality principle is the rule of the majority. Among those who

¹³⁶ Ibid.

choose to participate, the preference of no one citizen should be weighted more heavily than those of any other citizen.

Equality under classical democratic theory is justified on three major grounds. First, it is postulated that interests and values are subjective and autonomous; therefore, it is essential that each citizen makes his or her own choices. Cole argues that no-one can represent another accurately because no person's will can be treated as a substitute for, or representative of, the wills of others.¹³⁷ Second, classical democratic theorists argue that the rights and interests of every or any person are only secure from being disregarded when the person interested is himself or herself able and habitually disposed to stand up for them.¹³⁸ Finally, classical democratic theorists argue that it is only through individual political activity that individuals become fully aware of their responsibilities to society and gain the personal confidence that comes from the shared control of public actions.¹³⁹

Equality as one of the core values of classical democratic theory has played an important role in the development of the right to public participation. Rejecting theories of public administration that claim that the public interest as a whole can be defined by neutral and disinterested bureaucrats, public participation proponents have argued that it is only through the clash and conflict of the full diversity of affected interests that a reasonable approximation of responsive public policy can be developed. Therefore, public participation proponents

¹³⁷ G.D.H Cole, *Social Theory* (1920) 103, quoted in Stuart Langton (ed) *Citizen Participation in America: Essays on the State of the Art*, (1978) 20.

¹³⁸ John Stuart Mills, *Consideration of Representative Government* (1962) 58.

¹³⁹ Rousseau is perhaps the most prominent theorist associated with this self-realisation rationale for political equality. See generally, J.J Rousseau, *The Social contract* (1954) 11.

place special emphasis on reaching out to the affected but inexperienced public who might otherwise not enjoy the opportunity to participate and whose specific interests might not be considered. Also, the desire to increase the sense of self-confidence and social responsibility for traditionally marginalised segments of society has driven the growing demand for a greater recognition of the right to public participation.

It is therefore clear that the growth in the agitation for greater recognition of the right to public participation falls squarely within the classical theories of democratic governance and their core values of equality of opportunity for participation in decision making at all levels of government. The demand for greater recognition of the right to public participation can therefore be said to be a current manifestation of the continuing evolution towards a closer approximation of the classical democratic ideal of equality of opportunity for all.

In addition to the core value of equality of opportunity for participation in decision making, classical theorists also espouse the principle of popular sovereignty that upholds government as a creation of the people rather than a separate standing entity. Under popular sovereignty, democratic governance is viewed as self-government, that is, government that derives from and responds to the wishes of the people thus setting the basis for the roots of the right to public participation. Rosseau, Mill and others¹⁴⁰ argue that political obligation can only legitimately derive from an individual's feeling of voluntary

¹⁴⁰ McPherson, see above n 118, refers to them as Developmental Democracy theorists who emerged about the middle of the 19th century with the emergence of the working class.

association with the state, his satisfaction with the state and his satisfaction that government is ultimately responsive to his needs and interests. This does not mean, however, that every interest will be satisfied every time. Rather, the general will must sometimes override the particular will under conditions of conflict. That notwithstanding, it is important that the state shows sufficient sensitivity and responsiveness to the needs of the people so that they share a sense of mutual commitment. Under classical theory, it is also espoused that the most effective defence of liberty is achieved through the principle of popular sovereignty. Therefore, the classical democratic theorists argue that, while limitations and constraints on the power of the state must be guaranteed through constitutions and laws, it is equally important that the ultimate source of limited government is the people themselves because the laws of a democratic state are only as effective as the values and interests of the public.¹⁴¹

It is therefore very clear from the foregoing that the classical democratic principle of sovereignty has played a central role in laying the foundation for the development of the right to public participation in decision making at all levels. This is so especially since the power and discretion of administrative agencies constitutes a challenge whereby, while formally accountable to the legislatures and elected executives, modern agencies and bureaucracies have become so massive and pervasive that they largely escape careful and continuous scrutiny. In many respects, therefore, granting the public access to participation in decision making presents one of the most effective and viable options for ensuring accountability of government agencies. Therefore, the

¹⁴¹ McPherson, see above n 118.

basic theme of popular sovereignty that runs through classical democratic theory has been rediscovered through the right to public participation.

2.6.2 Contemporary theory

Much of the most important and contemporary discourse on the value of public participation has been raised and discussed in the context of a continuing debate on classical democratic theory, the two major proponents of which have been the elitist and participatory democracy theorists. While the two theories draw from the classical theories of democracy, they differ in their attitudes to the organisational requirements, desirable extent and, ultimately, the purpose of democratic rule. More fundamentally, the two theories differ in their basic attitudes to the essential nature and capability of human individuals.¹⁴²

2.6.21 The elitist theory

According to the proponents of the elitist theory of democratic governance, the role of the public in a democracy should be appropriately limited to periodic election of leaders who can represent and defend public interest more effectively than they can themselves. Schumpeter, one of the celebrated elitist theorists, argues that democracy is an institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the public vote. He notes further that:

“The role of the people is to produce a government, or else an intermediate body, which in turn will produce a national

¹⁴² Robert B. Gibson in P. S. Elder (ed), *The Value of Participation in Environmental Management and Public Participation*, 21.

executive or government The democratic method is that institutional arrangement for arriving at political decisions in which individuals acquire the power to decide by means of a competitive struggle for the peoples' vote."¹⁴³

Therefore, according to the elite theorists, through the leadership of elected officials, public interests and values can be effectively represented with far greater efficiency and far less danger to stability and authority than under conditions of direct democracy, which involves direct public participation.¹⁴⁴ Consequently, to the elitist theorists, the revitalisation of representative institutions is seen as the primary means of coping with the challenge of responsiveness and accountability presented by the growth of administrative power. They argue that the role of the public should be primarily indirect - mediated through elections. The focus of democratic practice for the elitist theorists is on transmitting information about interests and needs through these mechanisms to the elected officials who can responsibly act upon them.

Elitist theory does not credit participation with having any intrinsic merit for the individual. Individuals are considered to be generally and naturally self-centred and irrational, particularly in groups. In fact, elitist theory generally restricts public participation to the election of leaders for public office. This limited form of participation is considered necessary as it prevents the leaders from becoming tyrants as competing for votes at regular intervals acts as a protective device. According to elitist theorists, any public participation

¹⁴³ Joseph Schumpeter, *Capitalism, Socialism and Democracy* (New York, Harper and Brothers, 1942) 269.

¹⁴⁴ *Ibid* 246.

beyond mere voting would not only be valueless and inefficient, it would also lead towards chaos.¹⁴⁵

2.6.22 The participatory theory

The response of the proponents of participatory democracy to the elitist theorists rests on the assumption that human beings are not merely consumers¹⁴⁶ of satisfaction but rather exerts¹⁴⁷ requiring opportunities and encouragement for self-expression and development. They hold that the essential human personality is basically compatible with collective life and that it will express itself in increasingly desirable ways in terms of both individual and social interest if it is nurtured and allowed to grow and develop without being frustrated and weakened by the dictates of authority or corrupted by a repressive social order.¹⁴⁸

Participatory theorists hold that the purpose of democracy is to ensure that decisions are made by the individuals who will be affected. The requirements of this democracy are fully met only if all individuals are enabled and encouraged to participate in decisions which will affect their social, economic

¹⁴⁵ Ibid 256 – 62.

¹⁴⁶ The consumer concept depicts humans as insatiable desirers and appropriators. It suggests both that humans are moved by their essential nature to consume and acquire and that these consumptive and acquisitive urges can never be fully satisfied. Consequently, this concept implies that human activities and means of social organisation ought to be primarily concerned with the ever-increasing production of commodities and services. According to Macpherson, the first society that postulated man as an infinitely desirous consumer of utilities was the capitalist market.

¹⁴⁷ According to Macpherson, the concept of humans as exerts emerged in the mid 19th century with the rise of powerful critical protest against the obvious inhumanity of conditions imposed by industrial market society particularly on the working class and the utterly destitute. The concept therefore emerged as a significant challenge to the dominant concept of humans as consumers.

¹⁴⁸ See P.S Elder, above n 113, 2.

and political concern. Participatory theory proposes democratic societies not just democratic governments.¹⁴⁹

Whereas in elitist theory limited participation is only grudgingly admitted as a necessary check against the elite's tendency towards tyranny, in participatory theory extensive and meaningful individual involvement in the decisions and activities of collective life is the central concern of social organisations.

“Such action is not only a defence but good in itself to make positive decisions for one's community, rather than being regimented by other's decisions, is one of the noble acts of man.”¹⁵⁰

Participatory theorists consider participation to be good in itself for two mutually reinforcing reasons. First, it permits and provides a context for the expression of the individual's attributes and capacities. Second, participative experience strengthens, deepens and enriches the individual's understanding and appreciation of their own capacities and attributes, enhances their ability to accommodate their exertions to the needs of others and increases their knowledge of the imperatives of harmonious social interaction. Accordingly, participation has both an expressive and an educative aspect. The interaction of these two aspects assures the viability as well as the value of participative social organisation. It is through the educative experience of participatory expression that the individual learns to take into account wider matters than his

¹⁴⁹ Ibid.

¹⁵⁰ Paul and Percival Goodman, *Communitas* (New York: Vintage, 1947) 10-11.

own immediate private interests if he is to gain cooperation from others and learn that public and private interests are linked.¹⁵¹

According to John Stuart Mill, non-participative democracies retard or prevent the development of individual moral and intellectual qualities even if the governing few prove to be entirely competent in handling administrative tasks.

He wrote:

“....what sort of human beings can be formed under such a regiment? What development can either their thinking or their active faculties attain under it?...Their moral qualities are equally stunted. Wherever the sphere of action of human beings is artificially circumscribed, their sentiments are narrowed and dwarfed.”¹⁵²

Participation helps develop the reasonableness and sensitivity of the individual. By broadening interests and outlook and by developing through experience and practise the skills and capabilities needed for more harmonious and fulfilling participation, it continually makes participative activity more effective, useful and cooperative. There is a cumulative process involved, acting at both the individual and social levels. For the individual, experience in participation not only develops the practical capacities of articulateness, clarity of thought and critical judgement but also increases self-confidence and political efficacy¹⁵³ thus providing both the encouragement and the skills necessary for more and

¹⁵¹ See the discussion of Carole Patemen on Rousseau' in *Participation and Democratic theory* (1972) 25.

¹⁵² John Stuart Mill, *Representative Government* (first published in 1961) 203-204.

¹⁵³ *Ibid*, 50.

more significant participation. At the social level, participative organisations and activity become increasingly reliable, harmonious and effective as the continued experience of participation enables individuals to expand their skills, understanding and knowledge. Individuals whose moral and intellectual qualities have been nurtured and developed through participatory experience will be more able to see how their needs are meshed with those of others where common interest is involved.

These individual and social effects of participatory experience provide participatory theorists with their response to the arguments of the elite theorist that widespread participation would threaten social stability. As Carole Pateman has observed:

“.....there is no special problem about the stability of a participatory system; it is self sustaining through the educative impact of the participatory process. Participation develops and fosters the very qualities necessary for it; the more individuals participate, the better able they become to do so.”¹⁵⁴

Participation offers a means of reconciling the essential human need for self-expression with the immutable human condition of social dependence. The basis for this reconciliation is free cooperation, which can only arise and be developed through the voluntary self-expression of individuals who, in recognition of their social condition, choose to live, decide and act with each

¹⁵⁴ Ibid 42-43.

other harmoniously.¹⁵⁵ It is only through the experience of participation that every individual's capacity for self expression can be exercised and only through the experience of participation can the intellectual and moral qualities that sustain the viability of participative democracy be developed. Thus the means and ends of participatory democracy merge.

It is clear from the debate over public participation between participatory theorists and elitist theorists that it is not really about a choice between two competing alternatives. Rather, the focus is on the best way in which to enhance public participation in policy making. Accordingly, the increase in the demand for public participation based on classical democratic theory and the revitalisation of representative institutions espoused by elitists can be seen as complementary mechanisms that ensure responsiveness and accountability on the part of policy makers. A clear illustration of the convergence of the two theoretical approaches to enhance public participation can be found in the new governance structures that enhance public participation like decentralisation. Decentralisation basically refers to a process where a central government relinquishes some of its management responsibilities or powers to a local government, local leader or community institution.¹⁵⁶ The types of power transfer that decentralisation involves include: the power to create rules or

¹⁵⁵ See Elders above n 113, 24.

¹⁵⁶ See above n 55, 90. It is important to note that there are several different kinds of decentralisation. These include political or democratic decentralisation which involves the government transferring decision making power and financial resources to elected representatives of people at regional or local levels; administrative decentralisation where central government ministries transfer some functions to regional or local posts perhaps moving personnel to a particular location or assigning new responsibilities to staff in those branch offices; co-management arrangements where power over natural resources are shared between the government and local users; and community management programmes which include higher levels of discretionary authority and empowerment at the community level that do co-management programmes. In community management, a local group typically manages the resource under contract with a government agency.

modify old ones¹⁵⁷, the power to make fiscal and revenue decisions,¹⁵⁸ the power to implement rules and ensure compliance¹⁵⁹ and the power of adjudication.¹⁶⁰ To the elitists, decentralisation presents new institutional mechanisms for transmitting information about the needs and interests of the public while for the participatory theorists, decentralisation presents potential to enhance public participation in decision making at all levels. Ideally therefore, decentralisation helps balance central government oversight and regulation with local input and empowerment. Done well, decentralisation should bring people closer and increase opportunities for public participation in decision making at all levels because it devolves power to the public.¹⁶¹ Decentralisation should also benefit and improve equity in natural resources management because it can tap local knowledge of the environment and bring better appreciation of local people's needs. In addition, local people are more likely to respect resource decisions made with local input. However, in order to have any benefits for public participation, decentralisation must result in a transfer of meaningful powers including fiscal powers. The institutions to which powers are transferred must be representative of the local populace in its diversity and not just represent elite interests. Those in power must have a broad knowledge of local natural resources and people's dependence on them and the local public must be able to hold institutions accountable through elections, hearings or other democratic means. In addition, fiscal and

¹⁵⁷ For example the power to set land use and zoning rules or to decide what kinds of trees can be harvested in a forest, or what days certain users can fish in a specified area.

¹⁵⁸ For example, the power to levy fees at the entrance to a park, to set waste management or water treatment fees or to decide how to spend revenues raised from hunting fees from a game reserve.

¹⁵⁹ For example the power to penalise a factory's excess emissions, to sanction town people who cut trees in a communal forest without permission or hunt wildlife without a permit.

¹⁶⁰ The power to resolve conflicts and oversee negotiations over resource use and rules.

¹⁶¹ See Above n 55, 92.

regulatory incentives must be in place to promote sustainable management of natural resources over the long term.¹⁶²

CHAPTER THREE

THE RIGHT TO PUBLIC PARTICIPATION

3.1 The international context within which the right to public participation has emerged¹⁶³

The post World War II reconstruction period led to unprecedented global economic development. This development was unequal, accentuating differences in wealth between countries of the northern hemisphere and southern hemisphere as well as within countries. It also required unprecedented use of exhaustible natural resources such as clean air, flora and fauna and minerals. As it became clear that the limited resources would ultimately become incapable of satisfying the various needs of industrial and developing countries, public opinion increasingly demanded action to protect the quantity and quality of the components of the environment and their interaction as part of ecosystems.¹⁶⁴

Some genuinely ecological approaches first emerged in the 1930s with the adoption of several regional instruments that can be seen as precursors to the present day environmental concepts of public participation. The first among

¹⁶² Ibid 93.

¹⁶³ The majority of this section is based on an earlier publication by the author published by IUCN "Improving Environmental Procedural Rights in Uganda" in *Environmental Law in Developing Countries, Selected Issues*, IUCN Environmental Policy and Law Paper No. 43 Vol. II (2004) 9-19.

¹⁶⁴ Alexander Kiss and Dinah Shelton, *International Environmental Law* (3rd Ed, 2004) 139.

these, the *1933 London Convention* relating to the preservation of fauna and flora in their natural state applied to an Africa then largely colonised. It regulated the export of hunting trophies and banned certain methods of hunting.¹⁶⁵

Between the two world wars, states entered into a growing number of trans-boundary agreements that included provisions on the problem of water pollution. These efforts continued after World War II especially in central and Eastern Europe. They included such conventions as the *1954 London Convention for the Prevention of the Pollution of the Sea by Oil*¹⁶⁶. Most of these agreements were limited to interstate action and had no mention of public participation in the decision making process.

During this period, environmental concerns increasingly appeared in general international legal texts. Incrementally, the first elements of an international environmental code for the protection of the environment emerged. International jurisprudence contributed by introducing the fundamental principles, which dominate the law of trans-frontier pollution. The Trail smelter arbitration¹⁶⁷ affirmed that no state has the right to use its territory or permit it to be used to cause serious damage by emissions to the territory of another state or to the property of persons found there. In 1949, the international court of justice in the *Corfu Channel* case affirmed that no state may utilise its territory contrary to the rights of other states.¹⁶⁸ At the end of the 1960s, scientific studies raised general public awareness of dangers

¹⁶⁵ Ibid.

¹⁶⁶ London may 1, 1954.

¹⁶⁷ Arbitral award in the *Trailsmelter case* March 11 1941 3 UNRIAA 1905.

¹⁶⁸ Alexander Kiss and Dinah Shelton above n 164, 39.

threatening the biosphere. Rachel Carson's classic, *Silent Spring*, is often credited with bringing environmental concerns into the public arena.¹⁶⁹

The year 1968 was the turning point however with the United Nations, the Council of Europe and the Organisation of African Unity all taking decisive steps on environmental protection. The Council of Europe adopted the first general environmental texts approved by an international organisation with the adoption of the *Declaration of Air Pollution Control* and the *European Water Charter*. Africa produced the second major initiative, despite a widely held view in the region that environmental deterioration was due to industrial pollution and was thus primarily a problem of the northern hemisphere. On September 15 1968, the heads of state and government of the Organisation of African unity signed an *African Convention on the Conservation of Nature and Natural Resources* replacing the 1933 *London Convention*.¹⁷⁰

The United Nations joined the European and African initiatives of 1968 directed at protecting the environment when the General Assembly convened a World Conference on the Human Environment which was held in Stockholm in 1972.

When the Stockholm Conference took place,¹⁷¹ it brought together some 6,000 people including delegates from 113 states, observers sent by 400 non-governmental organisations, invited individuals and approximately 1,500 journalists.

¹⁶⁹ See Carson Rachel, *Silent Spring* (London Penguin, 1962).

¹⁷⁰ Alexander Kiss and Dinah Shelton above n 164, 39.

¹⁷¹ June 5-16 1972.

3.1.1 The Stockholm Declaration on the Human Environment

Before the Stockholm Conference on the Human Environment, sporadic efforts were made to remedy specific environmental problems like pollution or nuisances such as smoke, noise and water. The first international agreements that appeared in the nineteenth century were often localised and their primary purpose was basically to sustain the harvesting of economically valuable species.¹⁷²

The Stockholm Conference on the Human Environment provided the watershed event in international environmental law to which the development of the right to public participation can be traced. This conference summed up the awakened conscience of humankind and marked the beginning of a truly environmentally conscious era. As the Stockholm Conference's final declaration made clear, its purpose was "*to inspire and guide the peoples of the world in the preservation and enhancement of the Human Environment*"¹⁷³. The result was the *Declaration of the United Nations Conference for the Human Environment*.¹⁷⁴ For the first time at global level, heads of state and government agreed that the protection and preservation of the environment was the responsibility of *everybody* (emphasis mine). The delegates at the conference proclaimed that "*to defend and improve the human environment for*

¹⁷² For example the 1902 *Convention for the Protection of Birds useful to agriculture* (Paris March 19 1902); the 1909 *Agreement restricting Boundary Waters between the United States of America and Canada* (Washington Jan 11 1909).

¹⁷³ Declaration of the United Nations Conference on the Human Environment (Nairobi: United Nations Environment Programme, 1972), Part 1, par. 3.

¹⁷⁴ The final Declaration consisted of 6 declarations and 26 principles which were organized around four major themes: (1) the right to all people to a healthy environment (2) intergenerational integrity (3) assistance to developing countries and (4) protection from pollution.

*present and future generations has become an imperative goal for mankind.....*¹⁷⁵ Accordingly, it was agreed that “*in order to achieve this environmental goal, it will demand the acceptance of responsibility by all citizens and by enterprises and institutions at every level, all sharing equitably in common efforts*”¹⁷⁶ thus recognising for the first time the importance of public participation in environmental protection and natural resources management. Eric Dannenmaier has correctly noted¹⁷⁷ that the Declaration could not speak openly of democracy and thus the right to public participation because of the diversity of political systems represented at Stockholm. That notwithstanding, the veiled references to citizen responsibility and involvement in common efforts in the Stockholm Declaration did set the foundation on which the emergence and development of the right to public participation has been built.

3.1.2 The World Charter for Nature

Almost ten years after the Stockholm Declaration, the world took another step towards the recognition and promotion of the right to public participation in the *World Charter for Nature*¹⁷⁸. The Charter emphasised the universal responsibility of *all peoples* to safeguard resources for future generations and to protect and restore the natural world. The Charter provides for public disclosure of public information and requires that this disclosure be in time to permit effective consultation and participation¹⁷⁹. There are also provisions within the Charter requiring that opportunity be provided for all persons to

¹⁷⁵ See above n 173, para. 6.

¹⁷⁶ Ibid Para. 7. (emphasis mine)

¹⁷⁷ Eric Dannenmaier, *Democracy in Development: Toward a Legal Framework for the Americas*; (977) in 11 *Tulane Environmental Law Journal* 6.

¹⁷⁸ Adopted in Algiers on 26 June 1981.

¹⁷⁹ See Article 16.

participate, individually or with others, in the formulation of decisions of direct concern to their environment and to give access for redress when the environment has suffered damage or degradation.¹⁸⁰

However, even though the Charter provided a breakthrough in terms of recognising the impact of unsustainable consumption of natural resources and production and in asserting the importance of public disclosure of public information and public participation, it fell short of advocating legally enforceable rights.

3.1.3 The Rio Declaration

The achievements of Stockholm and Algiers were brought to the centre stage of international environmental discourse in Rio. At the 1992 United Nations Summit on Environment and Development held in Rio de Janeiro (Rio Summit), delegates from 109 nations openly acknowledged that public participation is essential to sustainable development and natural resources management and to fulfilling the mutual commitments made in Rio. This acknowledgement and commitment is embodied in the provisions of Principle 10 of the Rio Declaration which states that:

“environmental procedural rights are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and an

¹⁸⁰ See Article 23.

opportunity to participate in decision making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy shall be provided.¹⁸¹

The Declaration requires that states provide individuals with appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities. In order to make access to information meaningful, states are further required to facilitate and encourage public awareness and participation by making information widely available.¹⁸² In addition, each state is required to provide an opportunity for individuals to participate in decision making processes.¹⁸³ The Declaration creates an opportunity for the enforcement of environmental rights by requiring that states provide effective access to judicial and administrative proceedings including redress and remedy.¹⁸⁴

It is therefore very clear from the provisions of the Rio Declaration that the right to public participation was not only recognised but a positive obligation was placed upon states to ensure the full and proper enjoyment of this right. The delegates of the Rio Summit accepted the importance of concrete legal mandates, and emphasised the use of legal and regulatory means to ensure public participation¹⁸⁵. Indeed, the Declaration did not only provide for access

¹⁸¹ Eric Dannenmaier, above n 177, 6.

¹⁸² See above n 30, Principle 10.

¹⁸³ Ibid.

¹⁸⁴ Ibid.

¹⁸⁵ Eric Dannenmaier above n 177, 8.

to information, public participation and access to justice in general terms, it went into the detail of identifying specific categories of people to whom special attention should be given. It thus identifies categories of persons traditionally excluded from participation in decision making for whom integration into the decision making process is deemed particularly important: women, youth and indigenous peoples.¹⁸⁶ Indeed, the Rio Declaration in principle 10 contains mandatory language for the promotion and recognition of the rights of access to information, public participation and access to justice.

3.1.4 Agenda 21

Nitin Desai¹⁸⁷ has described Agenda 21 as one of the principal outcomes of the United Nations Conference on Environment and Development presenting a series of integrated strategies and detailed programmes to promote environmentally sound and sustainable development in all countries. It sets forth in somewhat great detail, an action plan by which the signatories to the Rio Declaration may implement the principles set forth in it. It crystallises the Rio Declaration provisions on public participation rights by requiring succinct action to be taken by states for its realisation.

Agenda 21 calls on governments to promulgate or strengthen, subject to country specific conditions, any legislative measures necessary to enable the establishment of non-governmental organisations to protect the public interest through legal actions. Governments are urged to develop or improve mechanisms to facilitate the involvement of concerned individuals, groups and

¹⁸⁶ Ibid, 7. Principle 20, 21 and 22 of the Rio Declaration respectively provide for the integration of women, youth and indigenous people respectively.

¹⁸⁷ See Foreword to the guide on Agenda 21: Nitin Desai was the Under Secretary General for Policy and Coordination and Sustainable Development at the United Nations.

organisations in decision making at all levels, to establish judicial and administrative procedures for legal redress and remedy of actions affecting environment and development that may be unlawful or infringe on rights under the law, and to provide access to individuals, groups and organisations with a recognised legal interest. Agenda 21 also promotes mechanisms for appropriate involvement of individuals and groups in the development and enforcement of laws and regulations on environment and development and mechanisms to allow non-governmental organisations to play their partnership role responsibly and effectively.¹⁸⁸

Agenda 21¹⁸⁹ contains very strong reference to the importance of participation and the role that non-governmental organisations can play at all levels from policy formulation to decision making and implementation. Agenda 21 places a positive responsibility on all governments and international bodies to develop mechanisms to allow non-governmental organisations to play their partnership role responsibly and effectively in the process of environmentally sound and sustainable development. Agenda 21 also provides the mechanism for implementation including the financing for the participation of non-governmental organisations.

The promotion of the right to access to information for decision making forms an important part of Agenda 21¹⁹⁰. It notes that in sustainable development, everyone is a user and provider of information. This includes data, appropriately packaged, experience and knowledge. The need for information

¹⁸⁸ Eric Dannenmaier above n 177, 8.

¹⁸⁹ See Chapter 27 which deals with strengthening the role of non-governmental organisations.

¹⁹⁰ Chapter 4 of the Agenda deals with the right to access to information for decision making.

arises at all levels from senior decision-makers at the national and international levels to the grassroots and individual levels. Therefore, the emphasis under Agenda 21 in this regard is placed on bridging the data gap and improving information availability in order to promote public participation in environmental protection and sustainable development.

It is important to note that Agenda 21 does not contain only general provisions on access to information. The specific action areas of Agenda 21 also contain detailed provisions relating to and strengthening the right to access to information. For example Chapter 19 of Agenda 21 dealing with toxic chemicals¹⁹¹ affirms the importance of information especially in assessing the risks entailed by the use of a great number of chemicals¹⁹². Chapter 36 of Agenda 21 is dedicated to promoting education, public awareness and training. It places a firm and positive responsibility on all governments to develop their own priorities and schedules relating to education, public awareness and training. Similarly, Chapter 37 deals with mechanisms for capacity building in developing countries especially in relation to the implementation of Agenda 21 which extensively deals with the rights of access to information, participation and access to justice.

An analysis of Agenda 21 together with the Rio Declaration reveals that they represent progress from Stockholm by openly endorsing a role for citizens in sustainable development decisions, and in promoting the integration of groups

¹⁹¹ The Chapter deals with environmental sound management of toxic chemicals, including prevention of illegal international traffic in toxic and dangerous products.

¹⁹² One of the programme areas within this chapter is the harmonisation and classification and labelling of chemicals as well as information exchange and establishment of risk education programmes.

that do not traditionally have such a role. Governments took an important step forward at the Rio Summit when they affirmed the role of citizens in development decisions and provided an outline of the areas where the public should become engaged.¹⁹³

However, it is important to note that in spite of the progress made at Rio, Agenda 21 is no more than an international consensus document, which mostly relies on broad statements rather than legally binding commitments. That notwithstanding, the period since Rio witnessed various international conventions addressing specific environmental issues incorporating the right to public participation. For example, the 1994 Desertification Convention¹⁹⁴ adopted a model that emphasised the participation of populations and local communities in developing and implementing environmental programmes. The Convention requires that local action plans facilitate access by local populations to appropriate information and technology and provide for effective participation at the local, national and regional levels of NGOs and local populations in policy planning, decision making and implementation and review of national action programmes. The *Biodiversity Convention*¹⁹⁵ incorporates similar public participation principles.¹⁹⁶

3.1.5 The World Summit on Sustainable Development (WSSD)

¹⁹³ Eric. Dannenmaier above n 177, 9.

¹⁹⁴ *Convention to Combat Desertification in those Countries Experiencing Serious Drought and or Desertification, Particularly in Africa*, done on June 17 1994 (entered into force Dec. 26, 1996) art 3, reprinted in 33 I.L.M. 1328(1994).

¹⁹⁵ *United Nations Framework Convention on Biological Diversity*, done on June 2, 1992 (entered into force Dec. 29, 1993).

¹⁹⁶ Carl E. Bruch and Roman Czebiniack, *Globalising Environmental Governance: Making the Leap from Regional Initiatives on Transparency, Participation and Accountability in Environmental Matters*. 32 *ELR News and Analysis* (2000) 10430.

In the decade following the Rio conference, environmental concerns encountered increasing competition on the international agenda from economic globalisation, an emphasis on free trade and the development crisis of the poor countries. As one example, the *Doha Declaration* of the World Trade Organisation (WTO) adopted by a ministerial meeting on November 14, 2001 appears to give priority to WTO norms in addressing the relationship between using free trade rules and the trade obligations set out in multilateral environmental agreements. This was further illustrated more visibly when the United Nations convened a conference to mark the tenth anniversary of the Rio meeting but failed to mention the environment in its name. Instead, it was convened as the World Summit on Sustainable Development.¹⁹⁷

Between 26th August and 4th September 2002, representatives of more than 190 countries met in Johannesburg in order to reaffirm their commitment to the Rio principles, the full implementation of Agenda 21 and the programme of action for the further implementation of Agenda 21. At the end of the WSSD, the participating governments adopted a declaration on sustainable development affirming their will to assume a collective responsibility to advance and strengthen the interdependent and mutually enforcing pillars of sustainable development: economic development, social development and environmental protection at local, national, regional and global levels.¹⁹⁸

While recognising that the global environment continues to suffer and acknowledging the loss of biodiversity, the declaration mainly focused on

¹⁹⁷ Alexander Kiss and Dinah Shelton above n 164, 661.

¹⁹⁸ Ibid.

development and poverty eradication especially in the poorest countries. Despite advocating the creation of specialised global institutions for environmental protection, the declaration less ambitiously supports the leadership of the UN and proposes more effective democratic and accountable international and multinational institutions to achieve the goals of sustainable development.¹⁹⁹ In general, there is only a solitary provision relating to public participation in the declaration, noting that sustainable development requires a long term perspective and broad based participation in policy formulation, decision making and implementation at all levels. Accordingly, the declaration affirms that, as social partners, there will be continued work for stable partnerships with all major groups respecting the independent, important roles of each of these partners.²⁰⁰

The economic pillars dominate the two texts. Care for environmental protection appears in part 111 of the *Plan of Implementation of the World Summit on Sustainable Development* (the Plan) which advocates changing unsustainable consumption patterns and production towards sustainability within the carrying capacity of ecosystems, de-linking economic growth and environmental degradation and reducing resource degradation pollution and waste. It also recommends the 'polluter pays' principle, increasing eco-efficiency, the use of cleaner production programmes, enhanced corporate environmental responsibility, environmental management systems and the use of economic instruments and environmental impact assessment procedures.²⁰¹

¹⁹⁹ Paras 27 and 28 of the Plan of Implementation of the World Summit on Sustainable Development, A/CONF.199/CRP.7.1.

²⁰⁰ See principle 23 of the Johannesburg Declaration on Sustainable Development.

²⁰¹ Alexander Kiss and Dinah Shelton above n 164, 661.

Part IV of the Plan, detailing protection and management of natural resources and economic and social development, is particularly important for the environment although its legal context is rather weak. Nevertheless, it does contain some token provisions relating to public participation. Part iv paragraph b, provides for access to public information and participation, including by women at all levels in support of policy and decision making. The Plan also calls for the enactment of measures to protect indigenous resource management systems and support the contribution of all appropriate stakeholders, men and women alike, in rural planning and development.²⁰²

Alexander Kiss and Dinah Shelton²⁰³ note that economic development, international trade and corporations, many of which are more powerful than small states, prevailed at the Johannesburg Summit. Major economic actors were encouraged to create partnerships for enhancing sustainable development. The rules of the WTO were given high political priority while environmental law was relegated to second place. An opportunity to link human rights and the environment was missed especially in relation to the right to public participation. The instruments adopted at the summit did not affect the validity of Agenda 21, which continues to govern the environmental programme of international institutions, and remains a general guideline for governments, regional and local authorities as well as for non-state actors. The WSSD reaffirmed the texts adopted at Rio and called for priority attention to two matters: the implementation of and compliance with international

²⁰² Paragraph 40(h) of the Plan of Implementation dealing with sustainable development in a globalising world.

²⁰³ Ibid.

environmental agreements by contracting states and the coordination among the secretariats of multilateral environmental agreements.²⁰⁴

3.1.6 The United Nations Millennium Development Goals

The new century opened with an unprecedented declaration of solidarity and determination to rid the world of poverty. In 2000, the *Millennium Declaration*²⁰⁵, adopted at the largest ever gathering of heads of state,²⁰⁶ committed countries rich and poor to doing all they can to eradicate poverty, promote human dignity and equality and achieve peace, democracy and *environmental sustainability*. Part IV of the Declaration specifically focuses on “protecting our common environment” in which member states commit themselves to support the principles of sustainable development including those set out in Agenda 21²⁰⁷. They resolved to adopt, in all environmental actions, a new ethic of conservation and stewardship.²⁰⁸ Under part V on human rights, states committed themselves to spare no effort to work collectively for more inclusive political participation, allowing for genuine participation by all citizens in countries.²⁰⁹

Emanating from the Millennium Declaration, the *Millennium Development Goals* (MDGs)²¹⁰ bind countries to do more in the attack on inadequate

²⁰⁴ See report of the executive director of UNEP to the governing council, Dec 16 2002, UNEP/GC.22/4).

²⁰⁵ 55/2 United Nations Millennium Declaration. Resolution adopted by the General Assembly

²⁰⁶ At the United Nations (UN) Millennium Summit of September 2000, 147 heads of state and governments and 191 nations adopted the Millennium Declaration

²⁰⁷ United Nations Millennium Declaration part IV (22).

²⁰⁸ Ibid. part IV (23).

²⁰⁹ Ibid. Part V.

²¹⁰ The eight Millennium Development Goals include: Eradicate extreme poverty and hunger, Achieve universal primary education, promote gender equality and empowerment of women, Reduce Child mortality, Improve Maternal Health, Combat HIV/AIDS and Malaria

incomes, widespread hunger, gender inequality, *environmental deterioration* and lack of education, health care and clean water. They also include actions to reduce debt and increase aid, trade and technology transfers for poor countries. The March 2002 Monterrey Consensus, reaffirmed in September 2002 along with the Johannesburg Declaration on Sustainable Development and Johannesburg Plan of Action, provides a framework for this partnership between rich and poor countries.

Of the eight Millennium Development Goals, only Goal 7 aims to ensure environmental sustainability and is elaborated by a set of three targets and eight indicators.²¹¹ It is important to note that neither Goal 7 itself, nor any of the targets or indicators, specifically deals with the issue of public participation in environmental decision making. The only provision relating to public participation as noted under part V only deals with it in the context of political participation and not in the context of environmental decision making *per se*.

A critical examination of the MDGs reveals that among all the goals, MDG 7 is the least clearly articulated, making it much more difficult to integrate public participation in environmental sustainable development as envisaged in the

Ensure environmental sustainability and develop a global partnerships for development. The eight MDGs comprise 18 targets and 48 indicators. Most of the numerical targets are to be achieved over a period of 25 years from 1990-2015.

²¹¹ The targets include: Halve by 2015 (1) the proportion of people without sustainable access to safe drinking water and basic sanitation; (2) proportion of population with sustainable access to improved water source; (3) proportion of population with access to sanitation. The eight indicators include: (1) integrate principles of sustainable development into country policies and programmes and reverse the losses of environmental resources (3) proportion of land area covered by forest (4) ratio of area protected to maintain biological diversity to surface area (5) energy use (kg oil equivalent) per \$ GDP(PPP) (7) carbon dioxide emission (per capita) (7) proportion of population using solid fuels significant improvement in the lives of at least 100 million slum dwellers (8) Proportion of households with access to secure tenure. Although the targets and indicators apply at global level, and there is no mandate for meeting them at an individual country level, it is important to gauge each countries progress toward meeting the quantitative targets by 2015.

MDGs. The global targets are not logically integrated and their indicators need to better capture issues of environmental sustainability. The current indicators fail to cover some key areas of environmental sustainability and they do not adequately reflect governance specific priorities such as environmental procedural rights and specifically the right to public participation in environmental decision making.

It is therefore clear that the existing indicators under MDG 7 need improvement. For example, ensuring that the protected area indicator under MDG 7 contributes to poverty eradication as well as sustainable development calls for a different approach to resource conservation that provides benefits for the poor and meets the objectives of social justice as well as environmental sustainable development. Traditional forms of protected areas have been state controlled, imposed structures based on 19th century conservation ideology that suggested that people and nature should be kept separate. However, other governance structures exist that build on traditional knowledge, local management practices and traditional institutions of indigenous communities.

Emphasis is therefore needed within the protected area indicator on increasing coverage through alternatives to top down 'fences and fines' structures with which the term protected area is commonly associated. Alternatives to protected area conservation could include such options as community conservation and co-managed protected areas. These alternatives are important

to consider because traditional state run protected areas on their own may not contribute to the achievement of the MDGs.²¹²

The shortcomings of MDG 7 notwithstanding, it is clear that the MDGs were generally formulated with a clear view that they would require the participation of both state and non-state actors in order for them to be fully achieved within the set timeframe. Accordingly, within the general provisions of the Millennium Declaration, there is provision to develop strong partnerships with the private sector and with civil society and to work collectively for more inclusive political processes, allowing genuine participation by all citizens in all countries.²¹³

It is clear, therefore, that there is recognition inherent within the MDGs that acknowledges that, in order for the goals to succeed, they must have the participation of all stakeholders. The goals must become a national reality, embraced by their main stakeholders – people and governments. They are a set of benchmarks for assessing progress and for enabling the people to hold political leaders accountable not just for Goal 7 on the environment but for all the other goals. They therefore require public participation of necessity and this is aptly recognised in the Millennium Declaration. It is the people who will help fight for the kinds of policies and actions both on the environment and other issues that will lead to sustainable development. The MDGs are also commitments by heads of state and government, who must be held accountable through a public participation process for their fulfilment by their electorates.

²¹² Dilys Roe, "The Millennium Development Goals and natural resources management: reconciling sustainable livelihoods and resource conservation or fueling a divide", IIED London (2002).

²¹³ Millennium Development Declaration 20.

In conclusion, it is clear that the MDGs have brought environmental discourse squarely within the ongoing global discussion on poverty and development. This orientation that presents environmental issues with the broader debate on poverty and development creates yet another dimension within which the right to public participation may be analysed with the emphasis being placed on the role it can play not only in promoting environmental decision making and natural resources management but also in sustainable development that leads to poverty eradication.

3.2 The right to public participation at the regional level

Over the past decades there has been a growing recognition at regional and international levels that environmental protection and management must involve all sectors of society. As experience has developed at the national level, regional agreements and conventions have increasingly promoted the right to public participation.²¹⁴ Regional initiatives promoting environmental governance have complemented the evolution of global principles and continue to be important in clarifying and implementing the right to public participation. While global instruments have promoted environmental governance through general principles, they have provided little guidance on how to implement those principles. Yet clear and concrete domestic implementation is necessary to ensure public participation as a practical matter. In the Americas, Asia, East Africa, Europe and the newly independent states of the former Soviet Union, regional initiatives are fleshing out the basic principles and improving guidance

²¹⁴ Carl E. Bruch and Roman Czebiniack above n 196, 10429.

to nations in operationalising the right to public participation.²¹⁵ Accordingly, the United Nations Economic Commission for Europe (UNECE) convened a process that led to the creation of the 1998 *UNECE Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters* (Aarhus Convention). Similarly in April 2000, the Organisation of American States (OAS) adopted the *Inter American Strategy for the Promotion of Public Participation in Decision Making for Sustainable Development* (IPS). The North American region has implemented the *North American Agreement on Environmental Cooperation* (NAAEC) and the East African Region has adopted the *Memorandum of Understanding (MOU) for Cooperation on Environmental Matters*. Other ongoing initiatives include the *Asia Europe Meeting* (ASEM)²¹⁶ which is developing elements of good practice in the draft document *Towards Good Practices for Public Involvement in Environmental Policies*²¹⁷ and the *South African Development Community* (SADAC) which in 1999 agreed to establish an environmental protocol on environmental governance to cater for public participation rights in environmental decision making.²¹⁸

²¹⁵ Ibid, 10431.

²¹⁶ ASEM was first convened in Bangkok in March 1996, and its participants included 10 Asian nations, the European Commission and all 15 EU nations. The collective effort was intended to create a collective effort to create collective processes to better promote economic, political and cultural development as well as environmental protection. In 1999, ASEM established the Asia Europe Environmental Technology Centre (AEETC) to provide policy guidelines, exchange technologies and promote cooperation in the areas of the environment, agriculture and technology. As part of this effort a three year project entitled *The Project* was coordinated by AEETC and developed Elements of Good Practice for Environmental Governance. The non-binding elements are intended to establish a foundation for advancing public involvement in ASEM nations. The elements of good practice are rooted in Principle 10 of the Rio Declaration and divided into four sections: access to environmental information, public participation, access to justice and implementation of the elements.

²¹⁷ Carl E. Bruch and Roman Czebiniack above n 196, 10428.

²¹⁸ See *Times of Zambia* Oct 11, 1999: SADC Ministers Agree to form binding Protocol.

3.2.1 The Aarhus Convention

The Aarhus Convention²¹⁹ has, in an unprecedented way, provided for the realisation and implementation of the right to public participation. Indeed, the right to public participation forms one of the three pillars of the Convention along with access to information and the right to access to justice. The Convention provides that the three pillars depend on each other for full implementation of the Convention objectives²²⁰ thus giving cognisance to the indivisibility and interdependence of these rights.

In order to give practical meaning to the right to public participation, the Convention provides for the right of the public to seek out and have access to public information., which public authorities are obliged to provide to the public.²²¹ The Convention also provides for the right of the public to receive²²² information by placing a positive responsibility on the states to disseminate information of interest to the public.²²³ The definition of 'environmental information' in the Convention includes information in any material form (written, electronic or visual) on the state of the elements of the environment, institutional and natural factors affecting or likely to affect the elements of the environment, and the state of human health and safety, conditions of human life, cultural sites and built structures.²²⁴ Although this definition has been

²¹⁹ UN/ECE Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters.

²²⁰ See Article 3.

²²¹ See Article 4.

²²² The right of the public to receive information under Article 5 of the Convention places an obligation on the states to collect up to date information and disseminate it to the public. States are further required under this Article to inform the public about the nature and extent of information held by government and how the public may access it.

²²³ Article 5. Such information may include information on an imminent threat to public health or the environment. Public authorities are required to disseminate information that can help the affected public prevent or mitigate their effects.

²²⁴ Article 2.3.

criticised²²⁵ as not being exhaustive, it does contain the widest definition of information that the public can have to access to anywhere at the regional level. Moreover, access to information within the Convention extends not only to information held by environmental authorities but also by any of the public authorities that fall within the scope of the Convention.²²⁶

The right to public²²⁷ participation in the Aarhus Convention is of three kinds. It covers participation where the public is interested in decision making for a particular activity²²⁸, participation in the development of plans, programmes and policies relating to the environment²²⁹ and participation of the public in preparation of laws, rules and legally binding norms.²³⁰ The Aarhus Convention requires that, for the areas in which public participation is required, public authorities must provide adequate, timely and effective notice to the

²²⁵ See Carl Bruch and Roman Czebeniak above n 196, 10433.

²²⁶ See Aarhus Convention Article 2(2), which defines Public Authority. An important element of the Access to Information provisions within the Convention is that any person may request information without demonstrating an interest in the information or stating the purpose for which it will be used. The Convention requires that any information requested must be provided in no more than one month with a possible extension of up to two months. Moreover where the information required by any member of the public is not in the possession of any public authority, it is required to either forward the request for that information to the authority that does have it or inform the applicant where it believes that information may be obtained. The Convention contains several other significant provisions relating to Access to Information. It requires states to promote public access to information by informing the public about the nature and extent of information held by the government and how the public may access it. In addition, states are required to progressively provide information via electronic data bases that the public may access through the internet and to prepare, publish and disseminate national state of the environment reports. However, the right to Access to information under the Convention is not absolute. Public authorities may withhold information if its release would harm certain interests, such as national defence, commercial confidentiality, intellectual property rights and personal privacy.

²²⁷ The Aarhus Convention describes public as the public affected or likely to be affected by, or having an interest in environmental decision making. See Article 2.5. Public also includes one or more natural or legal persons and in accordance with national legislation or practice, their associations, organisations or groups. See Article 2.4.

²²⁸ See Article 6: Such activities include participation in decision making on Licensing and permitting certain kinds of proposed activities which are listed in Annex 1 to the Convention

²²⁹ Article 7 requires states to make appropriate and practical and or other provisions for the public to participate during the preparation of plans and programmes relating to the environment.

²³⁰ See Article 8 which generally encourages nations to promote public participation in the preparation of rules and regulations that may have a significant effect on the environment

public of the proposed activity, the nature of the possible decision (including opportunities for public comment) and other relevant information²³¹.

The public can submit oral or written proposals²³² and, in order to ensure that public participation is meaningful, the Convention requires parties to ensure that in the decision, due account is taken of the outcome of public participation. Public authorities are required to issue their decision in writing including the reasons for their decision and to make the final decision publicly available²³³.

Access to justice under the Aarhus Convention is deemed necessary to allow for the enforcement of the right of access to information and participation. Consequently, the Convention requires states to provide public access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment²³⁴. This requirement in the Convention enables the public to enforce their rights in relation to participation and access to information, especially where there is a positive responsibility on a public authority to perform under any of the rights.²³⁵ Article 9.1 provides that any person who believes that his or her request for information under Article 4 was not dealt with according to the prescribed requirements must have access to a court or other independent legally empowered body to review the decision. Likewise, Article 9.2 provides for a right to seek review of the decisions made on projects or activities addressed by Article 6, which generally deals with the

²³¹ See Article 6. 2 and 6.3; Carl Bruch, above n 196, 10435.

²³² See Article 6.7.

²³³ See Article 6.8 and 6.9.

²³⁴ See Article 9.3.

²³⁵ Id. See Article 9.

right to participate in decisions on specific issues. The Convention requires that the judicial and administrative review procedures be fair, equitable, timely and not prohibitively expensive.²³⁶ Additionally, court decisions are required to be in writing and publicly accessible.²³⁷

3.2.2 The Inter-American Strategy for the Promotion of Public Participation in Decision Making for Sustainable Development

Within the North American region, following the commitments that states made under the Rio Declaration and Agenda 21, the Organisation of American states (OAS) developed what is commonly referred to as the ISP or the *Inter-American Strategy for the Promotion of Public Participation in Decision Making for Sustainable Development*.²³⁸ Unlike the Aarhus Convention, the ISP is not binding on the member states. It is regarded only as a strategy, which encourages the signatories to undertake legal and institutional reforms for the implementation of the Rio commitments.

The process leading to the formation of the ISP can be traced back to the 1994 Miami Summit of the Americas²³⁹ where the OAS affirmed their commitment

²³⁶ See Article 9.4.

²³⁷ See Article 9.4 and 9.5.

²³⁸ The Inter American Council for Integral Development approved the ISP consisting of a Policy Framework and Recommendations for Action in April 2000. The Policy Framework was intended to be the essential document for the OAS member states to adopt. It contains the principles, objectives and policy recommendations of the ISP. The policy framework is intentionally general establishing the basic elements that the nations are encouraged to implement. In contrast, the recommendations for action, which were appended, to the adopted policy framework are hortatory and provide the nations with an array of particular policies, practices and institutional mechanisms that nations may consider adopting.

²³⁹ The Miami Summit for the Americas was less detailed than the Rio Declaration and Agenda 21 but it clearly embraced the principle of participatory democracy. The heads of state of the Americas at this Summit agreed that democracy includes not only free and fair elections, but also the right of all citizens to participate in government. The governments committed to facilitate fuller participation of their people in political activity, in accordance with national legislation. They also affirmed the importance of including in political dialogue women and indigenous groups deemed to be traditionally marginalised.

to the Rio Declaration. This process was carried forward to Santa Cruz in 1996²⁴⁰ where the heads of state of the Americas charged the OAS with the duty of formulating the ISP. In 1998,²⁴¹ the OAS once again agreed to commit to developing legal and institutional frameworks to encourage public participation. Following a process of thorough consultation, the Inter-American Council finally approved the ISP in April 2000.

The Policy Framework of the ISP establishes the basic elements that member states are encouraged to implement. These include:

- improving communication mechanisms to share information
- establishing legal and regulatory frameworks to ensure public access to information, decision making and justice
- promoting institutional structures, policies and procedures for expanding public participation
- advancing education and training programmes
- dedicating funding for public participation in decision making
- promoting fora for consultation.²⁴²

Whereas the ISP is not binding on its signatories, it has significant implications for the right to public participation and accountability. It represents yet another

²⁴⁰ The OAS summit on sustainable development in Santa Cruz Bolivia was a presidential level summit although the U:S was represented by Vice President Gore. The Declaration of Santa Cruz de la Sierra endorsed civil society participation in decision making in several areas and includes a commitment that the signatories from the thirty four democracies of the hemisphere will support and encourage as a basic requisite for sustainable development, broad participation by civil society in the decision making process, including policies and programmes and their design, implementation and evaluation.

²⁴¹ The Santiago Summit on Sustainable Development for the Americas 1998.

²⁴² Carl Bruch, above n 196, 10437.

step forward at regional level for the promotion and realisation of the right to public participation. Therefore, while the ISP is technically 'soft law', thus with no binding obligations and institutional framework, it establishes regional principles and standards that OAS and member states are now seeking to implement.²⁴³

3.2.3 The North American Agreement on Environmental Cooperation²⁴⁴

The North American Agreement on Environmental Cooperation (NAAEC) was negotiated as a parallel side agreement by the parties to the *North American Free Trade Agreement* (NAFTA). The primary stimulus for this environmental agreement was the widespread concern that NAFTA would result in a lowering of environmental standards. The Agreement provided the assurance that environmental concerns would be heard and addressed.²⁴⁵

The final draft of the Agreement was completed in 1993. Part one of the Agreement spells out the ten objectives of the parties. The first three and last five objectives contain environmental objectives. The fourth and fifth objectives of the Agreement are to promote the environmental goals and objectives of NAFTA in order to avoid trade distortions or new trade barriers. The first three objectives lay out the overall thrust of the Agreement: a) the protection and enhancement of the environment; b) sustainable development based in cooperation and mutually supportive environment and economic

²⁴³ Ibid.

²⁴⁴ This is an agreement between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America.

²⁴⁵ Andrew L. Hamilton, "The North American Agreement on Environmental Cooperation: a Framework for Continental Environmental Cooperation" (A paper presented at the Third National Science Meeting Saskatoon, Saskatchewan, Canada January 21-25 January 1997) 1.

policies and c) increased cooperation between the parties to better conserve, protect and enhance the environment including wild flora and fauna.²⁴⁶

The objectives of the Agreement clearly spell out public participation as one of the core objectives underlying the Agreement. The Agreement provides that it shall promote transparency and public participation in the development of environmental laws, regulations and policies.²⁴⁷

Part two of the Agreement addresses the general and specific obligations of the parties. The general commitments include a commitment to prepare reports on the state of the environment, the furtherance of scientific research and technology development and the assessment of environmental impacts. While each party to the Agreement has a right to establish its own level of environmental protection, there is an obligation to provide a high level of environmental protection and to strive to continue to improve the laws and regulations addressing the protection of the environment.²⁴⁸ Each party is obliged to effectively enforce its environmental laws and regulations.²⁴⁹ The objectives and obligations collectively provide a strong political mandate that can be used to increase continental cooperation in environmental measurement, monitoring, modelling, research and assessment.²⁵⁰

²⁴⁶ Ibid.

²⁴⁷ Objective (h) of the *North American Agreement on Environmental Cooperation*.

²⁴⁸ See Article 3 of the Agreement.

²⁴⁹ See Article 5. It is important to note that the Article provides for enforcement subject to Article 37 of the Agreement, which provides for the general enforcement principle of the Agreement.

²⁵⁰ See Andrew Hamilton, above n 245, 2.

The general obligations of the parties in part two of the Agreement contains specific provisions relating to public participation in environmental decision making. As part of the general commitments, the parties to the Agreement are required to promote education in environmental matters, including environmental law as a means of encouraging and promoting public participation in environmental matters among the party states.²⁵¹ The Agreement further provides, for interested persons and parties, a reasonable opportunity to comment on party member laws, regulations, procedures and administrative rulings of general application in respect of any matter covered by the Agreement.²⁵² In addition, with the aim of achieving high levels of environmental protection and compliance with environmental laws and regulations, each party to the Agreement is required to publicly release non-compliance information.²⁵³

Article 6 of the Agreement contains very important provisions relating to private access to remedies. Private access to remedies under the Agreement include the right to sue for damages, seek sanctions or remedies, emergency closures or orders to mitigate the consequences of violations of environmental laws: request the enforcement of environmental laws and to seek injunctions where a person suffers or may suffer loss, damage or injury contrary to party environmental laws. These rights are augmented by providing for procedural guarantees that include due process of law and open public access.²⁵⁴

²⁵¹ Article 2 (c) under general commitments of the Agreement.

²⁵² Article 4(b).

²⁵³ Article 5 (d).

²⁵⁴ Article 7 (1) and (2).

Part three of the Agreement established the *Commission for Environmental Cooperation* (CEC).²⁵⁵ The Commission is required to hold public meetings of all its regular sessions²⁵⁶ and to seek the advice of non-governmental organisations or persons, including independent experts once again recognising public participation.²⁵⁷

The Agreement provides for the establishment of a secretariat whose main function includes providing technical, administrative and operational support to the Commission.²⁵⁸ As part of promoting and encouraging public participation, the Agreement forbids the secretariat from disclosing information it receives that could identify a non-governmental organisation (NGO) or persons making a submission if the organisation or person so requires.²⁵⁹ In addition, the annual report of the secretariat is required to cover relevant views of NGOs and persons as a means of promoting public participation.²⁶⁰ All secretariat reports are required to take into consideration information submitted by interested NGOs and persons as well as information gathered through public consultation.²⁶¹ All these reports should be publicly available within 60 days following submission²⁶².

There are several other provisions within the Agreement providing for public participation. Article 14 provides for submission on enforcement matters by the public including NGOs or other persons. Article 17 provides for National

²⁵⁵ Article 8 .

²⁵⁶ Article 9(4) and (7).

²⁵⁷ Article 9(5)(b).

²⁵⁸ Article 11(5).

²⁵⁹ Article 11(8).

²⁶⁰ Article 12(d).

²⁶¹ Article 13 (2).

²⁶² Article 13(3).

Advisory Committees, which are required to have members of the public including representatives of NGOs and other persons sitting on them.

It is therefore very clear that the NAAEC contains several provisions within it that recognise and promote public participation in environmental decision making. The NAAEC has also adopted guidelines for promoting public participation in its own decision making process. These guidelines emphasise transparency, participation and accountability. The NAAEC seeks to provide the public with all the relevant documents in English, French and Spanish – in hard copy and electronically. The guidelines provide that the public should be involved in a wide range of NAAEC meetings, and allows for public notice of upcoming meetings. The NAAEC has also committed itself to providing financial assistance to facilitate public participation. To facilitate this participation, the NAAEC adopted three mechanisms: open meetings; calls for public comment and a contact list notifying interested people of upcoming NAAEC events.²⁶³

3.2.4 The Memorandum of Understanding between the Republic of Kenya, the United Republic of Tanzania and the Republic of Uganda for Cooperation on Environment Management

Within the African context, significant steps have been taken towards articulating a regional perspective on the right to public participation. The earliest Pan African initiatives focused on the need to improve public participation in development. The 1989 *African Alternative Framework for*

²⁶³ Carl E. Bruch and Roman Czebiniack above n 196, 10440.

*Structural Adjustment Programmes and the 1990 African Charter for Popular Participation in Development and Transformation*²⁶⁴ responded to the traditional mechanisms for development that did not adequately involve civil society or local governments in the decision making process.²⁶⁵

Following the African Charter for Popular Participation, African heads of government met with more than 100 African environmental and development NGOs to prepare a common position on the environment and development that was advanced at the 1992 UN Conference on Environment and Development in Rio. This summit led to the common African Position on Environment and Development²⁶⁶, which was endorsed by the *Organisation for African Unity* now the *African Union* and presented at the summit. The African Position on Environment and Development continued to shape the environmental agenda in Africa and has resulted in several endeavours, the most outstanding example of which (because of the level of its commitments) is the *Memorandum of Understanding for Co-operation on Environment Management* (MOU).

²⁶⁴ 500 participants attending the U.N Commission for Africa (UNECA) conference, which was held in Arusha, Tanzania, in February 1990, unanimously adopted the African Charter for Popular Participation in Development. Participants included representatives from 23 African Governments, NGOs throughout Africa; NGOs working in Africa, U.N organisations, donors and development specialists. While not legally binding, it has influenced several regional and national initiatives. The charter includes detailed mechanisms to protect and monitor public participation. It sets forth the roles and responsibilities of the people in Articles 13-5, 23(B), African Governments in Articles 16-20, 23(A), the international community in Articles 21-22, 23(C) and NGO's in articles 23(D) as well as the media and women's organisations, organized labor and the youth in articles 23(E)-(H). The charter specifically highlights the need for full support and participation of the people in environmental challenges.

²⁶⁵ Carl E. Bruch and Roman Czebiniack above n 196, 10441.

²⁶⁶ See the U.N Economic Commission for Africa, African Common Position on Environment and Development (1992).

Created within the auspices of the *East African Community*,²⁶⁷ the MOU brought with it new opportunities for the pursuit and promotion of the right to public participation. The *Memorandum of Understanding for Co-operation on Environment Management* (MOU)²⁶⁸ was signed by the three East African states on the 22nd October 1998²⁶⁹. In its preamble, the MOU states that the governments of the Republic of Kenya, the United Republic of Tanzania, and the Republic of Uganda are conscious of the need to co-operate in the rational management and sustainable use of the environment and natural resources to ensure sustainable development²⁷⁰.

The MOU contains several areas of cooperation²⁷¹ between the three East African States and makes one of the most elaborate provisions on the right to public participation in the East African Sub-region. The MOU recognises the importance of access to information as a supportive and capacity building

²⁶⁷ Established by the East African Community Treaty Done at Arusha, Tanzania, Nov 30, 1999.

²⁶⁸ The Treaty establishing the East African Community provides for cooperation in Environment and Natural Resources Management between Uganda, Kenya and Tanzania.

²⁶⁹ The MOU is part and parcel of the *EAC Treaty* and it anticipates the development of a protocol on environmental management under the Treaty establishing the East African Community. (See Article 3).

²⁷⁰ This provision is in line with the its parent treaty provisions; the East African Community Treaty, which notes that development activities may have negative impacts on the environment leading to the degradation of the environment and depletion of natural resources and that a clean and healthy environment is a requisite for sustainable development.

²⁷¹ The general areas of cooperation provided for under the MOU include: Cooperation in strengthening and/or expanding the on going development activities that demonstrate sound environmental management practice, common water quality and control programmes based on harmonised water policies, standards and monitoring systems, developing and applying common measures to reduce and control general environmental degradation and promoting sustainable use of natural resources; developing common strategies to combat Desertification, land use policies as well as efficient use of water resources, and stock assessment and optimum utilisation and conservation of the fisheries resource. There are also special provisions for specific areas of cooperation in the areas of development and enforcement of environmental legislation; Management of the Lake Victoria Ecosystem; Management of the Forest Resources; Management of Wildlife, management of the Marine coastal Environmental; management of wastes and hazardous waste, pollution and control management, development and Harmonisation of Environmental Impact Assessments, Development and Harmonisation of Environmental Standards and capacity building and support measures.

measure for public participation in environmental decision making and sustainable development. It provides that:²⁷²,

“Partner states shall promote public awareness programmes and access to information as well as measures aimed at enhancing public participation on environmental management and issues”²⁷³

The advent of environmental impact assessments brought with it increased opportunity for public participation in decision making in development processes. The MOU has seized this opportunity to make wide ranging provisions for public participation in environmental impact assessments by the partner states. The MOU requires all partner states to enact legislation to regulate environmental impact assessment. The legislation on EIAs by the member states is required to contain provisions that enable public participation at all stages of the process related to environmental impact assessment²⁷⁴. It is

²⁷² See Article 16(2)(a); Article 16(2)(c) provides that: Partner states agree to establish resource centres on environmental management including environmental law, forestry, wildlife, pollution, management, environmental information, environmental impact assessment, hazardous and non hazardous wastes management, toxic and hazardous chemicals, environmental standards, water and land resources management”.

²⁷³ It is important to note that the MOU does not limit itself to general provisions on access to information. It contains more specific provisions on access to information in the areas of cooperation enumerated under it. There are provisions within the MOU for the partner states to develop common programmes and procedures for the dissemination of information on the operation and use of Environmental Impact Assessments as a necessary regulatory measure for sustainable development. In addition to that, the partner states also agree to exchange information on forest resources, wild life, the marine and coastal environment and waste and hazardous waste. In relation to marine and coastal environment, the MOU recognises the importance of co-operating and sharing information with international and regional organisations from research and monitoring. However, even though the MOU has extensive provisions on access to information, these provisions are more of general statements of intent by the member states rather than binding commitments. Moreover, the MOU does not elaborate on the practical procedures and mechanisms that member states will take to actualise access to information by the public in the East African community. That notwithstanding, the MOU sets a firm basis for the promotion and realisation of the right to access to environmental information by the citizens of the East African Community in ways that that were hitherto not possible in the member states.

²⁷⁴ See Article 14(2).

further required that partner states develop common programmes and procedures for the dissemination of information on the operation and use of environmental impact assessment as a necessary regulatory measure for sustainable development.²⁷⁵

The MOU also contains strong provisions on public participation in the areas of general cooperation. For example, it provides that “Partner states agree to review existing national policies and legislation on forests to reflect modern concepts of multiple economic, social and ecological roles of forests”²⁷⁶. The MOU also provides for community participation in wildlife resource management within the three East African States.²⁷⁷

The access to justice provisions in the MOU require member states to develop measures, policies and laws which will grant access, due process and equal treatment in administrative and judicial proceedings for all persons who are, or may be, affected by environmentally harmful activities in the territory of any partner states.²⁷⁸ This provision lays the foundation for *locus standi* in environmental matters in East Africa because it not only enables the aggrieved party to seek redress in their home country but also in any of the partner states who are signatories to the memorandum of understanding. The provisions of

²⁷⁵ See Article 14(3).

²⁷⁶ Article 10(b); The realisation that forests can have economic as well as social (emphasis mine) values means that there is a recognition that resource dependent communities that live in and around forests do have a role to play in management of forest resources. Public participation in the management of the forestry sector is further strengthened by the provisions of Article 9(f).

²⁷⁷ It provides for the development of user rights in and outside protected areas and calls upon member states to harmonise their wild life laws in order to avoid discrepancies in enforcement across borders. The recognition of user rights in protected areas is a major move in the participation of communities in the management of Wild life areas, which have hitherto been the preserve of the state.

²⁷⁸ See Article 16(2)(d).

the MOU grant rights of access to the nationals or residents of the partner states to judicial and administrative establishments to seek remedies for transboundary environmental damage.²⁷⁹ These provisions of *locus standi* open up the judicial space for the partner states in a way that has hitherto not been known in the Sub-region. The concept of *locus standi* in the East African region has traditionally been interpreted narrowly to limit access to justice to only the residents of a partner state in which the violation occurred. In addition, any would be complainants were required to have a direct and distinct interest in the matter that is greater than the general public interest. By providing in Article 16(2)(d) access to “all persons who are or who may be affected by environmentally harmful activities..” the MOU goes beyond the confines of *locus standi* to open up the justice system to all environmentally aware and loving citizens within the partner states. However, the MOU is not only significant for its *locus standi* provision but also for the requirement that any access to justice shall ensure due process and equal treatment of all.

It is very clear from this analysis of the MOU that it has quite substantive provisions on the right to public participation in a wide array of environmental and natural resources management areas. Whereas these provisions are by no means exhaustive, they do set a new course in environmental governance in the East African Sub-region. Moreover the existence of more prescriptive provisions in the MOU, like those relating to environmental impact assessments, means that the three East African States are moving in the right direction toward the promotion and recognition of the right to public participation. The act of signing the MOU by the three East African States is

²⁷⁹ See Article 16(4).

very significant for environmental governance and accountability in East Africa because it lays the foundation for the formulation and eventual development of a *Protocol on Environmental Governance* in East Africa.²⁸⁰ The MOU and the anticipated *Protocol on Environmental Governance* also serve to bring the region out of isolation and into the global ambit of the developing discourse on environmental procedural rights. Virtually all regions of the world²⁸¹ are moving towards the development of instruments which are meant to promote the right to public participation. The European Union has taken the lead in this endeavour with the adoption of the Aarhus Convention, which is the first binding instrument at regional level on environmental procedural rights²⁸².

²⁸⁰ The Treaty for the Establishment of the East African Community between Kenya, Uganda and Tanzania provides for the development of an Environmental Protocol. The MOU is viewed as a fast track towards the development of an environmental protocol to the East African Treaty.

²⁸¹ For example, the Inter- American Strategy for the Promotion of Public Participation in Decision Making for sustainable development which is regarded as a strategy that encourages the signatories to undertake legal and institutional reforms for the implementation of the Rio Declaration; the NAAEC among Canada, Mexico and the United States which is a side agreement that grew out of the concerns that the NAFTA did not adequately take into account environmental interests and therefore was established in part to enhance compliance with and enforcement of environmental laws and regulations and to promote transparency and public participation in the development of environmental laws; the ASEM for Asian countries which is a collective effort to create a co-operative process to better promote economic, political and cultural development as well as environmental protection. As part of this effort, a three year project entitled public participation in Environmental Aspects in ASEM countries was initiated in June 2000.

²⁸² The UNECE Convention on Access to Information, Public Participation in Decision making and Access to Justice in Environmental Matters.