

## CHAPTER SIX

### THE LEGAL AND POLICY REGIME FOR THE PARTICIPATION OF INDIGENOUS PEOPLES IN THE CONSERVATION AND MANAGEMENT OF PROTECTED AREAS IN UGANDA

#### 6.1 The policy regime

Public participation in environmental decision making in Uganda is set within the broad policy framework for the promotion and protection of the environment.<sup>526</sup> This policy framework is articulated in the 1995 *National Environment Management Policy*, which sets as two of its key policy objectives:

- integrating environmental concerns in all development policies, planning and actions at national, district and local levels, with *the full participation of the people* (my emphasis)
- ensuring *individual and community participation* (my emphasis) in environmental improvement activities.

Underlying these broad policy objectives are key principles, which are intended to guide policy development and implementation strategies.<sup>527</sup>

However, the key principles contain only one specific reference in relation to public participation and this is to be found in reference to the provisions for the

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<sup>526</sup> The stated goal of the policy is sustainable social and economic development, which maintains or enhances environmental quality and resource productivity on a long-term basis that meets the needs of the present generations without compromising the ability of the future generations to meet their own needs. See Chapter 2. Of the *National Environment Management Policy* for Uganda: 1995.

<sup>527</sup> See the *National Environment Management Policy* Chapter 2.3.

effective involvement of women and youth in natural resources policy formulation, planning, decision making, management and programme implementation.<sup>528</sup>

The policy states that the participation of the people in resource management is intended not only to enlist their support but also to influence change in behaviour and attitudes and act as an incentive for sustainable resource use. The objectives for public participation in environmental matters in Uganda include:

- involving resource users in environmental planning, implementation, implementation, monitoring and evaluation at all levels
- bringing resource management closer to resource users.<sup>529</sup>

The policy contains additional provisions for the participation of non-governmental organisations (NGOs) in environmental protection and management.<sup>530</sup> The policy also recognises the importance of NGOs in mobilising and sensitising the public in environmental matters and in ensuring that the voices of the underprivileged are incorporated into national development processes.<sup>531</sup> Finally, the National Environment Management

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<sup>528</sup> Ibid Chapter 2.3 (xiv).

<sup>529</sup> Ibid, Chapter 3.14 of the policy contains the substantive provisions on public participation in environmental decision making.

<sup>530</sup> Ibid, Chapter 5.3.

<sup>531</sup> Ibid.

Policy provides for the establishment of guidelines for public participation in environmental matters.<sup>532</sup>

## 6.2 The legal regime

The policy provisions on the right to public participation in environmental decision making are elaborated upon in the *National Environment Statute*. The National Environment is :

“a statute to provide for sustainable management of the environment, to establish an authority as a coordinating and supervisory body for that purpose and for other matters incidental to or connected with the foregoing.”<sup>533</sup>

One of the statute's guiding principles is to encourage maximum participation by the people of Uganda in the development of policies, plans and processes for the management of the environment.<sup>534</sup> It also contains several provisions for protecting special environmental resources which it provides for public participation. In the forestry sector, the statute contains elaborate provisions for community participation in reforestation and afforestation. It charges the local environmental committees with the duty of ensuring public participation by encouraging voluntary self-help in the community to plant trees and other vegetation.<sup>535</sup> The statute makes the community responsible for taking measures for planting trees and other vegetation on their land, whether that

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<sup>532</sup> It is important to note that these guidelines have never been put in place and there is no indication that there are any plans to draft these guidelines in order to make the realisation of the right to public participation in environmental matters a reality in Uganda.

<sup>533</sup> See Preamble to the *National Environment Statute*.

<sup>534</sup> Section 3(2)(b).

<sup>535</sup> Section 40.

land is customary, freehold or leasehold or held in any other form of tenure.<sup>536</sup>

The responsibility for community participation in the forestry sector in the national environment statute is enforced with criminal sanctions. The statute provides that “any person who contravenes any measures prescribed by the National Environment Management Authority under section 40 relating to afforestation or who fails to comply with a lawful directive by a local environment committee commits an offence.”<sup>537</sup> In order to enhance public participation, the statute establishes a board of directors for the National Environment Management Authority. This board includes two members of the public.<sup>538</sup> The inclusion of members of the public on the highest policy making body on the environment in the country is an important consideration in the statute. It is important to note, however, that the public representatives on this board are appointed by the minister responsible for the environment, which means that they do not necessarily represent the public or civil society because they are not accountable to them but to the government.

The right to public participation in environmental decision making and natural resources management in Uganda is also set within the general context of the decentralisation policy. The decentralisation policy was introduced in Uganda with the enactment in 1993 of the *Local Governments (Resistance Councils) Statute*, which devolved a series of hitherto centrally wielded powers, including those relating to environmental management, to local authorities. The statute is described as a statute providing for the “decentralisation of functions and powers and services to local Government (Resistance Councils) to increase

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<sup>536</sup> Section 40(3).

<sup>537</sup> Ibid.

<sup>538</sup> Section 9. See also second Schedule to the Statute.

local democratic control and participation in decision making and to mobilise support for development, which is relevant to local needs.”<sup>539</sup> The decentralisation provisions in the 1993 *Local Government Statute* were consolidated in 1995 by the adoption of a new constitution for Uganda. The Constitution establishes as one of its key principles the devolution of functions and powers to democratically elected councils on the basis of universal adult suffrage. This constitutional principle was immediately translated into law with the passing of the *Local Government Act* in 1997. The self-ascribed objective of the Act is to:

“amend, consolidate and streamline the existing law on local government in line with the constitution to give effect to the decentralisation and devolution of functions, powers and services; and to provide for decentralisation at all levels of local government to *ensure good governance and democratic participation in, and control of decisions making by the people* (my emphasis); and to provide for revenue and the political and administrative set up of local governments; and to provide for election of Local Councils and any other matters connected to the above.”<sup>540</sup>

The specific objectives of *the Local Government Act* are:

- a) to give full effect to the decentralisation of functions, powers, responsibilities and services at all levels of local government

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<sup>539</sup> Nyangabyaki Bazaara, *Decentralization, Politics and Environmental Management in Uganda*. WRI Working Paper Series, Institutions and Governance Programme (2003) 3.

<sup>540</sup> *The Local Government Act*, Chapter 2.

- b) to ensure democratic participation in and control of decision making by the people concerned
- c) to establish a democratic gender sensitive administrative set up in local governments
- d) to establish sources of revenue and financial accountability and
- e) to provide for election of local councils.<sup>541</sup>

In line with the general principle of decentralisation in Uganda and the specific objective relating to public participation in decision making, there has been corresponding decentralisation in environmental decision making and in the management of natural resources. It is therefore important to further examine the right to public participation in environmental decision making within this context.

### **6.3 Decentralisation in Uganda**

In order to understand public participation in environmental decision making within a decentralised framework, it is important to first examine the nature and structure of decentralisation in Uganda.

Decentralisation is based on local councils, which is a generic term that replaced resistance councils in the 1993 statute. Resistance councils were administrative organisations developed during the guerrilla struggle in the 1981-86 period that saw President Museveni assume power. In rural areas, the

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<sup>541</sup> Ibid.

local government structure has five levels of local council, the lowest being the village council and the highest being the district council.<sup>542</sup>

In between in ascending order are parish, sub-county and county councils. In urban areas, the city council equates to a district council and the city is divided into sub-county councils. In municipalities, local governments comprise the municipal councils and municipality division councils. In towns, local governments are town councils.<sup>543</sup>

It is important to note that not all levels of the council are deemed local governments. Local governments are those institutions with legislative and executive functions. In rural areas, these are the sub-county and district councils. In urban areas, these are the city councils and the city division councils; in the municipality these are municipal and municipal division councils and in towns these are town councils. Other levels – county, parish and village councils in rural areas and parish and ward councils in urban areas are simply administrative.<sup>544</sup>

The *Local Government Act* 1997 had the effect of devolving powers to the district and lower levels of government and the democratisation of decision making as described above. Under the Act, the district and sub-county are local governments that are bodies corporate, capable of suing and being sued. They have financial autonomy and as such are no longer required to send their

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<sup>542</sup> Nyangabyaki Bazaara, *Actors, Powers and Environmental Accountability in Uganda's Decentralisation* (A paper presented at a conference on Decentralisation and the Environment, Bellagio, Italy 18-22 February, 2002) 4.

<sup>543</sup> Ibid.

<sup>544</sup> Ibid.

budgets to the minister responsible for local government for approval. The district and sub-counties are also responsible for formulating and approving their own bye-laws as long as they are not inconsistent with the constitution and other national legislation. The districts and lower government councils are constitutionally established and as such constitute their own councils. The revocation of a mandate of any of the council members is vested in the electorate who can initiate the removal of any councillor through petitioning the electoral process. Neither the central government nor the minister responsible for local government has the power to dissolve a council until their statutory term expires. However, in exceptional cases, when it has been proven that a council has failed to discharge its duties, the president with the approval of two thirds of all members of parliament may assume executive powers of any district.<sup>545</sup>

The district executive council is responsible for implementing decisions and its members are in full time service. The chairperson of the district council is the overall coordinator of district programmes and directs any business of the council, and is answerable to it.

Under the *Local Government Act*, councils are responsible for, among other things: “assisting government to preserve the environment through protection of forests, wetlands, lakeshores, streams and prevention of environmental degradation.”<sup>546</sup> The Act also entrusts district councils with the responsibility

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<sup>545</sup> The conditions under which the president may take over executive powers of a district include: where the district council so requests and its in the public interest to do so; where a state of emergency has been declared in that district or in Uganda in general and where it becomes extremely difficult, or impossible for a district government to function.

<sup>546</sup> Section 15 (2).



of vector control, environmental sanitation, entomological services and vermin control and forests and wetlands.<sup>547</sup> However, it is important to note that environmental policy formulation is retained as a responsibility for the central government.<sup>548</sup> The district councils are also allowed to delegate some of their environmental duties to the lower local councils. These include: control of soil erosion and protection of wetlands, the control of vermin, taking measures for the prohibition, restriction, regulation or abatement of grass, forest or bush fires and to cut fire breaks and general local environment protection and the control of local hunting and fishing.<sup>549</sup>

#### **6.4 The historical context within which the right to public participation in environmental decision making has emerged in Uganda**

##### **6.4 1 *The colonial period***

When Uganda was first colonised by the British, they created a form of local government that was headed by a chief. The chief was an appointee of the colonial head, the governor, and was not accountable to the local populace he headed. According to Fred Burke<sup>550</sup>:

“Backed by the power of the colonial government in the guise of the district commissioner, the chief’s powers of arrest and seizure, and control over allocation and use of property were nearly unlimited. His powers were in fact limited only by his accountability to the district

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<sup>547</sup> See Schedule to the Local Government Act 1997.

<sup>548</sup> The second schedule to the Local Government Act lays out the different functions and services of the central and local governments.

<sup>549</sup> The Local Government Act, section 4.

<sup>550</sup> Burke Fred G, *Local Government and Politics in Uganda*, Syracuse, Syracuse University Press (1964) 34.

commissioner who was also in turn only accountable to a distant colonial official. The chiefs were therefore relatively free to exploit their subjects.”<sup>551</sup>

The public was not involved in the decision making process at any level and most certainly not in matters relating to environmental or natural resources management. Elections were first introduced in Uganda towards the end of the colonial era, as part of local government reforms introduced in 1949. Claims of public participation and downward accountability were used to justify those elections.<sup>552</sup> It was the contention of the colonial government that:

“the conduct of self-government demands experience in the practice of selecting representatives charged with giving expression to policies approved by the community, and its success depends on the public to hold them to account if they fail in their duties. It is perhaps only in those territories where a regular system of local councils, based wholly or partly on the use of election, has been introduced as part of the native administration, there has been provision of local government instructions which can afford some preparation for the practice of political self-government.”<sup>553</sup>

In spite of the colonial government’s intention to introduce public participation in political decision making through the introduction of elections, the system

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<sup>551</sup> Nyangabyaki Bazaara, above n 539, 4.

<sup>552</sup> Ibid.

<sup>553</sup> Hailey Lord, *Native Administration in the British African Territories: A general survey of the System of Native Administrative Part IV*, London: His Majesty’s stationary office (1951) 34.

that was introduced did not involve the public. It was a system by and for the state officials. This is because, as it turned out, the basic electoral college was the parish council, which was constituted, not by the parish community, but by elected colonial government parish officials. These parish chiefs elected the chiefs who would serve on the county councils. The county council chiefs in turn elected the district council.

It is therefore clear that the electoral system introduced in Uganda during British colonial rule was neither democratic nor participatory. It was a top down administrative system that did not cater for public accountability by the elected officials. It excluded women and youth and many times, if the elections were not rigged by the competing village chiefs, the colonial government simply appointed those chiefs it felt served it better thus rendering the whole election process meaningless.<sup>554</sup> This system of governance could therefore not be expected to provide for meaningful and effective public participation in environmental decision making and natural resources management.

Nevertheless, in spite of the shortcomings of the colonial government, the district council was permitted by the colonial government to make bye-laws for good rule and government. Such bye-laws were only to be in respect to matters set out in the *Native Authorities Ordinance and the Native Authority Rules* unless the Governor requested the district council to make a bye-law in relation to any other matter. The *Native Authorities Ordinance* determined, among other things, the areas over which chiefs could make bye-laws.<sup>555</sup> In relation

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<sup>554</sup> Burke, above n 550.

<sup>555</sup> See Section 7 (A) and (B) of the Native Authorities Ordinance 1919 which provides that:

to the environment, the chiefs could make bye-laws “preventing the pollution of the water any in any stream, watercourse, or water hole and the prevention of the obstruction of any stream or watercourse and regulating the cutting of timber and prohibiting the wasteful destruction of trees.”<sup>556</sup> It is important to note that all the bye-laws made by the district council needed the strict approval of the colonial government.

In 1952, the *National Parks Ordinance No.2* was enacted. It provided for the establishment of national parks for the purpose of preserving wildlife, wild vegetation and providing for other incidental matters.<sup>557</sup> In 1959, residence in game reserves was specifically prohibited, although the rights of prior residents in game reserves were recognised. This allowed human populations to grow within game reserves, as the legislation was unclear about the rights of residents. Legislation also provided for the establishment of local game committees, which were to advise the governor or minister on game conservation and hunting.<sup>558</sup> This allowed local leaders to become directly involved in the management of wildlife and protected areas. Education

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Subject to the provisions of any law for the time being in force in the protectorate, any chief may from time to time issue orders to be obeyed by the African residing within the local limits of his jurisdiction as follows: A) Any order, which such a chief may issue by virtue of any native law or custom for the time being in his area: provided that such a law or custom is not repugnant to morality or justice. B) Any order for any of the following purposes: (1) restricting and regulating the manufacture, distillation, possession, sale or supply of any native intoxicating liquor and in addition thereto, prohibiting any person from manufacturing, distilling, selling or supplying such liquor except in pursuance of a permit issued subject to such conditions and payment of such fees as the provincial commissioner may from time to time approve (2) prohibiting or restricting the holding of drinking bouts (3) prohibiting or restricting the cultivation of poisonous or noxious plants, and the manufacture of noxious plants and drugs (4) prohibiting or restricting the carrying of arms (5) prohibiting any act or conduct which in the opinion of the chief might cause a riot or disturbance of the peace ....

<sup>556</sup> Section 7 (B) (6) and (7) of the Native Authorities Ordinance.

<sup>557</sup> For a detailed discussion see Kamugisha, J.R, *Management of Natural Resources and Environment in Uganda: Policy and Legislation Landmarks, 1890 –1990*, Nairobi, SIDA's Regional Soil Conservation Unit, RSCU (1993).

<sup>558</sup> Ibid.

programmes were also an important part of protected area management and two national parks formed in the 1950s were equipped with residential education centres.

Despite the initiative to cater for community participation in the management of protected areas, the separation of conservation and human use were as marked in Uganda as elsewhere and the American model of 'fortress conservation' was implemented wherever the opportunity presented itself.

The clearing of human settlements from areas threatened by sleeping sickness carried by tsetse flies, common in game parks in Uganda, presented an opportunity to create protected areas. The creation of Queen Elizabeth National Park in 1952 is a good example of this. Despite the threat of sleeping sickness and against the orders of the colonial government, many people returned to the area to continue fishing on Lake Edward and Lake George inside the Park. To this day, these villages are seen as a management problem for the Park<sup>559</sup> and periodic efforts have been made to remove or relocate villages.<sup>560</sup> Another example is the expulsion of the Ik people from their hunting grounds with the creation of the Kidepo Valley National Park in 1962. The disastrous consequences this had for them are well documented.<sup>561</sup>

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<sup>559</sup> See generally: Olivier, R.C.D, *The Queen Elizabeth National Park Management Plan*, Kampala, Uganda National Parks (1990).

<sup>560</sup> See Generally: Infield, M, *Socio-economic Survey in the Queen Elizabeth National Park*, Uganda, Kampala, Uganda Institute of Ecology (1989).

<sup>561</sup> See generally: Turnbull, C.M, *The Mountain People*. New York. Simon and Schuster (1972).

#### **6.4.2 The post-colonial period**

The immediate post independence period saw the introduction of political parties in Uganda. These political parties were literally being groomed by the colonial government to take over power and, thus they focused more on political participation and for the first time introduced universal adult suffrage. There was little or no consideration given to public participation in environmental decision making and all the natural resources in Uganda remained squarely under the control of the colonial government. When Uganda obtained independence in 1962, the colonial government transferred all the natural resources to the independence government. The government that took over at independence continued the British colonial legacy of complete control of natural resources with no room for public participation in the decision making process.

The period between 1970 and 1980 was a turbulent one in Uganda filled with political upheaval and economic degradation and Uganda's natural resources did not escape the ensuing chaos. The decline of conservation and protected area management in this period swept away most conservation programmes that were introduced by the colonial government and taken over by the independent government in 1962.<sup>562</sup>

While the years of turmoil caused massive hardship and national regression, the relative peace created since the late 1980s by the National Resistance Movement (NRM) Government has allowed for a new look at all policy and

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<sup>562</sup> Edmund Burrow, Helen Gichohi and Mark Infield, *Rhetoric or Reality: A Review of Community Conservation Policy and Practice in East Africa*. Evaluating Eden Series No.5 (2000) 22.

legal instruments to ensure that they fit Uganda's aspirations for the 1990s and beyond, rather than being tied to dated and outmoded instruments dating to Uganda's colonial past. This allowed for the development of legal and policy instruments, which are people centred, and fit within the new system of decentralised natural resources management in Uganda.<sup>563</sup>

The NRM Government reintroduced local governments in Uganda based on elections by universal adult suffrage. It also proceeded to decentralise the governance structure in Uganda, which included the decentralisation of natural resources management as well as the provision of opportunities for public participation in environmental decision making. Public participation in environmental decision making within a decentralised context in Uganda is provided for at two key levels: the central and local government levels. The central government retains legislative and management powers over protected areas including forests and wildlife.<sup>564</sup> Public participation in environmental decision making and natural resources management of protected areas under the responsibility of the central government is generally limited, especially in the forestry and wildlife sectors on which many communities still depend for daily subsistence.

However, in order to enhance public participation in environmental decision making in protected areas, the central government has introduced a number of pilot collaborative management projects. The key ones have been established

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<sup>563</sup> Ibid.

<sup>564</sup> It is important to note that the first *Local Government Act* in 1993 had devolved all authority over protected areas to local governments. However, in 1995, the government retracted these powers back to the line ministries because of reported massive corruption by the local government officials. See Inspector of Government Report on 1999 on corruption in the forestry sector in Uganda and Forestry Policy 2001.

around Bwindi Impenetrable Game Park, Mount Elgon Forest Park, Budongo Forest Reserve and Mabira Forest Reserve. These collaborative arrangements were entered into with the local communities by the central government in order to augment public participation in environmental decision making and natural resources management.<sup>565</sup> The collaborative management schemes detail the kinds of resources that can be harvested by the community, in set quantities and at set periods. The collaborative management arrangements also establish resource user institutions on which the community is represented. It is important to note that the level of public participation in environmental decision making provided for by the collaborative resources management arrangement is limited because it only benefits those members of the public who get direct benefit from specific resources. As the collaborative arrangements are limited in their reach in terms of public participation in environmental decision making and natural resources management, to select communities living adjacent specific resources several members of the public who may have an interest in the environmental issues relating to those resources are not represented and this often leads to conflict by other interested parties.<sup>566</sup>

Local governments on the other hand are permitted to manage local natural reserves, which are less than 100 hectares. Local governments are required by law to develop local environmental action plans with the participation of the community. However, public participation in environmental decision making at

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<sup>565</sup> *The Forestry Policy 2001* also notes that the collaborative arrangements are intended to redress past injustices and alleviate poverty of poor communities.

<sup>566</sup> A detailed discussion on collaborative natural resources management in Uganda will be discussed as part of a case study on Bwindi Impenetrable Game Park in the subsequent sections of this chapter.



local government level, through the development of local environmental management plans, is very limited. The limited level of local participation in environmental decision making can be attributed to several factors, most important of which is the lack of awareness and knowledge of the importance of community involvement in environmental decision making.

### **6.5 The participation of the Batwa in the conservation and management of Bwindi Impenetrable Game Park**

Bwindi Impenetrable Game Park is a world heritage site<sup>567</sup> located in South Western Uganda. Situated on the edge of the Western Rift Valley, the park is 32,092 square kilometres and borders the Democratic Republic of the Congo. Bwindi is characterised by steep hills and narrow valleys with a general incline from the northwest and western areas. Together with some remnant lowland forest outside the boundary, the park constitutes an important water catchment area serving the surrounding agricultural land. Bwindi is one of the few large expanses of forest in East Africa where the lowland and montane vegetation communities meet. Combined with its probable role as a Pleistocene refuge, this situation has led to an extremely high biodiversity.

Current evidence indicates that Bwindi contains the most diverse forest in East Africa. There are more than 200 tree species and over 104 species of ferns as well as other taxa. In recognition of this, Bwindi was selected by IUCN's Plant Programme as one of the 29 most important forests in Africa for preserving plant diversity. Bwindi is also believed to hold the richest faunal community in East Africa, including over 214 species of forest birds (336) in total, 120

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<sup>567</sup> Bwindi Impenetrable Game Park was declared a world Heritage site in 1994.

species of mammals and 202 species of butterfly. Highly significant is the presence of almost one half of the world's population of mountain gorillas, about 300 of 650, which live in some 23 family units.<sup>568</sup> Bwindi is undoubtedly the most important area in Uganda for species conservation due to its exceptional species diversity, including many Albertine Rift endemics and nine globally threatened species.

The northern sectors of Bwindi Impenetrable Game Park were first gazetted by the British Colonial Government as Kasatora and Kayonza Crown Forest Reserve covering a total area of 20,700 ha in 1932. In 1948 the two reserves were combined and extended into the Impenetrable Central Crown Forest Reserve covering 29,800ha.<sup>569</sup> Two local forest reserves were then incorporated into the central reserve in 1961, increasing the gazetted area to 32,080 ha. In the same year, the entire reserve was gazetted as an animal sanctuary<sup>570</sup> in an effort to grant additional protection for the mountain gorillas.

The gazettement of Bwindi as an Impenetrable Game Park sparked off a riot in the 1960s championed by a local chief called Kinaba because the local community perceived the word 'impenetrable' to mean that they would no longer have access to the forest. A Norwegian forest officer acting as District Forest Officer for Kigezi District in the late 1960s changed the name to Bwindi Central Forest Reserve. In reality, Bwindi gets the name 'impenetrable' from the dense cover of herbs, vines and shrubs inhabiting the valley bottoms of the forest. Bwindi is

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<sup>568</sup> Von Zeipel, M, *A decade of peace revives Uganda's wildlife and gorilla tourism*, WWF NEWS (1996) 4.96. The rest of the mountain gorillas are within the Virunga's along the confluence of the Uganda, Rwanda – Democratic Republic of Uganda.

<sup>569</sup> See *Forest Act 1947* as amended in 1964.

<sup>570</sup> *Game Preservation and Control Act*, 1959, amended 1964.

classified as medium altitude moist evergreen high altitude forest<sup>571</sup> and was upgraded to a national park in 1991<sup>572</sup>. However, until then, Bwindi was managed as both a forest reserve and game sanctuary, under the joint management of the forest and game departments. Bwindi Impenetrable Game Park is owned by Uganda National Parks.

Oral tradition common to the ethnic groups in South Western Uganda as well as western historians concur in identifying the Batwa as the first inhabitants of the Bwindi Impenetrable Game Park area until at least the mid sixteenth century.<sup>573</sup> The Batwa are mostly forest hunter gatherers, though some may also have lived in the savannah forest or forest lake environment.<sup>574</sup> It was then considered the northern frontier territory of the pre-colonial Rwanda State. According to the Tutsi Kings of Rwanda, these high altitude forests, then known as the 'domain of the bells' after the bells on the Batwa dogs' collars, belonged to the Batwa. Indeed, as one Batwa elder indicated:

“Since the beginning, we have lived in the forest. Like my father and grandfathers, I have lived from hunting and collecting on this mountain.

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<sup>571</sup> For a detailed discussion see, Langdale – Brown, I., Osmaston, H.A, Wilson, J.G *The Vegetation of Uganda and its Bearing on Land use*, Entebbe: Government Printer (1964).

<sup>572</sup> Statutory Instrument No.3. 1992; *National Parks Act* 1952.

<sup>573</sup> Jerome Lewis, *The Batwa Pygmies of the Great Lake Region*, Minority Rights Group International Report (2000). The Batwa that inhabit part of South Western Uganda are part of a group of Batwa that are also found in the DRC, Rwanda and Burundi. Their population is estimated at 70,000 to 87,000 people dispersed over an area approximately 100,000 square km. The Batwa are a minority numerically, making up between 0.02 and 0.7 percent of the total population in the various countries they occupy.

<sup>574</sup> The forest based Batwa that are found in this area of south western Uganda refer to themselves as Impunyu. They are semi-nomadic, moving from place to place but often spend elongated periods in favored campsites both in and outside the forest. Hunting a variety of small and medium sized animals and collecting different tubers, leaf and fruit stock, honey and fungi according to season. Groups are small rarely exceeding 50 people, often based around members of a particular clan. Much of the traditional religion is based on the forest, making offerings at certain sacred coves, hills, valleys, swamps or trees. Even when these sacred sites are now inside the national park, Impunyu continue to visit them secretly.

Then the Bahutu came. They cut the forest to cultivate the land. They carried on cutting and planting until they had encircled our forest with their fields. Today, they come right up to our huts. Instead of the forest, we are now surrounded by Irish potatoes.”<sup>575</sup>

The first Tutsi moved into the area after 1550. While recognising Batwa ownership of the high altitude forest, they received tribute from Batwa as representatives of the Tutsi King in Rwanda.<sup>576</sup> On the other hand the first Hutu clans moved into the area around 1750 to escape Tutsi rule in Rwanda. The Batwa claim affiliation to these same clans and not to the hundred or more others who came after and live in the region today.

The Batwa continued to live in this area all through the latter part of the 19<sup>th</sup> century and the early part of the 20<sup>th</sup> century. Conflicts with the Tutsi led to raids and battles. The Tutsi sought Belgian help from Rwanda to overcome the Batwa. In 1912, the English took over this area and elected Nnyindo as Batwa chief. However, Nyindo plotted with the Germans to try and overthrow the British colonialists. He was severely defeated by the British who continued to enforce their rule in the area along with the rest of Uganda until 1962 when Uganda was granted independence by the British.

Today, the Batwa clearly identify themselves as indigenous peoples and share many of the characteristics of indigenous peoples expressed in Article 1 of the *International Labour Organisation (ILO) Convention 169* concerning tribal

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<sup>575</sup> Jerome Lewis, above n 573, 8.

<sup>576</sup> Ibid.

and indigenous peoples in independent countries.<sup>577</sup> The Batwa involved in the indigenous rights movement emphasise that the Batwa's place in the history of the region is unique. While the other communities currently living in the area like the Tutsi, Hutu and Bakiga all claim their origins from outside this area, the Batwa in contrast emphasise that they have no origins elsewhere, no history of immigration, that they are truly the indigenous peoples of the area. The Batwa emphasise that despite Uganda's independence from the British, they remain a colonised people; their process of decolonisation remains unfinished. They see themselves as first being colonised by the agricultural Hutu, then by the pastoral Tutsi and finally by the Europeans. The Batwa have been dispossessed of all their land and do not enjoy security of tenure for what remains.<sup>578</sup>

#### **6.5.1 *The gazetting of Bwindi Impenetrable Game Park***

There are three historical eras in the gazettal of Bwindi Impenetrable Game Park; the pre-gazettal era, the forest reserve era and the national park era.<sup>579</sup>

##### **6.5.11 The pre-gazettal era**

The pre-gazettal era was marked by unlimited access to the park resources since there was no law barring or restricting community access to the forest resources. The activities to which the community put the forest and surrounding area included: harvesting forest products, hunting and fishing in the swamps and streams that form part of the park. The people remember this period with nostalgia:

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<sup>577</sup> Ibid, 6.

<sup>578</sup> Ibid, 5 – 6.

<sup>579</sup> Ibid.

“A long time a go we used to get all the resources we wanted from the forest with no-one stopping us. We would cultivate on the forest fringes, hunt and trap animals in the forest, make beehives and lay them there, cut large trees to convert them into timber and mine gold. All that is no more”.<sup>580</sup>

During this period, the people felt the forest belonged to them and was completely theirs because the community had complete control of the forest.

#### **6.5.12 The forest reserve era**

The time of free access came to an end in 1932 when the colonial government declared Bwindi a forest reserve. The boundaries were marked by exotic trees that were planted at the edge of the reserve to keep out the community. The restricted access of the community to the reserve was a new phenomenon that the community had no understanding or appreciation of. As one member of the community stated:

“We were just told that the boundary was created to protect land for us in the future. But we did not understand what this meant. Stations were created with various points in the forest where we asked permission to get products like wood. Permission would be granted. Everyone who could afford the permit could cut timber. Hunting was not monitored except for large animals like buffaloes. We continued to hunt secretly,

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<sup>580</sup> Namara A, M Gray and A. McNeilage, *People and Bwindi Forest Reserve, A Historical Account as Given by Local Community Members*, Institute of Tropical Forest Reservation, Kampala, Uganda, Mimeo (2000).

and if we met the forest guards, we would give them some meat and they would let us go.”<sup>581</sup>

It is clear that the community living around Bwindi Impenetrable Game Park were left out of the decision making process leading to the gazettement of Bwindi as a forest reserve by the colonial government. It is also clear that the interests of the community were not taken into account. To the community living around Bwindi Impenetrable Game Park, the forest and fauna as well as the animals living in it were a source of livelihood and sustenance. The sudden exclusion from accessing the forest and the requirement for permits in order to harvest some of its resources meant that their lives would never be the same again. And because there was no mechanism for public participation in the decision making process and in the management of the reserve, it meant that the community could not get their interests and concerns across to the policy makers for consideration. While the colonial government eventually made allowances for the community to access the forest reserve for medicinal herbs and for gathering and hunting for food purposes, the process was very closely monitored and the community felt insecure in their rights of access which they felt could be curtailed at any time by the government.

The situation continued until 1964 when the post-colonial government also gazetted the same area as an animal sanctuary thus bringing an end to hunting, at least officially, as one of the leading sources of livelihood for the Batwa. Bwindi continued to be regulated as both a forest reserve and animal sanctuary

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<sup>581</sup> Agrippina Namara and Xavier Nsabagasani, *Decentralization and Wildlife Management: Devolving Rights or Shedding Responsibility? Bwindi Impenetrable Game Park*, (2003) 7.

with restricted community access until 1991. This dual management of Bwindi was characterised by conflict between the forest department and the game department, which continued to vie for supremacy over control of the management of Bwindi. The period was also marked by conflict between these government departments and the community, which continued to resent their restricted access to the resources in the area. In order to help deal with some of the issues arising out of the dual management of Bwindi as both a game reserve and a forest reserve, the European Economic Community (EEC) and the World Wide Fund for Nature (WWF) funded the forest department and the game department respectively to streamline the management of Bwindi as a forest reserve and to improve the conservation of wildlife in Bwindi game sanctuary, particularly the primate populations and mountain gorillas. Neither the EEC nor the WWF project took into account community interests in the area. The decision leading to the streamlining of the management of Bwindi as both a forest reserve and game sanctuary were all done without prior consultation or involvement of the Batwa people. The major focus of the project was on the institutional arrangements for Bwindi and the need to ensure efficient conservation of Bwindi and effective protection of the mountain gorillas in the area.

Recognising this lacuna in the management process, CARE International worked together with WWF to implement an extension and conservation project that involved the community living adjacent to Bwindi. Although this did not totally deal with the community problems of being left out of the decision making process and thus not being able to get their aspirations taken into account by the policy makers, it did provide some respite for the



communities in terms of allowing them to access some of the vital resources that they needed in order to sustain their daily existence.

However, between 1971 and 1984, and especially during Amin's regime, Bwindi was disregarded by the state. Widespread commercial hunting, timber harvesting and some mining occurred. Evidence suggests that the majority of those organising and carrying out these commercial activities were non - Batwa.<sup>582</sup> This was because, while for the other groups the forest represented an additional source of income, for the Batwa it was their livelihood as their activities are focused on daily subsistence rather than intensive exploitation for commercial purpose.

#### **6.5.13 The national park era**

The situation continued until 1991 when a new regime for the management of Bwindi was introduced. The introduction of a new regime in the management of Bwindi in 1991 marked the beginning of the third phase in its gazettal. The period starting with 1991 saw a greater enforcement of the laws restricting community access to the game park. The greater enforcement of restrictions on access to the park was as a result of its gazettal as Bwindi Impenetrable Game Park. Henceforth the community living around the park was completely denied access to the park or any of its resources. The Batwa people who had traditionally relied on the park for their survival were completely cut off from accessing its resource. They were completely ignored during the legal process that led to the gazettal. Accordingly, when the new law was passed gazetting

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<sup>582</sup> See Kingdon, E., Caught between two worlds: moral problems relating to conservation in southwestern Uganda. (1990) 3 *International Journal of Moral and Social Studies* 235-49.

Bwindi as a Game Park, the Batwa people had no knowledge that the process was even taking place.

They only became aware that they could no longer access the park when they were stopped by heavily armed park guards who informed them that the park was now out of bounds for the people and they could not access it any more even to collect medicinal herbs. They were informed that while it was a game reserve they could access the forest and harvest several resources including timber. However, now that it was gazetted as a game park, it was totally out of bounds to them and was no longer accessible under any circumstances. They were further informed that the only people who could access the park were tourists, most of whom came to see the mountain gorillas. The community living around the park were hard pressed to understand why tourists, most of whom were white foreigners, could access the park and not them. Keeping out the local community greatly incensed them. Indeed, one member of the community is reported to have remarked in reference to its use by tourists:

“the forest used to be ours but it was closed to us and became a forest for white people”.<sup>583</sup>

The gazettement of Bwindi Impenetrable Game Park is remarkable because it clearly demonstrates how government policies were formulated in total disregard of the interests of the community that directly depended on the resources of the now gazetted park. It is important to note that this was the period before the decentralisation of natural resources management in Uganda

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<sup>583</sup> Agrippina and Nsabagasani above, no.581, 7.

and before the concept of public participation in environmental decision making gained recognition in Uganda. The gazettal of Bwindi was an extraordinary process because there was no public involvement in the process whatsoever. Indeed, the local community that had relied on the Bwindi for their survival for hundreds of years woke up one day to be told that the area was now a game park and was out of bounds to them. This created a high degree of animosity between the government and the local community who, in spite the new law gazetting Bwindi, continued to access it illegally, sometimes at the risk of being shot by the park warders.

This was an extraordinary situation because when Bwindi was gazetted as an Impenetrable Game Park in 1991, the government of Uganda received funding from the World Bank in order to carry out its interventions in Bwindi. As part of the funding requirements, the World Bank requested the government of Uganda to carry out an assessment of the impact of the park project on the indigenous peoples of the area. The World Bank rules provide for “prior and meaningful consultation” as well as “informed participation”, which should take place before the commencement of any intervention supported by it.<sup>584</sup>

In the case of Uganda, the assessment was carried out in 1995, four years after Bwindi had been gazetted and the Batwa people evicted from the forest and stopped from accessing it. The assessment identified the Batwa as one of the groups that would be affected by the park and made several recommendations. The recommendations included giving the Batwa use rights of certain resources

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<sup>584</sup> The World Bank used its Operational Manual Statement 2.34 (February 1982) on the need to consult Tribal People in Bank Oriented Projects and Operational Directive 4.20 requiring the consultation of indigenous people (Operation Manual September 1992).

in the park, rights of passage to sacred sites in the park, the attribution of forest and farm land to evicted communities, and capacity building, educational, health and economic assistance to the Batwa who had lost their livelihood with the gazetting of Bwindi.

In addition to these recommendations being made four years after the gazetting of Bwindi, none of them were truly implemented in a way that catered for the rights of the Batwa who had been disposed of their land. While the wildlife statute allows for Batwa use and even settlement in the park, the Batwa have actually never been allowed to access the park.<sup>585</sup>

In addition, very few Batwa were financially compensated for the loss of their land. Only two Batwa households are on record as having received full compensation. There is another small group of Batwa that was only partly compensated and they have not received the balance of their compensation to date. Because many Batwa did not have permanent plots of land in the gazetted area but moved from place to place as was their culture for hundreds of years, they were not compensated. They were classified as landless and thus received no restitution. Indeed the questionnaire that formed the basis of the assessment only interviewed farmers and pastoralists who had permanency in their usage of the land. The Batwa rights to hunt and gather from the forest were not given any consideration. It is reported that when some of the Batwa complained, government officials intimidated them and at least five families fled the area for fear of retaliation from government agents.<sup>586</sup> The Forest Peoples

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<sup>585</sup> See *Uganda Wild Life Statute No.4 of 1996*, Sections 23-26.

<sup>586</sup> Jerome Lewis, above n 573, 20.

Programme reports that they tried to persuade the Bwindi Management Trust, set up by the Global Environmental Facility (GEF), to pay the costs of the park Management to acquire alternative land for the Batwa who were expelled from their forests but they were informed that the component for the compensation of the Batwa had been shut down because the Trust's investments in the US stock exchanges had performed badly.<sup>587</sup>

As it turned out, the agricultural communities that had destroyed the forest in order to set up farming communities were recognised and given compensation for the land they occupied. The Batwa who had lived in the forest for hundreds of years without destroying it or the wild animals in it received compensation only if they had acted like farmers and destroyed part of the forest to make farmland. The community rights of the Batwa over the forest resources were totally ignored.

Caught between the farmer communities who had appropriated their land and the government conservation policies, which put an end to their forest hunting and gathering lifestyles, the Batwa's forest based economy was rendered ineffective. No longer able to practise their skills or obtain forest produce openly, the Batwa lost their place in the local economy and are on the verge of extinction. They have become badly paid low status casual labourers or potters and many rely on demand sharing or begging to support their families.<sup>588</sup> As one Twa explains:

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<sup>587</sup> Ibid. 20-21.

<sup>588</sup> Ibid.

“Since we were expelled from our lands, death is following us. The village is becoming empty. We are heading towards extinction. Now the old people have died. Our culture is dying too”.<sup>589</sup>

## **6.6 Public participation in environmental decision making and the management of Bwindi Impenetrable Game Park**

The explosive situation between the community and the government concerning access to the park continued until 1996 when a new wildlife policy and statute came into force in Uganda. The policy was significant in that, for the first time, it created an obligation to involve local communities in natural resources management and to ensure that conservation contributes towards rural economies. It created an obligation to consult the public, through public meetings, on the development of management plans for protected areas and the sharing of revenue between government agencies responsible for the conservation and management of protected areas and the communities that live adjacent to those protected areas.<sup>590</sup>

In response to the new policy, a statute, the *Uganda Wild Life Statute* 1996, was enacted that provides for public participation in the conservation and management of protected areas in Uganda through the formation of wild life committees.<sup>591</sup> The wild life committees are meant to advise the Uganda Wild

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<sup>589</sup> Kwokwo Barume Albert, *Heading towards extinction: Indigenous Rights in Africa – the case of the Twa of the Kahuzi – Biega National Park, DRC*, Forest Peoples Program and International Working Group on Indigenous Affairs, Copenhagen (2000) 87.

<sup>590</sup> *Uganda Wildlife Policy* 1995.

<sup>591</sup> Section 26 (2) of the *Uganda Wildlife Statute*.

Life Authority<sup>592</sup> on the management and utilisation of wild life within local jurisdictions. Community participation involves giving advice and benefiting from the revenue collected from the park. The statute says that the Uganda Wild Life Authority is obliged to pay 20 percent of the entry fees from all protected areas to the local government in which the protected areas are located. These funds are to be spent on projects identified by the community living in the area.<sup>593</sup> The Act also provides for the granting of use rights to community groups and individuals to make use of wild life on their land and obliges the Uganda Wild Life Authority to consult through public meetings on the development of management plans for protected areas.

The combination of the use rights clauses and the new category of community management areas creates an opportunity for the growth of local industry, based on both consumptive and non-consumptive use of the resources in protected areas, which include wild life. Although the development of regulations and institutions is needed, including the repeal of the hunting ban, the intention of the new legislation is clear - to engage the people of Uganda in the conservation and management of protected areas and to alter the role of the government from that of a policeman to a regulator and facilitator.<sup>594</sup>

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<sup>592</sup> Uganda Wild Life Authority was set up under the *Uganda Wild Life Statute* 1996 as a result of a merger between Uganda National Parks, which was a government parastatal body in charge of national parks, and the Game Department, which was in charge of game reserves. Previously, the Uganda National Parks was responsible for managing national parks, while the Game Department had the responsibility for game reserves, controlled hunting areas and animal sanctuaries, and for wild life existing in areas without formal protection. Uganda Wild Life Authority has proceeded to draft policy guidelines for the establishment of Community Protected area instructions, which include environmental committees.

<sup>593</sup> Section 70 (4) of the *Uganda Wildlife Statute*.

<sup>594</sup> Edmund Burrow, Helen Gichohi and Mark Infield, above n 562, 24.

However, in spite of the well-intentioned provisions in the legislation providing for more avenues for public participation in the conservation and management of protected areas, strong emphasis still remains on punitive policing. All protected areas still remain under the tight control of the state, being held in trust for the people of Uganda.<sup>595</sup> Indeed, the traditional views on the conservation and management of protected areas continue to dominate. Also, poor relations with the communities living adjacent to the protected areas and the Uganda Wild Life Authority continue to persist to this day. Statistics indicate that, of the 1,113 staff employed by the Uganda Wild Life Authority, only 46 or four percent are specified community conservation staff, compared to 765 or 69 percent who are indicated as security staff or undesignated junior staff.<sup>596</sup>

However, prior to the passing of the new wild life statute, the *National Environment Statute* had in 1995 provided for the establishment of local environment committees. The National Environment Management Authority (NEMA) was charged with the duty of ensuring the establishment of local environment committees to ensure community participation in environmental decision making and natural resources management.<sup>597</sup> In order to fulfil its responsibility to ensure community participation in environmental decision making, the NEMA proceeded to issue guidelines and prescribed measures specifying the appropriate arrangements for public participation in environmental decision making through the establishment of local environment committees. Bwindi was one of the first areas in Uganda to establish

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<sup>595</sup> See Article 237 of the *Constitution of the Republic of Uganda 1995*.

<sup>596</sup> See Report of the Uganda National Parks Restructuring Committee 1997.

<sup>597</sup> Section 15-17 of the NEMA Statute.



environment management committees. These committees were established with the participation of other government agencies involved in environmental decision making and natural resources management as well as local governments and civil society organisations involved in environmental lobbying and advocacy. In Bwindi, the environment committees were established in 1998 and were simply referred to as production and environment committees.

One of the most interesting developments with regard to public participation in environmental decision making and natural resources management was the Uganda Wild Life Authority's decision to permit otherwise illegal activities if they are demonstrated to be beneficial to conservation. This was in fulfilment of its mission, which is:

“ to conserve and sustainably manage the wild life and protected areas of Uganda in partnership with the neighboring communities and other stakeholders for the benefit of the people of Uganda and the global community”.<sup>598</sup>

While there is no explicit requirement within the *Uganda Wild Life Statute* requiring the Uganda Wild Life Authority to enter into any collaborative arrangements with the community, it has proceeded to enter into several collaborative arrangements with the communities living around protected areas. Again this is in fulfilment of its strategic objectives, one of which calls for collaborating with the communities living adjacent to the park as well as

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<sup>598</sup> See Preamble to the Uganda Wild Life Authority Policy Statement 1996.

with other stakeholders such as the private sector, NGOs, local governments and other government agencies involved in natural resources management, neighbouring countries and international treaty organisations.<sup>599</sup>

In Bwindi, the first collaborative agreement between the community and the Uganda Wild Life Authority was first entered into in 1992. The collaborative arrangement involved allowing the community living adjacent to the park involved in bee keeping to resume the practice. The collaborative arrangement was supported by several international NGOs including the WWF, the Institute of Tropical Forest Conservation (ITFC) and CARE International. The decision to support collaborative arrangements between the community and the Uganda Wild Life Authority was influenced by a desire to mitigate the conflict between the two that often turned violent with the community sometimes deliberately setting parts of the park on fire. It was also influenced by findings of a study carried out by UNESCO in which it sponsored an ethnobotanical survey in Bwindi to examine species ecology and botanically identify the plant species used by the local community.<sup>600</sup>

Recommendations of this survey included establishment of low impact, specialist resource use multiple zones inside Bwindi and the provision of substitutes for high impact general uses of forest resources on farms outside the park.<sup>601</sup> Based on the results of the study and the recommendations of the survey, Uganda National Parks gave permission to begin a process of establishing extractive resource use that they called 'multiple use'. The process

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<sup>599</sup> See Strategic Programme 5 in the Uganda Wild Life Authorities Strategic Plan 2002-2007.

<sup>600</sup> Burrow, Gichohi and Infield above .562

<sup>601</sup> For a detailed discussion see Cunningham, *People, Park and Plant Use, Recommendations for Multiple use Zones and Development Alternatives around Bwindi Impenetrable National Park, Uganda*, People and Plant Working Paper 4, UNESCO, Paris (1996).

was to involve entering into collaborative arrangements with the local community to access medicinal plants, basketry materials, seedlings of indigenous tree species and bamboo rhizomes to plant on farms and provide for foot access to spiritual and cultural sites. Multiple use served as an entry point for collaborative management in Bwindi Park. After nine months of negotiations, the first memorandum of understanding (MoU) between Uganda National Parks and the community of Bwindi Parish was signed, formally launching the piloting of collaborative management.<sup>602</sup>

The community identified the resources within the park that they would need to access. The community then worked together with Uganda National Parks to assess the availability of the resources that the community wanted access to. Negotiation and agreement followed, based on the level of available resources as indicated from the resource assessment. An agreement was then formalised between Uganda National Parks and the community. The agreement included details of the resources to be accessed by the community as well as the levels of extraction that would be permitted. It is the responsibility of the community to meet the conditions of the agreement and to collect the data on the resources collected to ensure that they remain within the agreed levels. There are, however, no clear indications of how monitoring will be carried out and who will do it. It is presumed that Uganda National Parks would take the

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<sup>602</sup> Subsequent to the first arrangement, two other collaborative multiple use arrangements were entered into with two other parishes of Nteko and Rutugunda. To date, there are 15 to 20 collaborative multiple use arrangements operating in the fifteen villages bordering the park. Following the successful piloting of collaborative multiple use arrangements in Bwindi, the Uganda Wild Life Statute was formulated to include legal provision for regulated resource extraction from National Parks. Recognised collaborative resource use programmes are currently in operation in six out of eleven National Parks in Uganda. The process of collaborative multiple resource use has been documented by Wild and Mutebi (1996) and has been appraised by two external reviews (Worah, 2001 and Dave et al 2001 and more recently by Blomely 2003).

responsibility for monitoring and evaluating the extent of resource use by the community, although there is no indication that this has been done to date.

Significantly, the community in Bwindi lacked the skills and resources to negotiate the collaborative arrangement with the Uganda Wild Life Authority, therefore they sought and received the help of one of the leading international NGOs in Uganda - CARE International through its Development Conservation Project. It proceeded to employ a high level of financial and human resources in the negotiation process. Although Uganda National Parks was unable to match the high levels of skill and finances applied to the process by CARE on behalf of the community, the result was a surprisingly well drafted agreement that appears to adequately cater for the needs of the community.

Realising the importance of continued dialogue and consultation with the community, the Uganda Wild Authority decided to institutionalise the process of public participation in environmental decision making and natural resources management by establishing park management advisory committees (PMACs). As already indicated, Uganda has a decentralised system of governance based on local councils from local council 1, which is the village level, to local council 5 which is the district level. The Uganda Wild Life Authority recognised the potential for this structure to provide important linkages between day-to-day contacts between conservation managers and the community and to provide the structural link to the district decision making process. This is very important because national parks are under the legal control of national environmental conservation and management agencies. In

addition, most of these national parks, including Bwindi, border more than one community and sometimes more than one district.

Park management advisory committees were designed to attempt to overcome the problem of the many disjointed institutions involved in environmental decision making and natural resources management and to create a linkage with the decentralised local government structure in order to enhance public participation in environmental-decision making and natural resources management. It was clear to the Uganda Wild Life Authority that there was not a clear linkage between the wild life committees under the wild life statute and the environmental committees under the NEMA statute.

In addition, there were several collaborative agreements with different communities living adjacent to the park and these did not necessarily have any linkage to either the environment committees or wild life committees. Moreover, the local government councils had been entrusted with carrying out certain environmental functions especially in relation to pollution and sanitation in their respective local councils. It was therefore the intention of the Uganda Wild Life Authority to bring all these players in environmental decision making and natural resources management together to ensure not only effective public participation in environmental decision making but also rationality and efficiency in natural resources management.<sup>603</sup>

Park management advisory committees are composed of representatives of the communities bordering the park to deal with community interests. Park and

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<sup>603</sup> Agrippinah Namara and Xavier Nsabagasani, above n 581, 20-25.

district officials also sit on the committee generally as non-voting members to provide technical information to the committee members.

The financial support for the activities of the park management advisory committees (PMACs) comes from fees collected from the protected areas themselves. Accordingly, the Uganda Wild Life Authority (UWA) is responsible for determining the amount of money that should go towards carrying out the functions of the committees. It is not surprising that there is conflict between the UWA and the PMACs with the latter feeling that the former provides funding and calls meetings only when there is an issue of concern or interest to them. The community therefore considers that PMACs function more as a conduit for government concerns than for enhancing public concerns. In addition, because the PMACs are funded by the UWA, there is a general feeling of intimidation among the PMAC members who feel constrained in airing their views concerning community access to some of the resources in the park for fear of antagonising the park officials and thus leading to a reduction or total stoppage of funding to the PMACs.<sup>604</sup>

It is clear that the various institutions for public participation in environmental decision making are not as effective as they could be in their role. In spite of attempts to create congruity in performance among the various institutions by the UWA, there is still little cooperation between the UWA, NEMA, the various local governments and the independent collaborative management institutions. There is duplication of activities, which creates confusion resulting from the competing interests of the various players involved in environmental

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<sup>604</sup> Ibid.

protection and natural resources management. All this works to the detriment of the community. In order to achieve meaningful and effective public participation in environmental decision making and natural resources management, there is a need to rationalise the various institutions involved in environmental decision making and natural resources management. There is also a need to create real opportunities for community participation in the key policies and decisions. Further still, there is a need for more consistent and independent funding mechanisms that do not create dependency on a sole benefactor that stifles robust and open discussion in the decision making process.

#### **6.7 The participation of the Batwa in the gazetting and management of Bwindi Impenetrable Game Park: an analysis**

The study on the gazetting of Bwindi Impenetrable Game Park and the participation of the Batwa in the process of its gazetting is significant because it is a classic demonstration of the suffering of indigenous peoples and how very little or no regard is given to their aspirations in the creation of protected areas.

It is clear that from the moment Bwindi was first gazetted as a forest reserve, then as a game sanctuary and finally as a game park that the Batwa were scarcely given consideration in the decision making process. It is also clear that the Batwa not only failed to get an opportunity to participate in the process but they also had no inkling that the area that had provided a home and source of livelihood for them for generations was about to be declared a protected area with little or no access available to them.

When Bwindi was first declared a forest reserve by the British in the 1930s, it did not even occur to them that it was important to involve the Batwa in the decision making process or even to just consult them on the forthcoming changes in the status of the forest that had provided a source of livelihood for generations of Batwa. It was a top down process that involved decision making by the colonial officers who made the determination that it was in the interest of the colonial state to declare Bwindi a protected area and gazette it as such. The whole process involving the decision to gazette Bwindi, as well as the legal process that entailed drafting a law by the colonial government declaring Bwindi a forest reserve, was carried out without the knowledge of the Batwa. As already indicated, they only found out Bwindi was a protected area subject to control and management by the colonial government as a forest reserve when they were informed by the newly appointed forest warders that the Bwindi was no longer freely accessible to the Batwa and that they would need the permission of the forest officer in the form of a forest permit to access the forest for the most basic of their needs.

The British attitude towards the Batwa and the failure to involve them in the decision making process leading to the gazetting of Bwindi as a forest reserve can be explained as perhaps the most bizarre and tragic of historical misfortunes. In 1751, Edward Tyson published a book entitled *The Anatomy of a Pygmy compared with that of an Ape and a Man* which effectively introduced the Batwa pygmies as a subhuman category to the Western world.. In 1906, the Bronx Zoo displayed its newest addition to the gorilla cage, a



Batwa pygmy called Ota Benga.<sup>605</sup> The New York Times touted the exhibit by calling it “the most interesting sight in the Bronx”. This animal-like perception of Batwa pygmies penetrated western consciousness.<sup>606</sup> Accordingly, when the British proceeded to gazette Bwindi, they did not think of the Batwa, who had lived off the forest, as human beings who were capable of participating in the decision making process relating to the gazetting of Bwindi. The process was repeated when Bwindi was gazetted as an animal sanctuary and therefore a controlled hunting area in the 60s. Following in the footsteps of the colonial government, the then government of the Republic of Uganda proceeded to make the decisions and followed it with a law gazetting Bwindi as an animal sanctuary without involving the Batwa in the process or even consulting them. Once again, the Batwa woke up to find themselves in a situation where they could no longer hunt as a means of supporting their daily subsistence. Once again, they required the permission of the game department in the form of a hunting permit in order to access Bwindi.

History repeated itself in 1991 when Bwindi was gazetted as a game park. The 1990s saw a resurgence in the emphasis on conserving and protecting areas of high environmental significance in Uganda following the years of neglect during the Amin era in the 1970s and the Obote era in the early 1980s. The NRM Government that took power in the late 1980s decided to revive Uganda’s protection of its natural resources and promote general environmental protection. With the help of the World Bank, Uganda commenced a process that saw the upgrading of Bwindi from just a forest

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<sup>605</sup> Unable to return home, Ota Benga committed suicide ten years later.

<sup>606</sup> Refugees International, *Forgotten People: The Batwa of the Great Lakes region of Africa*, at 20<sup>th</sup> April 2005 from [www.refugeesinternational.org/content/article/detail/89](http://www.refugeesinternational.org/content/article/detail/89).

reserve and animal sanctuary to a fully fledged game park. The desire to gazette Bwindi was not only driven by the need to better protect Uganda's natural resources but also to tap the growing tourist market. Following two decades of turmoil, Uganda was regaining its position in the international community and there was a steady growth in the number of foreign tourists who were coming into Uganda to see its natural beauty, especially the mountain gorillas. Uganda provided the only avenue for viewing gorillas in the wild, since Rwanda, the only other country in the world to have large populations of mountain gorillas, was experiencing civil war.

The government of Uganda therefore commenced the process of gazetting Bwindi as a game park. The process involved high-level discussions at government level that drew on the expertise of several international consultants and experts on environmental issues and natural resources management. The Batwa were neither invited to participate in the decision making process nor consulted in order to take their aspirations into consideration. The whole decision making process including the process of gazetting Bwindi took place without the knowledge of the Batwa. They only found out in early 1991 that Bwindi had been gazetted as a national park and was now totally inaccessible to them.

There was no involvement at all of the Batwa in the process of gazetting Bwindi. The Batwa were never informed that the process of gazetting Bwindi was taking place. In all three phases through which Bwindi progressed until it was gazetted a game park, the Batwa always found out what was going on after the gazettal process had already taken place. There was no way the Batwa

could mobilize, or even come up with, any strategies to enable them to participate in the process. Accordingly, the Batwa were left to react to the new changes that had been introduced and this often involved them getting violent. There are several reported cases of the Batwa setting parts of the park on fire as a means of getting back at the park wardens who deny them access to the park.

Recognising the animosity emanating from the Batwa because of being denied access to the park, the government, with the support of international donor funding, proceeded to enter into collaborative management arrangements with the local community. This process started around 1996 in Bwindi, long after the process of its gazettal had taken place. The process involved meetings with parish representatives who then elected representatives to the sub-county production and environment committees, a sub-committee of the sub-county councils. At parish and village levels, Local Council II and the village council executive committees operated on an *ad hoc* basis, as parish production and environment committees and village production and environment committees respectively. The parish production and environment committees in turn elected community protected area committees representatives from among themselves. Production and environment committees are closely linked to other institutions that are established with the purpose of facilitating community participation in the management of national parks. These include community protected area committees created for those communities neighbouring the national parks and multiple resource user groups, which are basically groups of local people allowed to harvest park resources on a controlled basis.<sup>607</sup>

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<sup>607</sup> Agripina Namara and Xavier Nsabagasani, above n 581, 11.

It is therefore clear that the collaborative arrangements set in place around Bwindi Impenetrable Game Park are subsets of the local council system that is set within the decentralised system of governance in Uganda. The local council system is meant to be representative of all categories of people in Uganda and enjoys a certain degree of legitimacy with the public, save for a few incidences of abuse of office and misuse of resources that have been reported in some local councils.

However, in spite of the detailed arrangements within which public participation in environmental decision making and natural resources management is provided for in Uganda, there is still a lot that needs to be done in order for the Batwa to effectively participate in the process and to protect their specific rights and interests as indigenous people. While the local council system was meant to be a conduit for public participation in decision making in all issues including environmental decision making, this works only to some extent in the political arena. However, when it comes to environmental decision making, local councils have more often than not been used by the central government to pass on government policies and laws and to enforce them through a process that is popularly known as 'sensitisation' which is in reality the process of getting communities to abide by government policies and laws or face penalties.

In addition to using the established mechanisms for public participation as conduits for passing on government policies and laws and for enforcing them, the public participation mechanisms in environmental decision making also face several pressure points from government that stop them from being

effective communicators of Batwa aspirations. Such pressure points include funding from government that more often than not means that the councillors are more inclined to upward accountability to the government that funds them rather than downward accountability to their electorates - the Batwa who voted them into office to represent their aspirations.

The funding pressures and their impact on public accountability are serious because most local councils do not allocate funding to environmental activities, which they consider to be only for aesthetic and non-consumptive values. This lacuna has in several cases been filled by donor agencies which have stepped in to provide funding to local councils to ensure that environmental issues are given due consideration by the local councils. While this has helped the Batwa, it has also become problematic because the local councils now consider funding for environmental issues almost a mandate of the donor agencies and so do not pay any attention to it anymore. The central government is not stepping in to alleviate the problem. In fact most local councillors now believe that the whole concept of decentralisation of environmental decision making and natural resources management is more like a shedding of responsibility by the central government. Because of the perception that the central government used decentralisation of environmental management to shirk their responsibilities and to dump the entire financial and administrative burden on the local councils, very few local councils have bothered to have a local council plan that integrates environmental issues. As one local councillor is reported to have said:

“Why are we expected to work with no facilitation at all?”<sup>608</sup>

Moreover, most local councils typically feel that environmental issues are generally non-productive. They argue that they need to focus on issues that enhance productivity and service delivery for the community so that they can get re-elected. As one local councillor is reported to have said:

“....what income does the environment generate?”<sup>609</sup>

Therefore, the Batwa find themselves the losers in this whole quagmire process since most of their aspirations require environmental interventions by uninterested local councils. The local councils in the Bwindi area do not always have effective Batwa representation. The Batwa are a minority group in Uganda and are also extremely marginalised in almost every aspect of life. In addition, they are stigmatised by most of the community living around them and so they very rarely, if at all, ever get to sit on any of the local councils even in their locales. Further still, the majority of the Batwa are illiterate and have an inferiority complex stemming from decades of stigmatisation and segregation. Indeed, the District Environment Officer for the Bwindi area mentioned that the Batwa are represented on the local councils by proxy - by other people who are not Batwa but understand their issues.<sup>610</sup>

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<sup>608</sup> Quoted from Agripina Namara and Xavier Nsabagasani, above n 581, 33.

<sup>609</sup> Ibid, 30.

<sup>610</sup> Jerome Lewis, above n 573.

## **6.8 Lessons learnt from the participation of the Batwa in the process of gazetting Bwindi Impenetrable Game Park**

The gazetting of Bwindi Impenetrable Game Park poses some of the most poignant and compelling lessons on the participation of indigenous peoples in environmental decision making and natural resources management. Indeed, the lessons are a classical illustration of the kinds of injustices that indigenous peoples suffer and the need to address them in order to achieve an acceptable degree of participation, environmental justice and equity in environmental decision making and natural resources management.

Perhaps the most significant lesson from the gazetting of Bwindi Impenetrable Game Park is the role prejudice and negative stereotyping of indigenous peoples plays in the complete and utter lack of opportunity for participation in environmental decision making and natural resources management.

It is clear that government instigated the process of gazetting Bwindi without involving or giving consideration to the participation of the Batwa in the process. Most of the planning was done in the capital city, Kampala, hundreds of miles away from Bwindi. The Batwa had no knowledge of what was going on and only got to know of the process when Bwindi was already gazetted and they were being asked to vacate the area. This is very significant because the process of gazetting Bwindi was quite lengthy and involved three phases and spanned four decades of planning from the time it was first gazetted as a forest reserve to the time it was eventually gazetted as a game park. At no stage did the government or any of its agencies responsible for the planning consider involving the Batwa in the decision making process. No consideration was

given whatsoever to their interests and the historical use to which the Batwa had put Bwindi over the decades or how excluding them from using the forest would affect their livelihoods. Instead, a draft plan and law gazetting Bwindi was presented to Parliament and approved without so much as a thought or mention of what the Batwa had to say of the process and its proposed outcomes.

What happened to the Batwa of Bwindi is very compelling because it reflects what many indigenous peoples experience in environmental decision making and natural resources management. They often wake up to find policy makers working with government bureaucrats have proceeded to dispossess them of their land and livelihood without any prior consultation or involvement in the process. Indeed lack of participation in the decision making process is one of the key issues of concern to indigenous peoples. This is especially important in environmental decision making and natural resources management since most indigenous peoples often find their livelihoods being put at risk at the expense of creation of protected areas such as game parks.

As already indicated, the colonial government did not involve the Batwa in the decision making process because of the prejudice they held over the Batwa. The colonial government as already pointed out based its understanding of the Batwa on the negative stereotyping that was propagated by the Western publishers and media that depicted the Batwa as sub humans who were in the same category as apes. It did not even occur to the colonial government that the Batwa were worth consulting or involving in the process. The post-colonial government was not any different from the colonial government. Many people



in Uganda, including government officials, still hold several prejudices against the Batwa that hinder them from being involved in the decision making process. The Batwa are generally considered uncivilised and sub-human people who eat repulsive food and lack intelligence or moral values. Moreover, most government officials see the Batwa as poachers especially of the specially protected mountain gorillas. This negative stereotyping of the Batwa is largely responsible for their not being involved in the decision making process and it basically stems from the ignorance of the rest of society which does not have a clear understanding of the indigenous way of life.

The lesson this stereotyping and its effect on the rights of indigenous peoples to participate in the decision making process teaches us is that indigenous peoples need to integrate with the wider society in order to dispel many of the prejudices and unfounded stereotypes. Integration with the wider society as opposed to isolation by indigenous peoples is as fundamental as any of their other aspirations because it plays an important role in their involvement in the decision making process.

In addition to negative stereotyping towards indigenous peoples, there is a general lack of commitment and apathy by government towards setting up mechanisms that guarantee effective and meaningful participation by indigenous peoples in the decision making process. The National Environmental Management Policy requires the government to set up national guidelines for public participation in the environmental decision making process. However, ten years after the National Environment Management Policy was first adopted, the national guidelines for public participation in

environmental decision making remain unwritten. This has resulted in indigenous peoples like the Batwa having to come up with ingenious and resourceful ways of participating in environmental decision making. This kind of involvement is expensive and *ad hoc* which means that sometimes important decisions relating to their survival take place before they can get an opportunity to participate. Also, because of the absence of national guidelines for public participation in environmental decision making, the different government agencies involved in environmental conservation and management have set up their own departmental mechanisms for public participation in their decision making process.

The NEMA, UWA and the various local government councils all have their own mechanisms in dealing with natural resources under their control, mostly in the form of committees for public participation in the decision making process. All of these myriad committees mostly operate at community level often in parallel to each other. This creates confusion and leads to duplication of services, often to the disadvantage of indigenous peoples and the communities they are trying to serve. The seemingly competing interests that the different government agencies are trying to promote also worsen the confusion.

The gazetting of Bwindi also illustrates how government policies on the creation of protected areas such as game parks without the involvement of the community can have such severe consequences for their survival, which may sometimes lead to the decimation of a whole community. In the case of the Batwa of Bwindi, the gradual appropriation of their ancestral land through

government policy leading to its gazettement as a protected area in the early 19<sup>th</sup> century has led to the near demise of the Batwa who were already a minority community. The gazettement of Bwindi Impenetrable Game Park forced out the last forest dwelling groups of the Batwa. Without access to their traditional means of survival, the Batwa are on the verge of extinction. In a bid to continue to survive in the now unfamiliar environment they found themselves in, the Batwa took up making crafts and selling them to their farmer neighbours.

However, by the 1970s, most local markets begun selling industrially produced containers that became widely popular. The Batwa reacted by keeping their prices static and thus attractively cheap. As a result of inflation, the real income gained from crafts fell and industrial substitutes took an ever-growing portion of the market. The Batwa then tried their hand at pottery and selling the pots they made to the community around them. However, access to clay to make the pots became increasingly difficult for the Batwa as land pressure encouraged farmers to reclaim marshes for cultivation thus forcing the Batwa out of pot making. As cheap mass-produced goods became widely available, the Batwa's craft and pot making became increasingly ineffective and they became more dependent on marginal subsistence strategies like casual labour and begging. Indeed, it has been reported that by 1993 begging was a major activity for 70 percent of the Batwa. Some children, especially those living around urban centres, start begging at four or five years of age. The loss of access to Bwindi, which supported the Batwa subsistence way of life, has left them in unfamiliar territory virtually threatening their survival. Many Batwa are dying of hunger because they do not know how to survive outside the

forest. There are reports that some Batwa go for four or five days without eating and that they have resorted to eating the skins of bananas peeled off by their Bahutu neighbours. Most young children have run to the urban centres to escape the hunger and now work as potters or beg for their survival.<sup>611</sup>

As scarcity and the fight for survival intensifies among the Batwa, they are breaking up into even smaller groups and sometimes as individuals to try and find a way to continue existing. As the groups become smaller, their ability to offer a unified stand and demand for participation in the decision making process that has resulted in the complete expropriation of their land and source of livelihood also diminishes.

The Batwa are also slowly losing their identity, which has over the decades been built on Bwindi and their ability to survive in it. The Batwa are not only facing a crisis of survival but also of identity. It is clear that the very existence of the Batwa is under threat. The problem of Batwa identity and survival is made worse by government policies that are now aimed at assimilating the Batwa into the wider community. There is no clear organisational force in Uganda from among the Batwa demanding to retain their way of life or the continued access to their traditional shrines within the Bwindi forest.

However, against all odds and in spite of their phenomenal marginalisation and the threat of extinction facing them because of loss of their source of livelihood, some Batwa have joined the international indigenous rights movement. International organisations have taken on the Batwa struggle and

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<sup>611</sup> See generally Jerome Lewis, above n 573.

have formed a Twa Support Group to assure effective communication and sharing of information between them and to avoid duplicating activities. The Batwa with the support of international organisations like Minority Rights Group International have embarked on a process that will enable them to represent themselves effectively at local, national and international levels. With the support of the international community, the Batwa are now active participants in the international indigenous movement.

The Batwa first attended the first United Nations Working Group on Indigenous Populations in July 1994 and have been regular participants since. The Batwa are using the UN and other fora to seek respect for their traditional territories, institutions and practices and to promote indigenous models of socially environmentally sensitive development and conservation that enables them to retain their identity and have some influence over the decision making process and their future. The contrast between assimilation (incorporation into society with loss of identity) and integration (participation as full members of society whilst retaining identity) has been a central concern of the Batwa indigenous organisations.<sup>612</sup>

Amidst the international campaign to gain respect for their way of life, the Batwa are also carrying out a strong campaign in Uganda and in Africa generally to get recognition. The Uganda Government as well as other African governments have so far been unwilling to recognise indigenous rights within the UN's human rights system. This too presents an important lesson because the right of indigenous peoples to participate in environmental decision making

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<sup>612</sup> See Jerome Lewis, above n 573, 7.

and natural resources management will remain on the periphery until African governments acknowledge them.

Another important lesson to be drawn from the Batwa experience is that it is important for indigenous peoples to engage in the decision making process right from the start to ensure that their aspirations and interests are taken into account. Failure to do this means detrimental decisions will be taken against indigenous peoples that may be irreversible. In the case of the Batwa, the inability to participate in the decision making process resulted in the permanent loss of their land when it was gazetted as a national park. This is an irreversible situation that has had dire consequences for their survival and identity. It is therefore imperative that the participation of indigenous peoples in environmental decision making and natural resources management is provided for right from the time the first decision is made to the minute implementation is undertaken. Anything less will result in the catastrophe that the Batwa now have to live with. Therefore, participation in the decision making process for indigenous peoples is important because it goes to the heart of their very survival as a people.

The plight of the Batwa demonstrates the lack of capacity of indigenous peoples and how this affects their ability to meaningfully and effectively participate in the decision making process. The lack of capacity as depicted by the Batwa is two fold. First of all, the Batwa are mainly illiterate and so they not only fail to keep up with proposed government changes that affect them but they also cannot affectively participate even when they are aware of the upcoming changes. In addition, this lack of capacity means that they cannot

effectively organise as a group and articulate their aspirations. In order for the Batwa to guarantee their continued existence as indigenous peoples, they need capacity building at all levels. Secondly, the Batwa are poverty ridden and are therefore unable to meet the high costs associated with engaging in the often lengthy and expensive processes involved in gazetting protected areas. Bwindi went through a long process of gazettal from the time it was first declared a protected forest reserve in the 1930s to the time it was declared a game park in 1990. It takes a lot of time and financial and human commitment on the part of the Batwa to keep up with the evolving process over the years to ensure that their aspirations and interests are taken into account. Given their poor economic status as already indicated as well as their illiteracy, there was no way the Batwa could have effectively participated in the lengthy decision making process. While the government had a plethora of highly qualified government bureaucrats and international consultants at every stage of the gazettal process of Bwindi as well as the deep pockets of the national treasury from which to draw funds to see the process through, the Batwa could neither match the level of expertise that the government had nor the amount of resources it had at its disposal. Apart from the one time in the late eighties and early nineties when international NGOs helped the Batwa negotiate for collaborative management arrangements with the government, the Batwa were left to their own devices most of the time while the lengthy gazettal process of Bwindi was taking place.

Related to the lack of capacity of indigenous peoples to participate in the decision making process, the other important lesson that the Batwa plight teaches is the important role that NGOs play in promoting and enhancing the

rights of indigenous peoples to participate in environmental decision making and natural resources management. The Batwa experience has revealed that both international and national NGOs can play an important role in supporting indigenous peoples to articulate their aspirations and to participate in the decision making process. The role that CARE International played in helping the Batwa negotiate collaborative management agreements with government led to the drafting of one of the most well-balanced arrangements between indigenous peoples and government seen anywhere in the world. CARE International made it their responsibility to ensure that the collaborative management agreements did not only take care of the government interests in the protection and conservation of the valuable fauna and flora of the Bwindi as well as the rare animal life, it also made sure that the Batwa's aspirations relating to their survival and spiritual needs were taken into consideration.

The role CARE International played not only involved speaking on behalf of the Batwa but also ensured the Batwa participated in the process by providing them with both the financial and human resources they needed to physically attend the negotiation process culminating in the signing of the collaborative management agreements. These agreements ensured that for the first time in the gazettal process of Bwindi, the Batwa had actually participated in the decision making process and had their aspirations taken into account by the government decision makers. It also meant that they had actually ensured the continued existence of their subsistence livelihood albeit in a limited form.<sup>613</sup>

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<sup>613</sup> Note that there are some risks in the representation of the indigenous peoples especially in terms of legitimacy for the groups actually doing the representation and whether this representation does in any way help in building the capacity of indigenous people.



## **CHAPTER SEVEN**

### **IMPLEMENTING PUBLIC PARTICIPATION IN ENVIRONMENTAL DECISION MAKING IN AUSTRALIA AND UGANDA: A COMPARATIVE ANALYSIS**

#### **7.1 Introduction**

The thesis has used examples of the participation of indigenous peoples in the conservation and management of protected areas to highlight the complexities of the implementation of public participation in environmental decision making in Australia and Uganda. Purnululu in Western Australia, and Bwindi in western Uganda are both world heritage sites. They have revealed several significant issues related to policy and legal approaches and institutional and implementation strategies relating to the participation of indigenous peoples in environmental decision making. Many of these have been dealt with in the analysis and lessons drawn from the two case studies.

This section undertakes a comparative analysis of a range of issues on the implementation of public participation in environmental decision making in Australia and Uganda. The comparative analysis will emphasise the experiences of the Aboriginal people in Australia and the Batwa in Uganda. The analysis will largely focus on the legal, institutional and implementation arrangements for public participation in environmental decision making in Australia and Uganda but will also consider several other related issues.

## 7.2 The legal framework

Australia and Uganda present two different legal and policy frameworks for public participation in environmental decision making. Australia is a federation of states and the relationship in the field of the environment has both legal aspects flowing from the divisions of legislative powers set out in the Australian Constitution and political aspects flowing from cooperative arrangements between the commonwealth and state governments. The Australian Constitution does not make a specific grant of legislative power to the commonwealth government regarding the environment.<sup>614</sup> Uganda on the other hand is a republic with a decentralised system of governance. Its environmental law derives directly from the constitution, which sets out in clear terms the mandate of the central government and the districts with regard to environmental management.<sup>615</sup>

Environmental legislation in Australia is generally the domain of the states. This is because the states have always exercised control over the allocation and development of resources by virtue of the legal rule that ownership of such resources belong to the crown in right of the state in which they are situated.<sup>616</sup> However, it is important to note that the absence of specific commonwealth power on environmental matters does not mean that the Commonwealth Government cannot legislate with respect to those matters provided the law is also in a formal sense a law with respect to one of the granted heads of power.

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<sup>614</sup> Ross Ramsay and Gerard C. Rowe, *Environmental Law and Policy in Australia: Texts and Materials*, Butterworths (1995) 283.

<sup>615</sup> *Constitution of the Republic of Uganda* 1995 Article 237.

<sup>616</sup> Robert, J Fowler, *Environmental Law and Its Administration in Australia*, *EPLJ* 1 (1984) 10 – 49.

<sup>617</sup> Accordingly, commonwealth legislation regarding the environment often expressly relies on its validity bestowed by a number of different constitutional sources of power. The rationale for this is that placing express reliance on multiple power increases the breadth of permissible environmental legislation and the prospect that legislation will be upheld if challenged.<sup>618</sup>

In Uganda, the power to legislate on environmental matters is more straightforward than in Australia. The central government has to rely on a single constitutional provision that gives it the power to legislate for environmental protection and management.<sup>619</sup>

Notwithstanding the different sources of legal power for Australia and the central government of Uganda when passing environmental legislation, it is clear that both governments have the power to effectively legislate for environmental matters. In that regard, there are very clear and succinct provisions for public participation and for the participation of indigenous peoples in environmental decision making in both jurisdictions.

In Australia, the *National Parks and Wildlife Act 1975* (Cth) set the stage for the participation of indigenous peoples in environmental decision making. Other initiatives at commonwealth level include the *Native Title Act*, the *National Strategy for Ecological Sustainable Development* (ESD), both of which have ample provision for the participation of indigenous peoples in

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<sup>617</sup> For a detailed discussion on this see generally, James Crawford, *The Constitution and the Environment*, *Syd L Rev* 13 (1991) 11 – 30.

<sup>618</sup> For example the *Environment Protection (Nuclear Codes) Act 1978* relies upon the trade and commerce power, corporations power, national implied power, defence power, territories power and external affairs power for its validity.

<sup>619</sup> Article 237 of the *Constitution of the Republic of Uganda*.

environmental decision making. Also important at the commonwealth level in relation to the participation of indigenous peoples is the *National Strategy for the Conservation of Australia's Biodiversity*, which has been adopted by all the states. The Commonwealth Government's initiatives for the participation of indigenous peoples in the conservation and management of protected areas are now incorporated in the *Environment Protection and Biodiversity Act 1999* (EPBC Act).<sup>620</sup>

In Uganda, all laws relating to environmental protection and management are the preserve of the central government. There are several laws on various aspects of environmental protection and management. However, the framework legislation for environmental protection and management in Uganda is the *National Environment Management Statute 1995* (NEMA Statute), which provides for sustainable management of the environment in Uganda and also provides for the establishment of an environmental authority as a coordinating and supervising body for environmental matters in Uganda. It is important to note though that, unlike its Australian counterpart, Uganda's environmental legislation does not have any specific provisions for the participation of indigenous peoples in environmental decision making. All the legislation including the framework law, the NEMA statute, only contains general provision on public participation in environmental decision making. This is because Uganda like most African states does not recognise the presence of indigenous peoples within its jurisdiction.

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<sup>620</sup> For a detailed discussion on the participation of indigenous people in environmental decision making under these various Acts and initiatives, see chapter five of the thesis.

An important dimension of the legal framework for the participation of indigenous peoples in environmental decision making is the role of the federal states in Australia and the districts under the decentralised system of governance in Uganda. The federal states have always exercised control over the allocation and development of natural resources by virtue of the legal rule that ownership of such resources belong to the crown in right of the state in which they are situated. Along with the right to control and allocate resources in their jurisdiction, came the power to legislate environmental matters by the states. Most of this legislation contains provisions for the participation of indigenous peoples in environmental decision making. Western Australia has several laws in addition to those at commonwealth level that provide for the participation of indigenous peoples in environmental decision making. Key among these is the *Conservation and Land Management Act* (CALM). While the CALM Act does not contain any specific provision for the participation of indigenous peoples in environmental decision making, the draft policy under it contains extensive provisions for this purpose.<sup>621</sup> In addition to the CALM policy, Western Australia has a *State Sustainability Strategy Draft*, which seeks to promote the participation of indigenous peoples in environmental decision making by recognising joint management of national parks. While it is clear that the Commonwealth legislation has more coherent and succinct provisions on the participation of indigenous peoples in environmental decision making, the WA Government too has several initiatives that are meant to promote the right of indigenous peoples to participate in environmental decision making and management.

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<sup>621</sup> For a detailed discussion on this see chapter five of the thesis.

On the other hand, under Uganda's decentralisation system of governance, the districts have no power to pass legislation relating to environmental protection and management.<sup>622</sup> Accordingly, while the districts in Uganda are bodies corporate capable of suing and being sued in their own names, they must follow the national legislation in relation to public participation in environmental decision making. In this regard, all districts are required to have district environment committees, which are required to implement and integrate national environmental policies including public participation in all their district programmes and to consult the public on all environmental issues in the district. The National Environment Management Authority established under the *National Environment Management Act* supervises the districts to ensure that they follow and enforce the national legislation including the provisions on public participation.

### **7.3 The institutional framework**

The institutional framework for public participation in environmental decision making in Australia and Uganda is as different as the legal framework. The Commonwealth Government in Australia has detailed institutional arrangements for the participation of indigenous peoples in environmental decision making. The key institutional arrangements are to be found under the EPBC Act, which requires all management boards of commonwealth reserves, which are wholly, or partially on indigenous land, to have an Aboriginal majority.<sup>623</sup> In addition, the Act requires the inclusion of indigenous peoples on

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<sup>622</sup> The powers of the districts or local governments as they are referred to are set out in the second schedule to the *Local Government Act, 1997* and it does not include the power to make laws in Uganda including those relating to the environment.

<sup>623</sup> See Chapter 5 part 15 division 4(f).

the Biological Diversity Advisory Committee<sup>624</sup> and also to set up an Indigenous Advisory Committee<sup>625</sup> to advise the commonwealth minister on the operation of the Act. It is important to note though that the committees are advisory only and as such their recommendations are not binding on the minister.<sup>626</sup>

In Western Australia, the institutional framework for the participation of indigenous peoples is generally *ad hoc* and most times quite archaic. Since the CALM Act does not contain any specific provisions for the participation of indigenous peoples, it consequently does not contain any specific institutional framework for the participation of indigenous peoples in the decision making process. Nevertheless, the National Parks and Nature Conservation Authority (NPNCA) established under CALM has, as one of its 15-member body, a representative of Aboriginal people.<sup>627</sup> The NPNCA has a detailed policy on Aboriginal involvement in national parks and nature conservation. Besides the provisions under the NPNCA for the participation of indigenous peoples in environmental decision making in Western Australia, there are generally no other legally based institutional arrangements. As a result, the process for the participation of indigenous peoples in environmental decision making in Western Australia has been *ad hoc* and policy based as illustrated in the case study on the participation of indigenous peoples in the gazetting of Purnululu National Park.

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<sup>624</sup> EPBC Act Section 504(4)(a – e).

<sup>625</sup> EPBC Act 504A.

<sup>626</sup> See EPBC Act section 505B.

<sup>627</sup> Section 23(1)(viii), added by the 1991 Amendment to the CALM Act.

It is therefore clear from the ensuing analysis that the Commonwealth Government in Australia has a much better institutional framework for the participation of indigenous peoples in environmental decision making than the government of Western Australia. While the WA Government takes cognisance of the commonwealth provisions on the participation of indigenous peoples in environmental decision making, the absence of specific legal provisions of its own greatly affects the ability of indigenous peoples to effectively participate in environmental decision making. Indeed when the negotiations for joint management of Purnululu National Park commenced, no specific institutional guidelines for the participation of Aboriginal people in the decision making process existed which could easily have been used to help solve the conflicts that arose during the negotiation process. Arrangements were put in place by the WA Government on an ad hoc basis as, and when, the need arose in order to accommodate the interests of Aboriginal people. These ranged from the establishment of commissions of inquiry such as the Seaman inquiry to the establishment of standing committees such as the Kimberly National Parks and Reserves Committee.

In Uganda, the institutional arrangements for public participation in environmental decision making at central government level are set out in the NEMA statute. The statute establishes a board of directors for the National Environment Management Authority and requires that at least two members of this board shall be members of the public.<sup>628</sup> The NEMA statute also provides for establishment of local environment committees. The National Environment Management Authority (NEMA) is required under the Act to issue guidelines and prescribed measures specifying appropriate arrangements for public

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<sup>628</sup> See NEMA Statute section 9. See also second schedule to the NEMA statute.



participation in environmental decision making through the local environment committees.

The NEMA issued their guidelines in 1998 but, in spite of the detailed provisions, there is very little public participation in environmental decision making through the committees. This may be because most people do not appreciate the importance of participating in environmental decision making. In addition to the environment committees under the NEMA statute established to enhance public participation in environmental decision making, the *Wild Life Statute* provides for wildlife committees, which are meant to advise the Wildlife Authority on the management and utilisation of wild life within local jurisdictions.<sup>629</sup> Community participation is not only limited to giving advice – the community benefits from the revenue collected from the parks.<sup>630</sup> In addition to the wild life committees, the Uganda Wild Life Authority also established park advisory committees. The park advisory committees were put in place to link the various institutional arrangements for public participation in environmental decision making in Uganda.<sup>631</sup> Lastly, the institutional arrangements for public participation in environmental decision making in Uganda include collaborative community arrangements, which are set up by the Uganda Wild Life Authority.

Once again it is important to note that the institutional framework for public participation does not cater for the specific participation of indigenous peoples but for the public generally.

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<sup>629</sup> See section 26(2) of the *Uganda Wildlife Statute*.

<sup>630</sup> See Section 70(4) of the *Uganda Wildlife Statute*.

<sup>631</sup> For detailed discussion on park advisory committees see Chapter six of the Thesis.

A comparison between the Australian and Ugandan legal and institutional frameworks for the participation of indigenous peoples in environmental decision making presents some interesting observations. Because Australia has a federal system of government, its institutional framework, like its legal framework, is at two levels: the commonwealth level and the state level. The analysis has shown that there are better established legal and institutional mechanisms for the participation of indigenous peoples in environmental decision making at commonwealth level than at state level in Western Australia.

Uganda as a republic has a single nationwide institutional framework for public participation in environmental decision making although it does not make any special provisions for indigenous peoples. While the analysis has shown that Australia's Federal status means that the Commonwealth Government's clear articulation of the rights of indigenous peoples to participate in environmental decision making will not necessarily mean that the system will be duplicated at state level, in Uganda the analysis has shown that the various institutional arrangements put in place under NEMA and the *Uganda Wild Life Statute* may not always lead to the desired outcome of improved participation for indigenous peoples as none of them contain any specific provisions to that effect.

In order to carry out a more meaningful comparative analysis of the participation of indigenous peoples in environmental decision making in Australia and Uganda, it is important to look beyond the legal and institutional

framework to the implementation mechanisms. It is clear from the case study in Australia that, regardless of the position at the commonwealth level, the states play a very important role in the realisation of the right to public participation. This is because most implementation mechanisms are at state level. As the case study of Purnululu National Park in Western Australia revealed, in spite of the clear provisions at commonwealth level for the participation of indigenous peoples in environmental decision making, the state itself has no specific provisions for the participation of indigenous peoples. To this end, the implementation mechanism set forth does not cater effectively and efficiently for the participation of indigenous peoples in environmental decision making. Therefore, when it comes to the realisation of the right to public participation for indigenous peoples, the implementation mechanisms do not allow for such realisation, as they do not provide the necessary space and opportunity for participation.

For the Aboriginal people of Purnululu, being able to participate in the process leading to the gazetting of Purnululu as a national park meant being creative and resourceful in their demands for participation. This involved demonstrations and incorporating an organisation, the PAC, in order to be given due recognition by the WA Government. This extra effort required on the part of the Aboriginal people is a clear demonstration of the failure of the WA Government to create certainty in the participation mechanism for indigenous peoples and to facilitate it. This not only forced them to take extreme measures sometimes but also affected their ability to effectively participate in the decision making process. As the struggles of the indigenous peoples of Purnululu demonstrated, even after going to great lengths to

participate in the decision making process, their aspirations were not always taken into consideration by the government. Even when they withdrew from the process as a sign of protest, it continued and decisions were made regardless of whether or not the indigenous peoples had their aspirations covered. This is a clear demonstration that the implementation mechanisms were not designed to ensure the rights of indigenous peoples to participate in the decision making process and, thus, whether or not they participated had no real impact on the outcomes of the decision making process.

The Australian implementation mechanisms are not the only ones to be found lacking in this regard. In Uganda, implementation mechanisms for the realisation of the right to public participation for indigenous peoples are hindered by the failure to specifically provide for indigenous peoples. Indigenous peoples need specific implementation mechanisms for their participation in environmental decision making because their issues are different from those of the general public and more often than not go to the very matter of their survival. As the Batwa study demonstrated, indigenous peoples do need special implementation mechanisms for participation in order for them to ably articulate their issues. The failure of the Ugandan government to make special provisions for the participation of indigenous peoples in environmental decision making partly explains the catastrophe that befell the Batwa. The various governments in Uganda were able to ignore the Batwa during the long process of gazetting Bwindi Impenetrable Game Park because there was no legal requirement for them to involve indigenous peoples as a people. The government was therefore able to involve other people in the decision making process using its general public participation provisions in the

law without being required to ensure the specific participation of indigenous peoples. The absence of a specific legal mechanism meant that there was no implementation mechanism set in place to ensure the participation of indigenous peoples in environmental decision making.

It follows, therefore, that given the poor implementation mechanisms in both Australia at the state level and Uganda for the participation of indigenous peoples in environmental decision making that the realisation of their right to public participation in environmental decision making still remains a long way away.

One of the key reasons underlying the dearth in the legal, institutional and implementation mechanisms for the participation of indigenous peoples in Western Australia and Uganda appears to be the attitude of the governments themselves.

The government in Western Australia has been noted to be generally not open to the kind of opportunities that exist at commonwealth level for the participation of indigenous peoples in environmental decision making. For example, in 1993 when the Court Liberal–National Government came to power in Western Australia, it sought to challenge the Native Title Act in the *State of Australia V Commonwealth*<sup>632</sup> case. The High Court ruled their proposed *Land (Titles and Traditional Usage) Act 1993 WA* inconsistent with the *Racial Discrimination Act* and the *Native Titles Act*. The Court Libera – National Government was so contemptuous of Aboriginal native title and their right to

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<sup>632</sup> (1995) 183 CLR 373.

participate in the decision making process that during its time in office, it limited the involvement of indigenous peoples in the negotiations for the cooperative management of Purnululu to an advisory role. Clearly, the negative attitude of the government in power towards indigenous peoples plays an important role in limiting the opportunities for their participation in environmental decision making. While there have been great strides to incorporate indigenous peoples in the decision making process, there is still a lot that needs to be done in order to come to a greater realisation of the rights of indigenous peoples.

The WA Government is not alone in its negative attitude towards implementing the right to public participation for indigenous peoples. In Uganda, the government like many other African governments, does not recognise indigenous rights. There are no specific legal, institutional or implementation mechanisms for the participation of indigenous peoples in environmental decision making. In addition to the Africa-wide problem of non-recognition of indigenous peoples, the specific negative attitude towards indigenous peoples in Uganda compounds the problem. As already indicated in the case study, there is a general negative stereotyping of the Batwa in Uganda by government officials and large sections of the public who see the Batwa as primitive, uncivilised and only good for poaching the highly valued mountain gorillas. Based on this negative stereotyping, there is no will whatsoever on the part of government to set in place an implementation mechanism that specifically caters for the participation rights of indigenous peoples.

However, in spite of the negative attitude of the respective governments toward indigenous peoples, the case studies have shown that indigenous peoples can play a very big role in influencing environmental decision making even when faced with inadequate legal, institutional and implementation mechanisms for their participation. In Western Australia, in spite of the absence of a clear legal and institutional basis for their participation in environmental decision making, the Aboriginal people put up a formidable effort in ensuring that their aspirations were taken into account in the decision making process leading to the gazettement of Purnululu National Park. For example, the Aboriginal people organised and participated in several conferences that afforded them the opportunity to exchange information and express their concerns with government agencies in a public forum. These conferences included the Derby Conference, the Millstream Conference and the Crocodile Hole Conference. In addition to the conferences, the Aboriginal people also formed a legally incorporated organisation to represent their interests in their negotiations with government. The Purnululu Aboriginal Corporation was subsequently incorporated in December 1986. It is therefore clear that the indigenous peoples of Western Australia did not sit by and lament the dearth in the legal and institutional framework for their participation. They took the initiative and devised ways to negotiate their aspirations with decision-makers and they were at least able to engage with them. The final decisions on Purnululu may not adequately reflect this but it was very significant in building Aboriginal political capacity for later proposals relating to protected areas and natural resources management.

The indigenous people in Uganda were not as organised or as proactive as their counterparts in Western Australia. The Batwa barely participated in the decision making process leading to the gazetting of Bwindi Impenetrable Game Park and, in fact, they were barely aware that the decision making process for the gazetting of Bwindi was taking process. Throughout the different stages that Bwindi went through, before it was finally gazetted as a game park, the Batwa always found out only after the decision making process had taken place that Bwindi was no longer available to them.

The obvious contrast between the way the Aboriginal and Batwa people handled their right to participate in the decision making process brings into focus an important dynamic in indigenous participation in environmental decision making. It is clear that the status of Australia as a developed country played an important role in distinguishing the Aboriginal people as being more proactive than their Batwa counterparts who come from one of the least developed countries in the world. The World Bank's Development Indicators show that Australia has a gross domestic product per capita per person of US\$25,753 while Uganda's is US\$1,152.<sup>633</sup>

It is obvious that Australia is a wealthier and more economically developed country than Uganda. The disparity in the level of development of the two countries not only affects the economic situation and wellbeing of its citizens but also the ability to provide opportunities and mechanisms for public participation in environmental decision making. This is because establishing

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<sup>633</sup> World Bank, 2002. World Development Indicators, Washington: World Bank on CD – ROM or on line at [http://publications.worldbank.org/commerce/catalog/product?item\\_id=631625](http://publications.worldbank.org/commerce/catalog/product?item_id=631625).



the kind of institutional and legal frameworks that leads to a meaningful and effective participation mechanism is a highly costly affair both in terms of financial and human resources. Therefore, for some least developed countries like Uganda, even in the presence of goodwill to implement public participation, the financial and human resources requirements might present one of the biggest challenges for meeting the requirements for the effective and meaningful implementation of the right to public participation.

It is clear the empowered way the Aboriginal people went about claiming their right to participate in the decision making process was a manifestation of the years of education and capacity building that the Australian Government has invested in Aboriginal people over the years. Clearly, the initiatives under the *Racial Discrimination Act* and other affirmative actions including education, training and loans for the Aboriginal people contributed a great deal in bringing them to a level where they were able to mobilise on their own and demand the right to participate in the decision making process leading to the gazetting of Purnululu National Park.<sup>634</sup> The Australian Government could not have undertaken any of these initiatives or provided the capacity building that the indigenous peoples needed to enhance their ability to participate in the decision making process without the economic ability to do so.

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<sup>634</sup> Self-determination, the process initiated by Australia's 1967 referendum, demanded a radical shift of attitude on the part of many Australians. It also demanded practical expression, through programs which demonstrated both to Aboriginal people and to the electorate that the federal government intended to keep its promises. These programmes initially included the commonwealth capital fund (CCF); subsequently, after the ALP's return to power in 1972, this program was renamed the Aboriginal Land Fund Commission (ALFC) which loaned out A\$ 6.63 million for 450 projects during the five years of its existence from 1968; and the enterprise support section of DDA. While these programs were available to all Aboriginal Australians, some, particularly ALFC was especially significant for more remote regions. For a detailed discussion on the development programmes set in place by the Australian Government for Aboriginal people.

This being said, Australian Aborigines still remain significantly disadvantaged with respect to non-indigenous Australians. This is demonstrated by the factors at play which limited the influence that they were actually able to exert in the Purnululu process.

In stark contrast, the indigenous peoples of Uganda have not had the benefit of any such affirmative action or any specialised government programmes for their education or capacity building. This is largely due (but not limited) to the economic status of the country, which hinders its ability to establish the required mechanisms for the empowerment and capacity building of indigenous peoples. In addition, the government of Uganda does not recognise the presence of indigenous peoples as a special category of people that need affirmative action or specific provisions to enhance their participation in environmental decision making. The Batwa have never benefited from any special educational or training programmes that were meant to empower them in a way that allows them to claim their right to participate in the decision making process as indigenous peoples. Therefore, given their physical isolation, lack of education and the general poor economic condition of the country in which they find themselves, they were never able to participate in any way in the decision making process to the same degree as their counterparts in Australia did.

Therefore, the comparative analysis in relation to the role indigenous peoples can play in enhancing their right to participate in environmental decision making has shown that the socio-economic status and level of development of the country in which indigenous peoples are located plays an important role in

determining the extent to which they can exercise their right to participation in environmental decision making. While the Aboriginal people were able to put up a worthwhile struggle for their right to participate in environmental decision making, their Ugandan counterparts, the Batwa, were never able to organise, express their aspirations or negotiate in a similar way.

It is important to note at this point by way of caution that while the socio-economic position and level of development of Australia played a significant part in the ability of the Aboriginal people to put up a more concerted fight than their Batwa counterparts for their right to participate in the decision making process, this in no way explains the full extent of the position of Aboriginal people in Australia. Although Aboriginal people may seem a little more empowered than their Batwa counterparts in terms of their ability to claim their right to participate; this is not the case if the Aboriginal people are compared to their non-Aboriginal counterparts in Australia. Elspeth Young explains that while Australia is a developed country, the conditions under which the Aboriginal people live are comparable to those of a third world country. She argues that, for example, in Australia non-Aboriginal income is double that of Aboriginal income. Aboriginal people on average receive lower cash incomes but also because of the youthfulness of the population, these incomes are spread much more widely to support dependants. The unemployment rates of the Aboriginal people are two or three times greater than the average rates experienced by non-Aboriginal people in Australia.<sup>635</sup>

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<sup>635</sup> . See Elspeth Young, *Third World in First: Development and Indigenous People*, Routledge, London, 1995, 32-88.

Aboriginal people are less healthy, less well educated, poorer and less likely to occupy influential jobs. All these conditions she concludes foster marginalisation and have implications for the development of Aboriginal people and their ability to influence decision making processes at all levels including in the environment and natural resources sector. In the remote areas in particular, development indicators created by combining social and economic characteristics, suggest that the Aboriginal level of disadvantage is well above average.<sup>636</sup>

It is therefore important to keep the position of the Aboriginal people relative to their non-Aboriginal counterparts in Australia in mind even as comparisons are made between the Aboriginal people and the Batwa.

In addition to the role the socio-economic status and level of development of Australia may have had on the capacity of Aboriginal people to participate in environmental decision making, the level of democratic governance has also had a significant impact. The University of Maryland produces an authoritative polity index of democracy and autocracy. Under this index, countries are ranked from a scale of -10 to +10 measuring the degree to which a nation is either autocratic or democratic. A score of +10 indicates a strongly democratic state; a score of -10 a strongly autocratic state. According to the index, a fully democratic government has three essential elements: fully competitive political participation, institutionalised constraints on executive power, and guaranteed civil liberties to all citizens in their daily lives and in political participation. A full autocratic system sharply restricts or suppresses competitive political

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<sup>636</sup> Ibid.

participation. According to the last index, Australia scores +10 for fully democratic government while Uganda scores -4, for a partially autocratic government.<sup>637</sup>

Australia is a stable and sustainable democracy and has been that way for several decades. This stability in terms of democratic governance, which has had people at the centre of development, has played an important role in building the capacity of indigenous peoples by providing opportunities and a platform for their participation in the conservation and management of protected areas. While the fight for the right to participate in the decision making process has been a long and treacherous one as indicated by the Purnululu case study, it is also clear that because Australia is an established democracy, the decision making process did not just simply ignore or suppress indigenous peoples but took some positive steps to include them in the decision making process. Developments such as the recognition of native title under the *Native Title Act*, the High Court ruling against Western Australia *Land (Titles and Traditional Usage) Act 1993 (WA)* as being inconsistent with the *Racial Discrimination Act* and the *Native Title Act* is an indication of the level of democratic maturity in Australia and its ability to uphold the principles of democratic governance, equity and justice and the rule of law.

In contrast, Uganda has experienced decades of intermittent violence and gross violation of human rights including those of indigenous peoples especially during the Amin Era. The level of democratic governance has provided neither

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<sup>637</sup> See Polity IV Project, 2002, Polity Project IV Project: Political Regimes Characteristics and Transitions. College Park: University of Maryland. Available on line at <http://www.bsos.umd.edu/cidcm/inscr/polity/index.htm>.

opportunity nor a platform for the articulation of the aspirations of indigenous peoples in the environmental decision making. Uganda has for many years been a partially democratic state with little or no room to tolerate divergent or opposing views to government and including the aspirations of indigenous peoples to have access to their ancestral lands. There has never been space in the democratic arena for the active articulation and pursuit of indigenous aspirations. This is because, as has been already noted, none of the governments in Uganda has ever recognised indigenous peoples as such and therefore has never dealt with their aspirations.

In addition, there has never been an established framework for freedom of expression within which the indigenous peoples can articulate their aspirations and participate in the decision making process. Any opportunity that the indigenous peoples took to articulate their aspiration to retain access and control over their land was interpreted to mean being against government policy for the conservation and management of protected areas and thus was met with stiff resistance.

Along with the role that indigenous peoples can play to enhance their right to participate in environmental decision making is the role that local and international NGOs can play to influence the enhancement of the participation rights of indigenous peoples. In Australia, Environs Kimberly and the Australian Conservation Foundation played an important role in not only helping the Aboriginal people of Purnululu articulate their issues but also helped them in resolving their internal conflicts as a people in order to present a united stand in their negotiations with the WA Government. In Uganda, CARE International played an important role in helping the Batwa negotiate

collaborative management arrangements that would enable them to access Bwindi after they had lost access to it after its gazettal as a game park.

#### **7.4 The level of implementation of international obligations**

Another important difference between Australia and Uganda is the level of commitment to and implementation of their respective international obligations relating to the participation of indigenous peoples in the conservation and management of protected areas.

Chapter four of the thesis presented an examination of the international framework for the participation of indigenous peoples in the conservation and management of protected areas. The leading binding international instruments relating to the participation of indigenous peoples in the conservation and management of protected areas to which both Australia and Uganda are signatories are the *ILO Convention 169* and the *Convention on Biological Diversity*.

An examination of the legal regime and studies on the participation of indigenous peoples in the conservation and management of protected areas in Australia and Uganda has shown the level to which both countries have gone to implement and conform to their international commitments in this area.

Australia has gone to some length to provide for the participation of indigenous peoples in the conservation and management of protected areas. At the commonwealth level, Australia passed the EPBC Act, which, among other things, is meant to implement its obligations under the *Convention on*

*Biological Diversity* as well as under a number of other international agreements that Australia has entered into. While there have been efforts in Australia to implement its international obligations regarding indigenous peoples and their participation in environmental decision making, the Purnululu case study has clearly demonstrated that there is still a lot that needs to be done. This is mostly as a result of the dichotomy between the measures put in place at the commonwealth and state levels for the participation of indigenous peoples in the conservation and management of protected areas.

The Ugandan case study has demonstrated that there are no specific provisions for the participation of indigenous peoples in the conservation and management of protected areas. Uganda is a signatory to all international instruments providing for the rights of indigenous peoples, yet it has not made any provision within its legal, policy and institutional framework for the implementation of these obligations.

It is clear from the analysis that in spite of their peculiarities, both countries fall short of the bind of requirements for environmental justice being evolved through the regimes such as Aarhus and international best practice.



## **CHAPTER EIGHT**

### **THE RIGHT TO PUBLIC PARTICIPATION IN ENVIRONMENTAL DECISION MAKING AND NATURAL RESOURCE MANAGEMENT: SUMMARY AND CONCLUSION**

The thesis set out to examine the right to public participation in environmental decision making and natural resources management within the context of the participation of indigenous peoples in the conservation and management of protected areas. It has examined the right to public participation in environmental decision making and natural resources management. It has revealed that the right to public participation is a political process in the public arena in which all citizens have an equal right to take part in and determine the decision making process at all levels. However, this right is often wrought with complexities, shortcomings and inadequacies which often affect its effective realisation as has been demonstrated in the case studies.

The thesis has also shown that the importance and value of public participation in environmental decision making and natural resources management lies in its ability to enhance and uphold the supremacy of the people in decision making and in controlling conflict over natural resources. Public participation in environmental decision making can enable the empowering of the often marginalised groups in society: women, indigenous peoples and other minority groups. Through participation, it is possible to improve gender equity and provide a means by which indigenous peoples can take part in the decision making process. Participation through affirmative action in favour of

indigenous peoples can be transformative and lead to changes that allow for their voices to be heard in the decision making process. In this regard, participation encourages the public to take ownership of the process by responding to the positive actions resulting from their participation.

Meaningful participation also plays an important part in enhancing accountability in environmental decision making. Accountability involves the ability to sanction the decision makers or responsible parties or the ability to punish or to bring pressure to bear. Because of increased accountability, public participation plays a very significant role in combating corruption in environmental decision making and natural resources management.

Whereas the practice of public participation in environmental decision making is fairly recent in relative terms, the conceptual foundations on which it is built are as old as time itself stemming from the early days of Greek mythology to the times of Aristotle when the concept of participation was first given credence, then to the French revolution and the American Declaration of Independence all of which stressed the importance of the public voice in decision making.

In contemporary times, the right to public participation has had distinguished elitist proponents like Schumpeter and vibrant participatory advocates like John Stuart Mills and Carole Pateman.

Therefore, given its long history in the traditional discourse on democratic governance, the rise in prominence in public participation in environmental

decision making has not been accidental. It has been driven by a combination of fortuitous and not so fortuitous events. These range from the rise in the bureaucratic estate, to the growth in information technology and connectivity, the complexity in the production process to an increase in the democratisation of political systems around the world and the growing acceptance of good governance norms. In addition, the rapid growth in non-governmental organisations and other public advocates has also helped to thrust public participation onto the centre stage of public discourse.

The discourse on public participation has also been played out on the international stage leading to the international recognition of the right to public participation in environmental decision making and natural resources management as essential to sustainable development. Accordingly, there are several instruments both binding and non-binding at the international and regional level, which provide for the right to public participation in environmental decision making and natural resources management. The most outstanding of these is arguably the *Aarhus Convention*.

However, the right to public participation is not without its complexities and neither is it a panacea for all the problems associated with environmental and natural resources management. Indeed, the two studies, Purnululu in Western Australia and Bwindi in western Uganda, have illustrated that the right to public participation is riddled with complications, is not always positive and is confronted with shortcomings and does not always deliver the expected benefits.

The right to public participation in environmental decision making is often promoted on the assumption that the general public wants to be more closely involved in decision making. The Ugandan case study has shown that the public is actually not always interested in environmental decision making just for the sake of it. It has to be accompanied by some additional value in order for them to actively engage in the decision making process. As indicated in the Ugandan case study, people always wanted to know what value would be added to their lives if they engaged in environmental decision making. Accordingly, education, capacity building as well as sensitisation on the value of the environment and environmental decision making are essential if the right to public participation is to be realised.

In relation to public interest in participation in environmental decision making, it is important to note the role geographical space plays in focusing and shaping public interest in environmental decision making. The effects of space, place and locality are important in determining who is interested in a decision problem and why. The case studies have shown that people local to a particular problem or issue will, by the very virtue of their geographical position, be (in the main) interested enough to get involved or at least express a considered point of view. As scale increases, a smaller proportion of the population affected will be interested enough to seek involvement, such that at the national scale the proportion of the interested population is pitifully small, even though the absolute numbers may be quite large.<sup>638</sup>

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<sup>638</sup> Kingston, R., Carver, S., Evans, A. and Turton, I., Web-Based Public Participation Geographical Information Systems: An Aid to Local Environmental Decision Making, *Computers, Environment and Urban Systems*, (2000), 24(2-3), 291-125.

Sjoberg and DrottSjoberg<sup>639</sup> note that this is true even for those issues that, at first glance, it would seem everyone ought to hold a vested interest in, like where to dispose of nuclear waste or create a protected area for example. Only when locational decisions are made about national issues does the problem then become local and so the politics of scale kick in again to create an explosion of local interest. 'Not in my backyard' is a much maligned public reaction to invasive siting decisions – a kind of geographical version of personal space – but it does demonstrate the parochial nature of public interest in decision making very well, particularly when concerned with controversial issues such as the creation of protected areas.<sup>640</sup>

In order to understand how the public respond to, and participate in, a decision problem, researchers have recognised that it is necessary to focus on the social and cultural factors that govern this process. Public participation attitudes are shaped by 'world views' shared by groups to which individuals belong. This recognises that society is composed of different groups each with different world views and this leads to different perceptions and attitudes to the decision problem and clearly affects the ways in which different people participate in the decision making process.<sup>641</sup> The case studies have clearly indicated that the indigenous peoples' view and attitude towards the creation of protected areas was quite different from that of the policy makers and other interest

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<sup>639</sup> Sjoberg, L. and DrottSjoberg, B.M., Fairness, Risk and tolerance in siting nuclear waste repository, 4(1)Journal of Risk Research, (2001), 75-201.

<sup>640</sup> Steve Carver, Participation and Geographical Information: a position paper for the ESF-NSF Workshop on Access to Geographical Information and Participatory Approaches Using Geographical Information, Spoleto (2001), 7.

<sup>641</sup> Cultural theory suggests that there are four stakeholder groups each having a distinctive attitude. The four types are: Individuals/entrepreneurs, hierarchists, fatalists and egalitarians. For a detailed discussion on this, see Douglas, M., *Risk and Blame*, Routeledge, London, (1992).

groups and this affected the manner in which they participated in the decision making process.

The studies have also rightly shown that those doing the decision making do not necessarily value public participation. Perhaps the most significant shortcoming associated with public participation is that the very concept may be used to undermine the very purpose for which it is intended by using it as mechanism for 'rubber stamping' or 'ticking off boxes' by policy makers so that they can just be seen to involve the people in the decision making process when in actual fact they are not taking their interests into consideration. The Australian case studies clearly demonstrated this.

During the initial stages of the establishment of Purnululu National Park in Western Australia, the multi-agency working group that was set up in the early 1980s which included indigenous peoples had recommended that the National Park be vested in the NPNCA as a class A reserve and that the vesting be subject to mechanisms providing for secure residence and equitable input to the management for Aboriginal traditional owners. However, the 1986 Cabinet decision in Western Australia totally disregarded this proposal by the indigenous peoples of Purnululu. It totally relegated Aboriginal special rights in land along with any semblance of structures that guaranteed equity. *Aboriginal owners became Aboriginal people with traditional affiliations in the area.* Aboriginal aspirations with respect to management were reformulated: *equitable input to management decision making became meaningful ongoing input.* Aboriginal aspirations for ranger training, employment and living areas in the park were no longer major planning and policy issues to be considered

equally by CALM, they became *Aboriginal interests in the park defined fully within the government prerogative*.

The Purnlulu study clearly demonstrates that there was no meaningful participation for the Aboriginal people and that their participation in the decision making process through the multi-agency working group was cosmetic and was never intended to give the Aboriginal people an influence.

The flip side to the abuse of the participatory process by governments and their agencies is the capacity and ability of local and indigenous peoples to participate in the decision making process. Implementing the right to public participation in environmental decision making and natural resources management works on the assumption that the communities concerned actually have the capacity and ability to participate. The Ugandan case study has shown that this is not always the case.

The process leading to the gazettement of Bwindi Impenetrable Game Park clearly demonstrated that the realisation of the right to public participation might at times be no more than a fantasy because the people it is meant to benefit do not have the ability to use it to claim their rights. The Batwa were never at any time during the process of gazettement of Bwindi able to participate in the decision making process because they lacked capacity to do so. Their lack of capacity was in several areas. They did not have the capacity to participate in the decision making process because decisions were made in Kampala, 300 km from where they lived and where the park was to be established. They did

not have the financial ability to travel all the way to Kampala to participate in the protracted and lengthy discussions that resulted in the gazettement of Bwindi.

In addition to financial incapacity, the Batwa did not have the required technical and legal expertise needed to meaningfully and effectively participate in the decision making process leading to the gazettement of Bwindi which involved examining and analysing scientific data relating to the value of Bwindi as a world heritage site and also needed a lot of legal expertise in drafting the legal instruments for the gazettement of Bwindi as a national park. The Batwa's capacity problems were compounded by their inability to organise as a people to speak with one voice about their aspirations. It is therefore clear that the Batwa did not have the capacity and ability to participate in the decision making process and it is no wonder that they were totally displaced from their ancestral lands with the eventual gazettement of Bwindi Impenetrable Game Park.

The Ugandan case study demonstrates that the right to public participation may not be able to bring meaningful benefits to indigenous peoples if they do not have the capacity to participate in the decision making process.

It is important to note that capacity issues in relation to the ability of indigenous peoples to participate in the decision making process go directly to the issue of poverty. In a country like Uganda where there is poverty on a national scale, the situation is even worse for indigenous peoples and this affects their ability to participate in the decision making process. Participating in the decision making-process is a costly undertaking by all accounts and



indigenous peoples will not be able to effectively and meaningfully participate in the decision making process while they are still wallowing in the levels of poverty they find themselves in.

The right to public participation in environmental decision making is complex in that its realisation depends to a great extent on the level of economic and financial capacity of the indigenous peoples to participate in the decision making process and the social context within which it is implemented. However, it is not just financial capacity that creates problems for public participation in environmental decision making. The two studies have further revealed that several other problems arise in relation to the participation of indigenous peoples in the conservation and management of protected areas including the capacity of the indigenous peoples to participate in the decision making process, the negative attitudes of government officials, the failure of governments to abide by their international commitments to public participation..

In conclusion, it can be observed that the thesis has given a detailed examination of the right to public participation and its importance as well as the value it potentially adds to environmental decision making and natural resources management within the context of the participation of indigenous peoples in the conservation and management of protected areas. . However, the case studies in Australia and Uganda have shown that, in reality, the implementation and realisation of the right to public participation is not always a given and that there are several complexities and shortcomings associated with national, state and local government policies and practices relating to the

participation of indigenous peoples in the conservation and management of protected areas.