Environmental procedural rights in Africa with specific reference to South Africa and Uganda

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Summary

This PhD thesis, titled *Environmental Procedural Rights in Africa with Specific reference to South Africa and Uganda* examines the extent to which South Africa and Uganda have domestically implemented environmental procedural rights in their existing legal systems and inherent policy objectives. This PhD thesis places emphasis on South Africa and Uganda in a bid to illustrate the extent to which the domestic implementation of environmental procedural rights has played a vital role in achieving environmental protection despite the challenges encountered by these two countries.

Chapter one addresses the conceptual aspects of environmental rights and it was noted that the biocentric/ecocentric and the anthropocentric approaches were of relevance in the domestic implementation of the environmental rights. Under the biocentric/ecocentric approach, it was illustrated that humans are not separate from the environment, reaffirming the notion that plant and animal life are interdependent. In the anthropocentric approach the status of humans in the natural hierarchy of the eco-system was acknowledged as the dominant species that can control the environment. With regard to the duty to *respect, protect and fulfil* imposed on states, this study noted that all states should endeavour to the greatest extent possible to comply with the above-mentioned duties. The duty to *respect* would for example be implemented by enacting and implementing domestic environmental laws which restrain the State from engaging in conduct which deprives the citizens of access to environmental procedural rights.

In Chapter one, this study also noted that there is an assertion based on the international environmental law principle of intergenerational equity that environmental rights (including environmental procedural rights) are not only rights of present generations, but rights of future generations as well.

Chapter two of this study addresses the concept of environmental procedural rights, i.e. the right of access to information, public participation and access to justice. In this study it was noted that the right of access to information, public participation, protest and access to justice are directly linked to the prevailing democracy and good governance in any particular state. With regard to access to information, the study noted that information sought or received should be full, accurate, up to date and offered free of charge. Accordingly, any rejections for requests for information shall only be made as provided by law. With regard to public participation, the study noted that decision-making should always involve the public. In chapter two it was also noted that public participation increases government efficiency, creates more transparency, and accountability and gives government processes credibility especially when it comes to environmental impact assessments (EIAs). Under the right of access to justice, the study noted that any person or group of persons whose environmental rights have been violated or are about to be violated, must be ensured of access to a review procedure before a court of law or any other independent or impartial body. Thus, according to this study, the right of access to justice entails measures such as states ensuring that all barriers such as costs and strict *locus standi* requirements are minimised. In this chapter, the study also makes a case for the inclusion of the right to protest (as implied from the right to freedom of expression, assembly
and association) as a fourth environmental procedural right. This study noted that the link between this right and environmental protection is very apparent as the citizens are able to make their environmental demands and interests openly known to the government and society.

Chapter three examines the background to the evolution of environmental procedural rights by addressing the international and regional approaches. Under the international approaches, the study focused on selected instruments in which the study noted that some of them are not binding (i.e. are in form of soft law) such as the Universal Declaration on Human Rights (UDHR) and also do not make specific reference to the environment or environmental procedural rights. Rather, environmental rights in some of these international instruments are proclaimed in a generalised manner. However, the study noted that, at the international level, the United Nations Environment Programme (UNEP) Guidelines for the Development of National Legislation on Access to information, Public Participation and Access to Justice in Environmental Matters have become widely acceptable as an aid to states seeking to fill possible gaps in their environmental regulatory framework relevant to environmental procedural rights. At the regional level, the study examines some selected regional instruments related to environmental procedural rights in Africa, America, Asia and Europe. The study further noted that, though at varying levels, the above-mentioned continents have adopted regional instruments aimed at enhancing environmental procedural rights.

On a positive note, the author noted that continents, such as Europe, have gone a step further in ensuring that the provisions in the regional instruments relating to environmental procedural rights are enforced. For example, under the Aarhus Convention, a Compliance Committee was established to ensure that Parties comply with the Aarhus provisions on environmental procedural rights. Accordingly, such procedures enhance access to justice and also expand public participation. In the view of the author, despite being a regional instrument, the Aarhus Convention prominently stands out compared to others as imposing concrete obligations on Parties to implement environmental procedural rights. In chapter three the study also notes that in some regions, such as Africa, their regional instruments are outdated (i.e. no longer compatible with prevailing conditions and environmental challenges) while others such as the 2003 African Convention on the Conservation of Nature and Natural Resources have never been fully operationalised.

Chapter four examines how South Africa and Uganda have domestically implemented the right of access to information. Chapter four addresses this by analysing the relevant constitutional and legislative provisions in the National Environment Management Act (NEMA) of South Africa and the National Environment Act (NEA) of Uganda. The study noted that the Promotion of Access to Information Act (PAIA) is the framework law on access to information in South Africa and the Access of Information Act (AIA) for Uganda. The study also noted that the NEMA and PAIA of South Africa as well as the NEA and AIA of Uganda do not specifically state in what language information requested should be given and also do not specifically provide for time frames within which information requested should actually be availed. Chapter four of the study has also covers the appeals and complaints procedures in South Africa and Uganda in instances where a request for information has been rejected. The study also noted that, unlike the NEA and AIA of Uganda, the NEMA of South Africa provides for protection of
whistleblowers who disclose information which may be used to avert an eminent or serious threat to the environment. This study also highlights the importance and relevance of information and communications technology (ICT) in enhancing the right of access to information in South Africa and Uganda. The study further noted that South Africa and Uganda do not lay significant emphasis on public education and awareness on environmental matters as vital tools of enhancing the right of access to information. The NEMA and PAIA of South Africa and the NEA and AIA of Uganda do not clearly distinguish the two (i.e. public education and awareness on environmental matters). Further to chapter four, the study noted that the right of access to information in South Africa and Uganda is not absolute as it may be subject to some limitations.

Chapter five has examines how South Africa and Uganda have domestically implemented the right of access to public participation in decision-making. The study took cognisance of the fact that, historically both countries were previously characterised by limited or no public participation in decision-making, especially in the affairs of government. South Africa had the apartheid regime until 1994, and Uganda had military and dictatorial regimes and only had the first democratic elections in 1996. Nonetheless, the study has noted that South Africa and Uganda have taken long strides in enhancing the right of access to public participation in decision-making. For instance the NEMA of South Africa under section 3 provides for other avenues through which public participation can be domestically implemented. Furthermore, the study also noted that the NEA of Uganda under its principles on environmental management also has provisions on public participation. On the whole, with regard to public participation in decision-making, this study noted that both South Africa and Uganda have constitutional and legislative provisions on public participation. However, these are only on paper and the reality is that citizen participation in environmental decision-making is still a challenge to many citizens especially in Uganda. This has been the case especially during environmental impact assessments (EIAs), issuance and renewal of pollution licences, and award of concessions which may have adverse impacts on the environment. This study noted that citizens are not adequately be sensitised about the relevance of their input during EIAs and the guidelines on how the citizens may participate in environmental decision-making are also not publicised.

In chapter six the study addresses the domestic implementation of the right to protest in South Africa and Uganda. The study noted that though there have been instances where the right to protest for the environment has been exercised by the citizens, it has not fully been utilised. Perhaps it may be suggested that the citizens are fearful of the way the state will react to such protests. Nonetheless, the study noted that where these protests were to a greater extent successful. The study also noted that the right to protest can only fully be realised with the presence of an independent and free media. The print and electronic media plays an important role of raising awareness and disseminating information. The media can also be used to mobilise protestors. It is therefore important for the governments of Uganda and South Africa to ensure freedom of the press and media. On the other hand, the media should also not abuse this freedom by promoting hate speech, defaming other citizens and inciting violence. The study also noted that political organisations, non-governmental organisations (NGOs) and trade/workers’ unions also have an important role to play in promoting the right to protest for the environment. It is therefore important that
states put in place environments conducive for these organisations to thrive and carry out their operations without unnecessary interference. The study further noted that despite the slow pace at which citizens are engaging in environmental protests, it is evident that citizens are now more willing to stand up to the authorities in relation to environmental issues. According to this study, the right to protest is the more viable option especially in instances where the other three environmental procedural rights have not yielded any positive results as illustrated by case studies in South Africa, Uganda and China. It was also noted that the right to protest is not absolute and is therefore subject to limitations as spelt out in the applicable legal provisions and this study is of the view that these limitations must be proportionate based on the prevailing circumstances. Thus, this study strongly makes a case for the recognition of the right to protest as a potential fourth environmental procedural right. Perhaps, this way states will fully implement it domestically and that way environmental protestors will be viewed with less suspicion.

Chapter seven examines the domestic implementation of the right of access to justice in South Africa and Uganda. Accordingly, this study noted that the other environmental procedural rights would be of no use to the citizens if they do not have access to justice and legal redress from impartial bodies. The study noted that, despite some challenges South Africa and Uganda have to a greater extent enhanced the right of access to justice by putting in place the relevant Constitutional and legislative provisions. For instance, the study noted that both countries have relaxed the previous strict rules on legal standing where litigants had to show that they had an interest in the matter. Currently, any person has legal standing to commence legal action on behalf of others and the environment. Consequently, this approach led to the evolution of public interest litigation where by any person can sue in public interest so as to protect the environment. The study also noted that that costs and security for costs are a major hindrance to accessing environmental justice. Furthermore, the study also noted that unlike the NEA of Uganda, the NEMA of South Africa has embraced the alternative dispute resolution (ADR) mechanisms, i.e. mediation, conciliation and arbitration to settle environmental disputes. With regard to remedies available to those that seek legal redress in the courts of law, this study was able to identify some. These included: damages, fines and penalties, imprisonment, payment of clean up costs, environmental restoration orders, interdictions and injunctions. This study also noted that both South Africa and Uganda do not have specialised environmental courts or tribunals. In chapter seven, this study also noted that in South Africa and Uganda a number of non-governmental organizations (NGOs) have been at the forefront of fighting for environmental rights of the citizens and have also been greatly involved in public interest litigation.

This study therefore concluded that there is a need to move beyond the three conventional environmental procedural rights of access to information, public participation and access to justice. This study is of the view that a fourth environmental procedural right to protest is of relevance in ensuring the right to a clean and healthy environment. It is thus suggested that this potentially fourth procedural right should be left to stand on its own rather than implying it from the right to public participation. Thus, this study also hopes to provide a basis for more research into other potential environmental procedural rights. This will in turn give citizens more options in ensuring that their environmental rights are protected.
Samenvatting

Dit proefschrift, bewerkte milieu procedurele rechten in Afrika met een specifieke verwijzing naar Zuid-Afrika en Oeganda, onderzoekt de mate waarin Zuid-Afrika en Oeganda in eigen land milieu procedurele rechten hebben geïmplementeerd in hun bestaande wettelijke systemen en inherente beleidsdoelstellingen. Dit proefschrift legt de nadruk op Zuid-Afrika en Oeganda om te illustreren in hoeverre de binnenlandse implementatie van milieu-procedurele rechten een vitale rol heeft gespeeld bij het bereiken van milieubescherming, ondanks de uitdagingen waarmee deze twee landen worden geconfronteerd.

Hoofdstuk één behandelt de conceptuele aspecten van milieurechten en er werd opgemerkt dat de biocentrische / ecocentrische en de antropocentrische benaderingen van belang waren bij de binnenlandse implementatie van de milieurechten. Onder de biocentrische / ecocentrische benadering werd geïllustreerd dat mensen niet gescheiden zijn van de omgeving, wat het idee bevestigt dat het leven van planten en dieren onderling afhankelijk is. In de antropocentrische benadering werd de status van de mens in de natuurlijke hiërarchie van het ecosysteem erkend als de dominante soort die de omgeving kan beheersen. Met betrekking tot de plicht tot eerbiediging, bescherming en eerbiediging van staten, merkte deze studie op dat alle staten ernaar moeten streven om zoveel mogelijk aan de bovengenoemde taken te voldoen. De plicht tot respect zou bijvoorbeeld worden geïmplementeerd door nationale milieuwetten uit te vaardigen en uit te voeren die de staat ervan weerhouden zich te gedragen door gedrag dat de burgers toegang tot procedurele procedurele rechten ontzegt. In hoofdstuk een merkte deze studie ook op dat er een bewering is gebaseerd op het internationale milieurechtprincipe van intergenerationele gelijkheid dat milieurechten (inclusief procedurele rechten op milieugebied) niet alleen rechten van huidige generaties zijn, maar ook rechten van toekomstige generaties.

Hoofdstuk twee van deze studie behandelt het concept van procedurele rechten op milieugebied, dat wil zeggen het recht op toegang tot informatie, inspraak van het publiek en toegang tot de rechter. In deze studie werd opgemerkt dat het recht op toegang tot informatie, inspraak van het publiek, protest en toegang tot de rechter rechtstreeks verband houden met de heersende democratie en goed bestuur in een bepaalde staat. Wat de toegang tot informatie betreft, merkte de studie op dat de opgevraagde of ontvangen informatie volledig, nauwkeurig, actueel en gratis zou moeten zijn. Dienovereenkomstig zullen afwijzingen voor verzoeken om informatie alleen worden gedaan zoals wettelijk bepaald. Wat de inspraak van het publiek betreft, merkte de studie op dat bij de besluitvorming altijd het publiek moet worden betrokken. In hoofdstuk twee werd ook opgemerkt dat publieke participatie de efficiëntie van de overheid verhoogt, meer transparantie en aansprakelijkheid creëert en de overheid processen geloofwaardiger maakt, vooral als het gaat om milieueffectbeoordelingen (MER's). Onder het recht op toegang tot de rechter, merkte het onderzoek op dat elke persoon of groep van personen wier milieurechten zijn geschonden of op het punt staan te worden geschonden, moet worden verzekerd van toegang tot een beoordelingsprocedure voor een rechtbank of een andere onafhankelijke of onpartijdige instantie. Volgens deze studie omvat het recht op toegang tot de rechter dus maatregelen zoals staten die ervoor zorgen dat alle
belemmeringen zoals kosten en strikte locus-vereisten worden gemiminaliseerd. In dit hoofdstuk wordt in de studie ook gepleit voor opname van het recht op protest (zoals geïmpliceerd door het recht op vrijheid van meningsuiting, vergadering en vereniging) als een vierde milieu-procedureel recht. Uit deze studie bleek dat het verband tussen dit recht en milieubescherming heel duidelijk is, aangezien de burgers hun milieu-eisen en -interesses openlijk kenbaar kunnen maken aan de overheid en de samenleving.

Hoofdstuk drie onderzoekt de achtergrond van de evolutie van procedurele rechten op milieugebied door de internationale en regionale benaderingen aan te pakken. In het kader van de internationale aanpak richtte de studie zich op geselecteerde instrumenten waarin de studie opmerkte dat sommige ervan niet bindend zijn (dwz in de vorm van soft law) zoals de Universele Verklaring van de Rechten van de Mens (UVRM) en ook geen specifieke verwijzing bevatten aan het milieu of aan milieuwetgeving. Integendeel, milieurechten in sommige van deze internationale instrumenten worden op een algemene manier afgekondigd. In de studie werd echter opgemerkt dat op internationaal niveau de United Nations Environment Programme (UNEP) -richtsnoeren voor de ontwikkeling van nationale wetgeving inzake toegang tot informatie, publieke inspraak en toegang tot de rechter inzake milieuangelegenheden algemeen aanvaardbaar zijn geworden als hulpmiddel voor staten proberen mogelijke leemten in hun milieureglement op te vullen die van belang zijn voor procedurele rechten op het milieu. Op regionaal niveau onderzoekt de studie enkele geselecteerde regionale instrumenten met betrekking tot procedurele rechten op het milieu in Afrika, Amerika, Azië en Europa. De studie merkte verder op dat, hoewel bij variërende niveaus hebben de bovengenoemde continenten regionale instrumenten aangenomen om de procedurele rechten op milieugebied te verbeteren.

Positief is dat de auteur opmerkte dat continenten, zoals Europa, een stap verder zijn gegaan door ervoor te zorgen dat de bepalingen in de regionale instrumenten met betrekking tot procedurele rechten op milieugebied worden gehandhaafd. Op grond van het Verdrag van Aarhus is bijvoorbeeld een nalevingscommissie opgericht om te waarborgen dat de partijen zich houden aan de Aarhus-bepalingen inzake procedurele rechten op milieugebied. Dienovereenkomstig verbeteren dergelijke procedures de toegang tot de rechter en breiden ze ook de publieke participatie uit. Naar de mening van de auteur is het Verdrag van Aarhus, ondanks het feit dat het een regionaal instrument is, opvallend in vergelijking met anderen, omdat het concrete verplichtingen voor Partijen oplegt om milieu-procedurele rechten te implementeren. In hoofdstuk drie merkt de studie ook op dat in sommige regio's, zoals Afrika, hun regionale instrumenten verouderd zijn (dwz niet meer verenigbaar zijn met de heersende omstandigheden en milieu-uitdagingen), terwijl andere zoals de Afrikaanse Conventie van 2003 over het behoud van de natuur en natuurlijke hulpbronnen nooit volledig geoperationaliseerd.

Hoofdstuk vier onderzoekt hoe Zuid-Afrika en Oeganda in eigen land het recht op toegang tot informatie hebben geïmplementeerd. Hoofdstuk vier behandelt dit door de relevante grondwettelijke en wettelijke bepalingen in de Nationale Wet milieubeheer (NEMA) van Zuid-Afrika en de Nationale Milieuwet (NEA) van Oeganda te analyseren. De studie merkte op dat de bevordering van de toegang tot informatie Act (PAIA) is de kaderwet over de toegang tot informatie in Zuid-Afrika en de Access of Information Act (AIA) voor Oeganda. In de studie werd ook
opgemerkt dat de NEMA en de PAIA van Zuid-Afrika, evenals de NEA en AIA van Oeganda niet specifiek vermelden in welke taal de gevraagde informatie moet worden verstrekt en ook niet specifiek voorzien in termijnen waarbinnen de gevraagde informatie daadwerkelijk zou moeten worden gebruikt. Hoofdstuk vier van het onderzoek heeft ook betrekking op de beroeps- en klachtenprocedures in Zuid-Afrika en Oeganda in gevallen waarin een verzoek om informatie is afgewezen. De studie merkte ook op dat de NEMA van Zuid-Afrika, in tegenstelling tot de NEA en AIA van Oeganda, voorziet in de bescherming van klokkenluiders die informatie vrijgeven die kan worden gebruikt om een eminente of ernstige bedreiging van het milieu te voorkomen. Deze studie benadrukt ook het belang en de relevantie van informatie- en communicatiemiddelen (ICT) bij het verbeteren van het recht op toegang tot informatie in Zuid-Afrika en Oeganda. In de studie werd verder opgemerkt dat Zuid-Afrika en Oeganda geen grote nadruk leggen op openbaar onderwijs en bewustwording over milieuaanlasten als essentiële instrumenten voor het verbeteren van het recht op toegang tot informatie. De NEMA en PAIA van Zuid-Afrika en de NEA en AIA van Oeganda onderscheiden deze twee niet duidelijk (dat wil zeggen openbaar onderwijs en bewustzijn over milieukwesties). Naar aanleiding van hoofdstuk vier constateerde de studie dat het recht op toegang tot informatie in Zuid-Afrika en Uganda niet absoluut is, omdat het mogelijk aan enkele beperkingen onderhevig is.


In hoofdstuk zes gaat de studie in op de binnenlandse implementatie van het recht op protest in Zuid-Afrika en Oeganda. De studie merkte op dat hoewel er zijn gevallen geweest waarin het recht om te protesteren voor het milieu is uitgeoefend door de burgers, het is niet volledig benut. Misschien kan worden gesuggereerd dat de burgers bang zijn voor de manier waarop de staat op dergelijke protesten reageert. Desondanks merkte het onderzoek op dat
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dez protesten in grotere mate succesvol waren. De studie merkte ook op dat het recht om te protesteren alleen volledig kan worden gerealiseerd met de aanwezigheid van onafhankelijke en vrije media. De gedrukte en elektronische media spelen een belangrijke rol bij het vergroten van het bewustzijn en het verspreiden van informatie. De media kunnen ook worden gebruikt om demonstranten te mobiliseren. Het is daarom belangrijk dat de regeringen van Oeganda en Zuid-Afrika de vrijheid van de pers en de media garanderen. Anderzijds mogen de media deze vrijheid ook niet misbruiken door haatzaaiende uitlatingen te bevorderen, andere burgers te belasteren en geweld aan te zetten. De studie merkte ook op dat politieke organisaties, niet-gouvernementele organisaties (NGO's) en vakbonden / werknemersvakbonden ook een belangrijke rol spelen bij de bevordering van het recht om te protesteren tegen het milieu. Het is daarom belangrijk dat staten omgevingen creëren die bevorderlijk zijn voor deze organisaties om te gedijen en hun activiteiten uit te voeren zonder onnodige inmenging. De studie wees verder uit dat ondanks het trage tempo waarin burgers zich bezighouden met milieu-protesten, het duidelijk is dat burgers nu meer bereid zijn om op te staan tegen de autoriteiten in verband met milieukwesties. Volgens deze studie is het recht om te protesteren de meest haalbare optie, vooral in gevallen waarin de andere drie milieu-procedurele rechten geen positieve resultaten hebben opgeleverd, zoals blijkt uit case-studies in Zuid-Afrika, Uganda en China. Er werd ook opgemerkt dat het recht om te protesteren niet absoluut is en daarom onderhevig aan beperkingen zoals uiteengezet in de toepasselijke wettelijke bepalingen en deze studie is van mening dat deze beperkingen evenredig moeten zijn op basis van de heersende omstandigheden. Daarom pleit deze studie er sterk voor om het recht op protest te erkennen als een mogelijk vierde milieu-procedureel recht. Misschien zullen staten op deze manier het land volledig in eigen land implementeren en zullen milieuaansteeven met minder wantrouwen worden bekeken.

interdictions en verbodsmaatregelen. In deze studie werd ook opgemerkt dat zowel Zuid-Afrika als Oeganda geen gespecialiseerde milieurechtbanken of -tribunals hebben. In hoofdstuk zeven merkte deze studie ook op dat in Zuid-Afrika en Oeganda een aantal niet-gouvernementele organisaties (NGO's) een voortrekkersrol hebben gespeeld in de strijd voor de rechten van het milieu van de burgers en ook zeer betrokken zijn geweest bij processen van openbaar belang.

Daarom wordt geconcludeerd dat er behoefte is om verder te gaan dan de drie conventionele procedurele rechten op milieugebied, namelijk toegang tot informatie, inspraak van het publiek en toegang tot de rechter. Deze studie is van mening dat een vierde milieuprocedureel recht om te protesteren van belang is voor het waarborgen van het recht op een schoon en gezond milieu. Er wordt dus voorgesteld om dit potentieel vierde procedurele recht op zichzelf te laten staan in plaats van het te impliceren van het recht op inspraak van het publiek. Daarom hoopt deze studie ook een basis te bieden voor meer onderzoek naar andere potentiële procedurele rechten op het milieu. Dit zal burgers op hun beurt meer mogelijkheden bieden om hun milieurechten te beschermen.
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