

Perspective on International Law Instruments Fostering Public Participation in Environmental Decision-making

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Abstract

Internationally, having a safe and sustainable environment is becoming more paramount and the public now has a right and a say on how the environment should be utilized in terms of development and economic growth. Hence before embarking on any development, the environmental implications need to be assessed. More importantly, the public has the right to participate in the decision on whether the proposed development should go ahead or not. If the outcome of public participation reveals that the proposed development will damage the environment, then, automatically, consent to proceed to develop should be withheld. There have been major international treaties that have been put in place to ensure that there is broad public participation before development commences. This paper assesses these treaties and their significance in ensuring that the environment is not damaged in the name of development and economic growth. Therefore, the overall objectives of this paper are to examine salient international environmental decision making instruments that are fostering sustainable development such as the Declaration on the Right to Development of 1986 (DRTD), Convention on Access to information, Public participation in decision-making and access to justice in environmental matters the 1998 (Aarhus Convention), Declaration of the United Nations Conference on the Human Environment 1972 (Stockholm Declaration), and Rio Declaration on Environment and Development 1992 (Rio Declaration).

Keywords: Environmental decision-making, Public participation, Sustainability, Development and growth.

Introduction

It is generally accepted that the right to development must be promoted for all and in particular the developing countries in order for them to keep pace with developed countries in terms of socio-economic amenities, goods, and infrastructure delivery. In 1966, the right to development was first mentioned by the then Foreign Minister of Senegal-Doudou Thiam, when he sought to articulate that there was a need for the right to development of the "Third World" (Gathii, 2020). Thiam said this against the backdrop that developmental deficits are intrinsically linked to developing countries as most of the then newly decolonized States dismally failed to meet the goals of the first decade of the United Nations Development hence resulting in the growing economic imbalance between the developing and developed countries. More importantly, the Declaration on the Right to Development was adopted by the General Assembly on 4 December 1986 (DRTD) (Fofack, 2014). The Declaration was built on the edifice of the Charter of the United Nations and the Universal Declaration of Human Rights. The Declaration is aimed at "promoting a social and international

order in which the rights and freedoms set forth in the Universal Declaration of Human Rights can be fully realized”(Conca, 2015). The right to development was reaffirmed in 1992 in the Rio Declaration on Environment and Development when it was stated that “the right to development must be fulfilled to equitably meet the developmental and environmental needs of present and future generations (principle 3).” In paragraph 10 of part I of the Vienna Declaration and Programme of Action, adopted by consensus in 1993, the World Conference on Human Rights reaffirmed the right to development as a “universal and inalienable right and an integral part of fundamental human rights.” In the same vein, the right to development was also reaffirmed in various international declarations and outcome documents issued between the adoption of the Programme of Action of the International Conference on Population and Development in 1994 and the adoption of the outcome document of the United Nations Conference on Sustainable Development, entitled “The Future We Want” in 2012. In the same vein, in 2015, “the right to development was explicitly recognized in four key internationally agreed policy documents namely; the Addis Ababa Action Agenda of the Third International Conference on Financing for Development (2015);” the Sendai Framework for Disaster Risk Reduction 2015-2030; “Transforming our world: the 2030 Agenda for Sustainable Development” also included are the Sustainable Development Goals and the Paris Agreement on climate change. Importantly, these documents seek to establish several rights of the public with regard to the environment by ensuring they speak to the need of broad participation and the need to reduce harmful emissions and promote sustainable development in the world (Florini and Pauli, 2018). To achieve this, public authorities at the national, regional, or local level have significant role to perform by ensuring that they contribute to these rights to become effective and realizable such that everyone has the right to receive information and participate actively on any environmental issues without any impediment. It is therefore imperative to ensure that proper and adequate information on the state of the environment are properly disseminated, various policies and measures that are being implemented and ensuring of broad human health and safety in a conducive environment. It is incumbent on te authority to vail applicants this information whenever requested even without and the applicant needs not state what the information is required for. It is also incumbent under the Convention for the public authorities to ensure that they actively widely disseminate environmental information in their possession. This is in line with the Convention which seeks to ensure that the peoples’ right to participate in environmental decision-making is broadly acknowledged. Prior the commencement of any development, there is need for public authorities to ensure that the public affected together with the environmental non-governmental organisations to comment on the proposed project that would likely affect the environment (Hasan et al., 2018). More importantly these comments need to be taken into due account in decision-making, and information to be provided on the final decisions and the reasons for the decision. By so doing, this will meet the test of the public participation in environmental decision-making (O’Faircheallaigh, 2010). However, failure to embark and ensure these processes and procedures would result

in the right to review procedures to challenge public decisions that have been made using access to justice. All these strategical international interventions are broadly concerned with preserving the sustainability of the environment. And as such, states have the obligation and responsibility to follow and implement the principles laid down by all these Declarations and Convention. However, some countries, such as South Africa have been found wanting in implementing these principles as the country has failed to follow the principles properly even though they have enacted legislation to this effect. In the case of “(Duduzile Baleni vs & others Minister of Mineral resources & others in the High Court of South Africa Gauteng Division, Pretoria case no: 73768/2016” (Hereinafter called “Duduzile case), the issues and considerations of the level of engagement that must be achieved prior to the grant of a mineral right in terms of Consent” as opposed to “consultation” featured prominently in this case. The court established that there must be broad engagement and consultation which must be in good faith in any environmental decision making and that mere engagement and consultation did not amount to consent. The court held that with regard to consultation, it is not merely a formal exercise where people are gathered together just for the sake of assembling people but should involve the active participation of the landowner in respect of possible interference with his/her rights in respect of the property even though no agreement is reached at the end of the consultation. The court also held that the reason for consulting the landowner is to establish and ascertain whether there could be an accommodation of some sorts that could be reached in respect of the impact on the landowner’s right to use his land. It is imperative for the consultation to result in an agreement at the early consultation stage otherwise, if there is no agreement, the holder of the prospecting mining right would have to pay compensation to the landowner at a later stage. Similarly, the court also observed that consultation presents a unique opportunity for the holder of prospecting right to provide the landowners with ample and the necessary information regarding everything that is intended to be done on the land. Undoubtedly, the full disclosure and information would enable the landowners to make an informed decision on whether to give consent or not. Over and above, the processes of engagement and consultation are very germane hence they are considered as integral parts of the fairness required before an Administrator decides whether there were constructive engagement and consultation that would produce unconditional consent. The processes can only be considered fair if the Administrator have full regard to precisely what happened during the consultation process in order to determine whether the consultation was sufficient to render the grant of the application procedurally fair. Anything contrary to this, would render the process unfair and the Administrator would take to mean that the consultation did not result to consent required by the law. In order to establish that the consultation process is fair, the court explicitly puts it this way “the consultation process required by section 16(4)(b) of the Act thus requires that the applicant must: (a) inform the landowner in writing that his application for prospecting rights on the owner’s land has been accepted for consideration by the regional manager concerned; (b) inform the landowner in sufficient detail of what the prospecting operation will entail on the

land, in order for the landowner to assess what impact the prospecting will have on the landowner's use of the land; (c) consult with the landowner with a view to reach an agreement to the satisfaction of both parties in regard to the impact of the proposed prospecting operation, and (d) submit the result of the consultation process to the regional manager within 30 days of receiving notification to consult."

Of note, while it is imperative for developing countries to strive for growth and development using the available and abundant natural resources, it should be achieved in reasonable and sustainable ways (Svenfelt et al., 2019). As such, all stakeholders and role players are to be carried along through proactive public participation before any decision is taken or concluded on development projects or plans that will impact the environment (Awan, 2013).

Methodology

This paper used literature review approach to discuss the significance of public participation in environmental decision-making (Berry et al., 2019). To this end, relevant contemporary scholarly works were searched and retrieved from the google scholar search platform. Keywords like environmental decision-making, public participation in environmental decision-making, sustainable development, consent, consultation were inserted into the search platform, scholarly works generated were retrieved and used to address the successes and failures of public participation. Similarly, sources such as legislation, case law, international declarations, conventions were also consulted and utilised.

Findings and Discussion

Public participation in environmental decisions making particularly when the decision is about development project that would impact the environment should take place before the commencement of the project (Jami and Walsh, 2016). Essentially, public participation in environmental decisions making is consider as the broad interaction between government and civil society where issues of design, evaluate, implement development policies, projects, and programs that seek to enhance the standard of living of the people (Wesselink et al., 2011). The participation should be constructive and as such could be either direct or indirect but it must be through legitimate intermediate institutions or representatives (Skeffington Committee, 2013). Public participation also needs to be informed and well organized where all and sundry are given opportunity to participate. Public participation fosters freedom of association and expression recognized in law and as such it is a key component of good governance (Gauthier et al., 2011). Against this backdrop, ensuring and entrenching good environmental governance entails that the processes and procedures of the decision-making are broadly transparent, participatory, effective, efficient, consensus oriented, accountable, responsive, equitable, inclusive (Dietz and Stern, 2008). Similarly, there must be observance of the rule of law where all views are considered more importantly, the views of the minorities should be fully taken into account and

that the voices of the most vulnerable in the society are heard in the decision-making. These Declarations and Conventions broadly represent how to achieve an overall balance where there is need for the environment to be fully protected while engaging in economic activities that will foster development and growth. Both are mutually beneficial to both present and future generations. It is imperative for the States to broadly embrace the principles of the Declarations and Conventions to protect the environment and the planet earth for the common good. Furthermore, those who intend to ignore or transgress these protective environmental interventions should be discouraged and held accountable for their transgressions. South African Courts have been championing the promotion, compliance, implementation, and enforcement of constructive consultation, engagement, and consent in any environmental decision making as adumbrated in the case of *Duduzile* where the court highlighted the imperative of constructive engagement prior any decision making.

The Declarations and Conventions interventions are imperative in fostering a sustainable environment and broad economic growth and development. For example, the Rio Declaration ensures environmental protection and economic development and at the same time serves as a benchmark for future developments. This Declaration recognises the importance of preserving the environment and sets international guidelines for sustainable growth and development, particularly as it pertains to the environment and conservation. More importantly, the first principle of the Rio Declarations state categorically “that human beings are at the center of all sustainable development and as such, they are entitled to a healthy and productive life in harmony with nature.” To this end, ensuring the fulfilment of the right to development must be done responsibly to equitably meet developmental and environmental needs of present and future generations. Of note, the Principle 6 of the Rio Declaration provides that “environmental protection should constitute an integral part and parcel of the development process and should not be considered in isolation from it. The special situation and needs of developing countries, particularly the least developed and those most environmentally vulnerable, should be given special priority.” Hence, in line with Principle 10 of the Rio Declaration which stipulates that citizens should participate actively in any environmental issues and that they best handled by them at all relevant levels. To this end, regarding the national level, it is imperative for individuals to have appropriate access to information concerning the environment that is held by public authorities (Cramer, 2009). This have to be done at the national level at all times otherwise, if undone, such decisions shall be invalid. Individuals should also have information on all hazardous materials and activities that are in their communities at all times and they should be given the opportunity to always participate in decision-making processes (Dhillon, 2017). To achieve this, it is incumbent on the states to facilitate and encourage broad public awareness and participation by making information widely available to the people and the society. Should there be any breach of all these salient Declarations interventions, there shall be effective access to judicial and administrative proceedings which shall include redress and remedy for the breach and violation. Aggrieved persons shall be provided opportunity to explore these redress and remedy. Over and above, in order for States

to achieve the potent Declaration interventions, there is need to impose a duty on the States to ensure that they enact environmental legislation that would be all inclusive in tackling, combating and prohibiting environmental hazards.

In the same vein, the Stockholm Declaration recognizes fundamental human rights and explicitly provides that human beings have the fundamental right to freedom, equality and conducive conditions of life in a conducive environment that allows and fosters the enjoyment of a life of dignity, healthy environment and human well-being. To this end, it is therefore incumbent that all and sundry bear responsibility to ensure that the environment is protected and sustainable for present and future generations (Beckman and Uggla, 2016). Also it is imperative to ensure that all the natural resources of the planet earth and the environment such as the air, water, land, flora and fauna and natural ecosystems must be safeguarded for the benefit of the present and future generations. For there to be sustainable environment, there must be constant maintenance of the capacity of the earth in order to ensure that vital renewable resources are produced and maintained at all times in order to prevent depletion and extinction. This would ensure that sustainable use of natural resources is maintained, preserved, restored where utilized or improved. This would include the restoration of used resources including conservation, and preservation for present and future generations. And more importantly, all and sundry should have the special responsibility to ensure the safeguard and wisely management of the heritage of wildlife and its habitat (Elnokaly and Elseragy, 2013). This is imperative because these habitat and wildlife are now gravely imperiled as a combination of adverse factors such as climate change and environmental degradation caused by human factors. The non-renewable resources must be responsibly and reasonably exploited so as to guard against the danger of their future exhaustion and extinction. Discouraging the discharge of toxic substances or other noxious substances to the environment which would pollute and harm the environment should be promoted at all times, where discouragement is failing, enforcement of salient environmental laws should be invoked to force compliance.

Remarkably, it is not that the Stockholm Declarations disentitle or prevents the States the sovereign right to exploit their resources found in their jurisdictions, but they should do so subject to their environmental policies and laws. However, the Declarations caution that States have “the responsibility to ensure that all activities within their jurisdiction or control should not result to or cause damage to the environment of other States or of areas beyond the limits of their national jurisdictions.” As precautionary and polluter pay measures, the States are compelled to cooperate with the international community as a whole to develop the international law which seeks to impose liability and compensation for the victims of pollution and other environmental damages (Dascalu, 2012). In crafting this international law, the values, standards and systems of member states need to be put into consideration and the peculiar nature and status of developing countries must be put into consideration against that of the developed nations as indicated by Senegal-Doudou Thiam when he muted the idea of the right of the developing countries to development as a prerequisite for closing development gaps between the developed and developing countries.

To this end, when it comes to international concerns regarding the protection and improvement of the environment, this should be handled in a cooperative spirit by all countries where both big and small countries are placed on an equal footing. On the part of the States, they should allow international organizations and agencies play significant role through coordination, efficient and dynamic roles in ensuring the protection and improvement of the environment in their various countries.

The significance of the Aarhus Convention is that it broadly deals with the issues pertain to public participation in decision-making concerning the environment, unhindered access to information and unhindered access to justice in virtually all environmental issues and matters. Aarhus Convention establishes very strong link between environmental rights and human rights by acknowledging that there is an obligation to future generations to ensure that any development intended should be sustainable development. To achieve this, the cooperation of all the stakeholders and role players are paramount and imperative. More importantly, Aarhus Convention explicitly highlights government accountability and environmental protection as the means to achieve transparent interactions between the public and public authorities in a democratic context. Aarhus Convention seeks to articulate the prime relationship between people and governments in ensuring protection for the environment hence while the Aarhus Convention is an environmental agreement, it also serves as an agreement to hold the government accountable, ensure transparency and responsiveness.

Over and above, the preamble to the Aarhus Convention deliberately sets out “the aspirations and goals that reveals its origins as well as guiding its future path. The preamble highlights two main concepts namely environmental rights as human rights and points out the importance of access to information, public participation, and access to justice to sustainable and environmentally sound development.” To achieve sustainable and environmentally sound development, the Aarhus Convention preamble recognizes that effective governmental decision-making that recognizes broad participation in environmental decision making that involve the participation and the input from members of the public. The overall benefit of these approaches is that by involving all and sundry in any decision pertaining to the environment, it is incumbent on the government to make such environmental information publicly accessible in order to enable the public to participate in decision-making. By so doing, government will ensure that society’s goal of sustainable and environmentally sound development are met.

Conclusion

This paper demonstrates that public participation in environmental decision making is internationally recognized and most of the principles and standards that a State should follow when it decides to embark on any developmental projects are tailored in line with the Declarations and Conventions. The Declarations and Conventions seek a common goal, to wit: the protection, preservation and conservation of the environment for present and future generations. In essence, these attributes foster

sustainable development where the environment is not degraded and damaged in the quest for economic growth and development. These international interventins seek to ensure that even if there is need for any developmental project that will foster economic growth and development, it should be done sustainably, responsibly and sensibly. And to attain this, public participation is *sine qua non*. Failure of public participation would result in grievous negative consequences.

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