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Examining the Right to a Fair Hearing and Environmental Restoration Orders in Uganda's Environmental Law

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ABSTRACT

This article examines the right to a fair hearing in the event of environmental restoration orders, the protection upon which the inhabitants of the environment have in circumstances of the violation of their rights. The article revealed that in the circumstances of the violation of the rights of fair hearing, the law establishes the public litigation principle and public trust doctrine under the environmental law which favours those who may not be able to understand the law and procedure in order to protect them from the violation of the law. It is recommended that agencies involved in environmental protection should continue to be improving their data consistency and quality within and among databases and knowledge bases operated by state government agencies, working with NGOs where appropriate, continue to promote environmental education and awareness especially at the state and local levels, in co-operation with NGOs where appropriate. More so, they should develop and implement a national environmental health strategy, defining targets and cost-effective measures for reducing the environmental burden of disease as well as indicators to monitor progress. Improve co-ordination among government agencies responsible for environmental health management and among state agencies responsible for implementation; better integrate environmental health objectives into general health policy, favoring preventive approaches over technical fixes where the former are shown to be cost-effective.

Keywords: Environmental law, Environmental restoration, Human rights protections, Human rights violations, right to fair hearing.

INTRODUCTION

Globally, prior to 1960, some multilateral treaties which today are considered to be part of international environmental law already existed. They mainly related to the management of living natural resources [1]. The first Multilateral Environmental Agreement (MEA) on marine pollution was concluded in 1954. During the 1960s, MEAs began addressing emerging trans-boundary environmental risks. A few treaties concerning radioactive, marine and freshwater pollution were concluded [2]. As the internati9nal community was incited to further normative efforts, by the first United Nations environmental, conference held in Stockholm in 1972, the 1970s saw the adoption of no less than 75 new MEAs, more than during the entire period before 1970 [3]. In Africa, the African Charter on Human and Peoples' Rights [4] provides that 'all peoples shall have a right to a general satisfactory environment favorable to their development. In Social Economic Rights Action Centre (SERAC) and The Centre for Economic and Social Rights v Nigeria[5], the Nigerian government was found liable for violation of the right to health and a clean environment because of pollution of the soil, water and air which harmed the health of the Ogoni people. The African Commission emphasized that the right to a clean and safe environment is critical to the enjoyment of other human rights. After gaining independence on 9th October 1962, Uganda inherited wholesale colonial policies and laws governing environmental resources. Most of the laws and policies were geared towards exploitation of resources to meet specific needs of the colonial masters [6]. The laws lacked sufficient constitutional backing, the enforcement mechanisms were weak and no attention was paid to community participation. In the 1990s, following consultations both locally and international the current National Resistance Movement (NRM) government introduced new laws in the field of the environment [7]. Under the environment, human beings are adventurous, therefore have limited knowledge about natural process and therefore often humans cannot predict the impact of their activities on nature but because of the constant experiments that humans carry on in respect to nature, quite often there are impacts which are not observed until the damage has occurred. Fore-stance, the Nile Perch was introduced in Lake Victoria without realizing it will eliminate some other fish species

therefore Limitation of human knowledge is important facet. Because of the tendency by humans to destabilize natural balance, it becomes necessity to put in place measures for regulating human conduct which impact on the environment. Left to them, the human instinct is very much towards self-aggrandizement, it is this behavior which tends to mean that the logic that human behavior will destabilize the environment might be appreciated academically but, in the reality, nobody thinks about it. In economic terms it is referred to as the tragedy of the commons [8]. The phrase is inherited from British economist called Harding who wrote about commons which refers to a common area. Harding described his observation with regards to a traditional community who rely on the common grazing, the cows are owned individually but the grazing area is held in common and the result is that everyone has the urge to maximize the use of the commons like adding the numbers of cows grazing at the commons or sending them earlier before others, the result is that the commons are degraded but no one restrains themselves, humans will degrade the environment because the environment is common to everybody and the benefit to be had from exploiting the environment is individual and so each person has the temptation to appropriate more and more components of the environment [9]. It becomes necessary to introduce standards to regulate human behaviours. However, on the other side, Environmental Law is defined as norms which regulate human conduct in order to ensure that the impact of human conduct does destabilize natural balance. This law is more about human behavior. This is laid in Article 50 of the constitution whereby any person or organization may bring an Action against a violation of another person's right. National Environmental Management authority however reports that it is the poor people who usually bear the blunt of environmental hazard and degradation [10]. Upon this note the judiciary has played a vital role in the environmental management and protection. This also covers the rights to the fair hearing of the occupants of the environment. In the ***Environmental Action Network Ltd (TEAN) V AG*** & ***NEMA***[11]**,** a public interest litigation group filed the application on its own behalf and on behalf of non-smoking members of the public under Article 50(2) of the constitution and sought a declaration that smoking in public places constituted a violation of a right to health and clean environment. The respondent objected on the ground that the applicant could not claim to represent the non-smoking members of the public. Ntagoba J held that an organization could bring a public interest action on behalf of groups or individual members of the public although the applying organization has no direct individual interest in the infringing acts it seeks to have addressed and accordingly granted the declaration.

In Green Watch V A. G & NEMA [12], the laws stand of an applicant organization came into issue with regard to environmental hazardous acts and the judge held that; there is limited public awareness of the fundamental rights or freedoms provided for in the constitution let alone the legal rights and how the same can be enforced. Such illiteracy of legal rights is even evident among the elites. It is just appropriate that the body like the applicant come to discharge the constitutional duty cast upon every Ugandan to promote the constitutional discharge, the constitutional duty cast upon every Ugandan to promote the constitutional rights of the citizens of Uganda and the institution of a suit of his/her nature is one of the ways of discharging that duty. This therefore shows the great role played by the ways of discharging that duty. This therefore shows the great role played by the judiciary in Uganda in environmental governance by relaxing the rules of standing and promoting the concept of public interest litigation, given the fact that most of the Ugandans are poor and not aware of their environmental rights. Despite the 1995 Constitution and the National Environmental Act (NEA), environmental deterioration through human activity is proceeding at an unprecedented rate. Unless this process is held in check, the damage caused will be grave and irreversible, damaging not only ourselves but future generations. The environmental damage in Uganda is caused not only in the nation where it occurs but at the global level in general, for example human activities sometimes tend to submerge concepts such as respect for nature, trusteeship of natural resources and community interests in common amenities, present in the traditions of many developing countries. Prolonged and resolved unfair hearing and the breach of the environmental rights of the occupant, however, the need for environmental restoration orders on which the absence of them it has created a vast violation of the environmental rights and thus the need for restoration of the orders to the safeguard of the environment in relation to the human beings and the inhabitants. This article examines the right to a fair hearing and environmental restoration orders in Uganda's environmental law.

Evolution of Environmental Law from English Law

Environmental law in common law jurisdictions grew out of the law of tort. It is a modification of English law and its principles [13]. In Uganda, for example, besides the questions of locus standi, the polluter pays principle and the doctrine of the public trust is incorporated in the constitution, as well as the environment Act and the land Act. The 14th century England had remedies for wrongs that were dependent upon writs Osborn's concise Dictionary describes or writ as a document in the Queen's (Kings) name under the seal of the crown, commanding the persons to whom it is addressed to do or forebear from doing an act. An original Writ was anciently the mode of commencing every action at common law [14]. No one could bring an action in the king's common law courts without the king's writ and the number of writs availed was limited. Where there was no writ, there was no right. Hence it was within these historical concepts that the environment law created the rights to

the persons and thus evolved in Uganda from the above.

Public Trust Doctrine as the Principle in Environmental Law to Harmonize Rights of Persons (inhabitants) and the Environment

The public trust doctrine is one of the oldest but constantly evolving doctrines relating to the ownership and use of essential natural resources. The doctrine dates back to institute of Justinian, (530 A.D) this restated Roman law, "By the law of nature these things are common to mankind, the air, running water, the sea and consequently the shores of the sea". Since then the civil law and common law have incorporated these principles [15]. This doctrine governs the use of property where title is presumed to be held by a given authority in trust for citizens. While there was substantial debate on the nature and scope of this doctrine in the 1970s & 80s, its continuous implication for public interest litigation in East Africa in particular is yet to be ascertained. The doctrine has found its way in national legislation and practice which has been interpreted creatively; it plays a very important role in environmental public litigation. It is argued that most conflicts over resources, especially between the state and resource dependent on communities are a result of the breach by the state, of the fiduciary relationship created by the trust. The flexible statutory and judiciary interpretation of the responsibilities of the trustee and the resource rights of the beneficiary could lay the basis for a vibrant and thriving legal regime on public interest litigation under the doctrine of public trust doctrine [16]. This Doctrine requires the government to preserve and protect certain resources that the government holds in trust of the public. For example Part XIII provides that, the state shall protect important natural resources, including land, water, wetlands, minerals, oil, fauna and flora on behalf of the people of Uganda"[17]. And while the binding nature of these principles remains unclear, at the very least it suggests that there is a constitutional basis for the public trust doctrine in Uganda. Traditionally, courts applied the public trust doctrine to waters and similar common resources and generally limited the power of the government to significantly alter the nature of the public resources for the benefit of an individual party. Courts have applied the public trust doctrine to invalidate conflicting legislation, for example, in ***Priewe Vs Wisconsin State Land & Improvement Co.*** [18]**,** the court invalidated legislation authorizing the drainage of the lake for development purpose, to limit alteration of public resources. The case of ***Green Watch Vs Attorney General & NEMA*** [12]**,** can be invoked in the public Trust doctrine where the locus standi of an applicant came into issue with regard to environmental hazardous acts and judge held that, there is limited public awareness of the fundamental rights and freedom provided for in the constitution. Let alone the legal rights and how the same can be enforced. Such illiteracy of legal rights is even evident among the elites thus· the public Trust Doctrine creates the environmental rights to the inhabitants and these include the rights to a fair hearing.

Rights of the Environmental Inhabitants in Uganda

Article 48 provides that every person shall have the right to a fair hearing[10]. The right to be heard is principally governed by the rules of the natural justice that is the rule against bias and no judge shall take it in his own hands. In this way the fair hearing and the right to a fair trial must be done impartially in order for the party to have justice. In the case of ***Nyakana V AG & NEMA***[17]**,** the court of Appeal found the violation of the fair trial notion by the 1995 constitution. This basically in the environmental law originates from the principle of public trust doctrine. This tends to harmonize the environment and the public, for instance, if persons know their rights on the use of the land. Under the rights of fair hearing, in the environment law, the following have to be proven;

Right to Access to Information

Antecedents of a putative right to government information may be traced as far back as the 18th century. The English parliament in 1712 imposed taxes on all Newspapers and advertisements, the purpose of suppressing the publication of comments and criticism objection able to the crown [19]. Environmental information means any information written visual, oral, electronic and any other material form on, the state of elements of the environments such as air and atmosphere, water, soil, land, landscape and natural sites, biological diversity and his components, including genetically modified organisms and the interactions among these elements. Environmental information also means the factors, such as substance, energy, noise and radiation, and activities or measures, including administrative measures, environmental agreements, policies, legislation, plans and programs, affecting or likely to affect the elements of the environment [20]. In order to satisfy the right of a fair hearing, one must be given the right to the information access at any time, the person must be informed of the dangers before the eviction from the environment or the land and this creates the harmonious environmental use with the other. Article 50(1) of Uganda's constitution not only grants locus standi to any person whose fundamental or other rights which include right to a fair hearing has been violated but also gives locus to bring an action where such a right is under threat[10]. The article acts both as a shield and a sword, since one does not have to prove damage. Uganda's legal system has for the most part been an inheritance of stereotypic colonial policies that have little if any appreciation for the unique needs of our country. With the seizure of power by the

National Resistance Army in 1986, there was an attempt to reform this abhorrent jurisprudence and that was realized through the 1995 Constitution and the National Environmental Act (NEA) [7]. There has since been tremendous headway made in protecting human rights of which the right to a clean and healthy environment is at the summit as far as environmental rights are concerned.

Right to a Clean and Healthy Environment

The Constitution of the Republic of Uganda provides for the right to a clean and healthy environment[10]. This right is also embedded in the objectives which provide that the government shall take all practical measures to promote a good water management system at all levels, institute an effective machinery for dealing with any hazard or disaster arising out of natural calamities or any situation resulting in general displacement of people or disruption of their normal life [21]. Objective XXVII is however the most relevant objective as far as environmental conservation is concerned. It mandates the state to promote sustainable development and public awareness of the need to manage land, air and water resources in a balanced and sustainable manner for the present and future generations. The same objective prioritises development and environmental needs of the present and future generations, by *inter alia* requiring the minimizing of damage and proper energy policy formulation and creation of specific recreational areas [10]. The Constitution provides for the rights and freedoms of the individual and groups enshrined in this chapter which shall be respected, upheld and promoted by all organs and agencies of the Government and by all persons. Article 245 of the Constitution provides that the parliament shall, by law, provide for measures intended to protect and preserve the environment from abuse, pollution and degradation; to manage the environment for sustainable development and to promote environmental awareness [20]. Better still, it empowers the population to whom it is granted, a right to enforce it against government or any other person or body. This right is not just provided by the Constitution, but the Constitution recognizes that it is inherent and God given, and as such it is the duty of government to ensure that it is granted and enjoyed [22]. Hence, in addition to the framework of National Environment Act, a number of environment sectoral legislation exists and environmental management is spread throughout the respective institutions responsible for aspects of the environment. It is therefore safe to say that Uganda has developed a lot of legislations on the environment but the challenge remains that of developing more regulations under the relevant parent Acts, effective monitoring and enforcement [23]. Uganda's climate is naturally variable and susceptible to flood and drought events which have had negative socio-economic impacts in the past. Human induced climate change is likely to increase average temperatures in Uganda by up to 1.5 °C in the next 20 years and by up to 4.3 °C by the 2080s. Such rates of increase are unprecedented. Changes in rainfall patterns and total annual rainfall amounts are also expected but these are less certain than changes in temperature[24]. In ***Advocate Coalition for Development and Environmental Management (ACODE) v A.G &NEMA***[25] where the applicants challenged the use of the *Butamira Forest Reserve* on grounds that such change of use violated the right to a clean and healthy environment it was stated that Ugandans are entitled to an environment adequate for their health and well-being.

Considerations of Environmental Protection in Uganda

NEMA sets environmental standards and carries out licensing and these measures control activities that may have deleterious or beneficial effect on the environment. Before investment projects are sanctioned it is important that the anticipated revenue returns are balanced with environmental interests. NEMA has succeeded in carrying out Impact Assessment within the following ways; assessing the possible changes, monitoring projects to determine the short and long term effects, distributing licensing system to relevant ministries; making recommendations on approval or mitigating factors relating to environmental assessments, following up to ensure that mitigation measures are put in place and ensuring compliance with EIA legislation [26]. NEMA also prepares a National Environmental Action Plan which is reviewed after every five years or less. This plan covers all matter affecting the environment in Uganda.[51] Such planning harmonises development activities with the need to protect the environment in accordance with established standards. NEMA also carries out environmental monitoring and assessment. Under the *Environmental Impact Assessment Regulations*, two systems of monitoring are specified; self-monitoring whereby the developers themselves are encouraged to monitor the impact of their activities and other enforcement monitoring is done by the government agencies such as NEMA through environmental inspectors (S.23(2)[27]. Monitoring needs adequate information about a project before it commences. This needs baseline monitoring in the pre- project period to enable one to consider alternatives. Mitigation monitoring occurs when monitoring whether mitigation measures prescribed in the EIA are being applied and to note whether they are working. Compliance monitoring is done to find out whether specific conditions or standards are being met and is conducted continually which can be done by environmental inspectors [27]. There is a host of jurisprudence to ascertain NEMA's progress in monitoring for example in *Uganda Electricity Transmission Co Ltd v De Samaline Incorporation Ltd* [28], the Court applied the precautionary principle and held the respondents liable. In this case, the report by NEMA found that the discharge of dust from the respondent's premises exceeded the maximum permissible limits for the discharge of dust into the environment. NEMA also carries out audits after

the project has commenced and goes on and prosecutes those in default. Audits may also lead to the redesigning of a project or the remodeling of its operations. NEMA carries out continuous audits with the help of inspectors, to ensure that industries comply with the requirements of the NEA. However, it is doubtful that this provision has any deterrent effect on industries which were established way before it was promulgated. NEMA has managed to enforce environmental easements. Enforcement can be defined as an action carried out to ensure compliance and this can be done through inspections, legal sanctions like closing activities within a given time frame. An environmental easement may be enforced by anybody who finds it necessary to protect a segment of the environment although he/she may not own property in proximity to the property subject to the easement. The Act clearly provides that management measures should be carried out in conjunction with the application of social and economic incentives including taxation measures [27]. The NEA recognises that it is not entirely practicable to guarantee the right to a clean and healthy environment in its entirety and that is why it puts in place the Polluter pays principle. In the case of ***Purohit v The Gambia*** [29]**,** the African Commission elucidated a trite canon that, given the poverty and inadequacy of resources, it is not possible to guarantee human rights in Africa to the outer limit. What is necessary however is that the governments take the initiative to do their best with the resources available. In the same vein NEMA ensures that industrial plants which produce highly toxic substances deposit bonds as security for good environmental practice. It also issues environmental improvement notices (government inspectors) to deter environmentally hazardous activities. NEMA just like a court of law is empowered to issue Restoration Orders under section 67 of the NEA requiring a person to restore the environment, or prevent a person from harming the environment[27]. In the case of In ***General Secretary, West Pakistan Salt Mines Labour Union (CBA) Hkewra, Jhelum v The Director, Industries and Mineral Development, Punjab, Lahore*** [30], the petitioners sought enforcement of the right to clean and unpolluted water. The mine's operations threatened contamination of the water catchment area, the water course, reservoir and pipelines. The Supreme Court directed the mining company to shift their operations within four months to avoid water pollution and appointed a commission of four persons to oversee compliance. The Commission was given the power of inspection, recording evidence and examining witnesses and was directed to report back to the com1. If compliance was not forthcoming or possible, the Court retained jurisdiction to determine whether the operation of the mine should be completely halted. The court directed the company and all miners operating adjacent to the water catchment area to take such measures to the satisfaction of the commission to prevent pollution of the water source reservoir, stream beds and water catchment area. The Court further ordered administrative authorities to refrain from any issuing any new or renewing licenses for mining in the region without the Court's prior approval. Similarly, NEMA may require compensation for harm done to the environment or a charge levied for the restoration undertaken and the culprit is normally given 21 days within which to restore what has been destroyed. Where the person in default is adamant to NEMA orders, the latter has been mandated to enter possession of the land in question and enforce the desired activity [30]. NEMA bears the yoke of ensuring that potential environmental polluters comply with the set guidelines. It has ensured that they keep records of the number of wastes and by products generated by their activities and to show how far they are complying with the provision of the Act. Inspections are carried out by gazetted inspectors who have very wide powers under the Act for example to take samples, seize any plant equipment or substance and close any facility or issue improvement notices[27]. The NEA provides for serious penalties such as fines, imprisonment and reparation which also uses criminal law to control the behaviour of people because of the natural tendency of people to fear the infliction of pain, isolation or economic loss. NEMA has been able to carry out inventories on persons with land titles in wetlands, riverbanks and lake shores. Consequently, in April 2010, the first one hundred culprits were published and an investigation into the source of their land titles launched. Follow up on this issue has however been stalled by the Uganda Land Commission and the Kampala Districts Land Board [27]. Furthermore, NEMA together with the Wetlands Management Department in the Ministry of Water and Environment has been able kick start the process of physical demarcation of wetlands. This process involves inter alia, the mobilisation of stake holders, community mobilisation and sensitization, placement of boundaries and surveying boundaries; in which processes NEMA is the oversight policy guide[27]. In April 2003, NEMA started the physical restoration of wetlands. This has been demanded for on various grounds such the need to improve or maintain water quantity and quality and the need

CONCLUSION

In the circumstances of the violation of the rights of fair hearing, the law establishes the public litigation principle and public trust doctrine under the environmental law which favours those who may not be able to understand the law and procedure in order to protect them from the violation of the law. It is recommended that agencies involved in environmental protection should continue to be improving their data consistency and quality within and among databases and knowledge bases operated by state government agencies, working with NGOs where appropriate, continue to promote environmental education and awareness especially at the state and local levels, in co-operation with NGOs where appropriate. More so, they should develop and implement a

national environmental health strategy, defining targets and cost-effective measures for reducing the environmental burden of disease as well as indicators to monitor progress. Improve co-ordination among government agencies responsible for environmental health management and among state agencies responsible for implementation; better integrate environmental health objectives into general health policy, favoring preventive approaches over technical fixes where the former are shown to be cost-effective. Similarly, NGOs should launch the planned national study on people's health, giving special attention to monitoring the long-term effects of chronic exposure to pollutants in the environment and in food; reinforce efforts to reduce health risks associated with indoor air quality for example radon, tobacco smoke, asbestos; set and enforce mm1mum ventilation standards in building codes so as to limit exposure to high-risk pollutants. Finally, NGOs should strengthen efforts to improve water and air quality and protect wetlands and natural areas for example in the Kampala Central Division as well as building on the working relationships among relevant authorities in Uganda

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