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SOME REFLECTIONS ON JUDICIAL PROTECTION OF THE RIGHT TO
A CLEAN AND HEALTHY ENVIRONMENT IN UGANDA

Ben Kiromba Twinomugisha



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1

INTRODUCTION

After gaining independence on 9 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.¹ The laws lacked sufficient constitutional backing, the enforcement mechanisms were weak and no attention was paid to community participation.² In the 1990s, following consultations both locally and internationally, the current National Resistance Movement (NRM) government introduced new laws in the field of the environment. Of particular note for the purposes of this article are the 1995 Constitution³ and the National Environment Act (NEA),⁴ which contain novel provisions including the right to a clean and healthy environment.

The Constitution obliges the state to promote sustainable development in the management and utilisation of natural resources 'in such a way as to meet the development and environmental needs of present and future generations of

Ugandans'.⁵ The state is particularly enjoined to take all possible measures 'to prevent or minimise damage and destruction to land, air and water resources resulting from pollution or other resources'.⁶ The state has a mandatory duty to protect and hold natural resources in trust for and on behalf of the people of Uganda.⁷ In addition, the Constitution guarantees every Ugandan 'a right to a clean and healthy environment'.⁸ The NEA is a comprehensive environmental framework legislation which seeks to address constraints and problems affecting environmental management in Uganda.⁹ The NEA also guarantees every person the right to a healthy environment.¹⁰ It also obliges every person to maintain and enhance the environment and inform the National Environment Management Authority (NEMA) or the local environment committee of all activities or omissions that may be deleterious to the environment.¹¹

The Constitution entrusts the judiciary with judicial power¹² and guarantees its independence in the exercise of judicial functions.¹³ Against this background, this article reflects on judicial protection of the right in Uganda. The article argues that through

1 Jones R. Kamugisha, *Management of Natural Resources and Environment in Uganda: Policy and Legislation Landmarks* 30 (Nairobi: SIDA's Regional Soil Conservation Unit, 1993).

2 *Id.*, p. 30.

3 Constitution of the Republic of Uganda (Entebbe: Government Printer) [hereinafter the Constitution]. It was promulgated on 8 October 1995, replacing the 1967 Constitution and has been amended by the Constitution (Amendment) Act 11/2005 and Constitution (Amendment) Act No. 21 of 2005. On the history and politics of Uganda and how they shaped events leading to the 1995 Constitution, see John C. Mubangizi, 'The Protection of Human Rights in Uganda: Public Awareness and Perceptions', *1/3 African Journal of Legal Studies* 168-186 (2005).

4 National Environment Act, Cap. 153 of the Laws of Uganda (Entebbe: Government Printer) [hereinafter NEA].

5 Part XXII (i) and (ii) of National Objective and Directive Principle of State Policy [hereinafter NODPSP], of the Constitution. Article 8A of the Constitution obliges Uganda to be governed based on the principles of national interest and common good enshrined in the NODPSP. The NODPSP shall also guide all organs of the government, including the judiciary in the interpretation of the Constitution. For these reasons, I have argued elsewhere that the NODPSP may be justiciable in certain circumstances. See for example, Ben K. Twinomugisha, *Protection of the Right to Health Care of Women Living with HIV/AIDS in Uganda: The Case of Mbarara Hospital* (Kampala: Human Rights and Peace Centre, Working Paper 2007-5, 2007).

6 See NODPSP, note 5 above, Part XXII.

7 *Id.*, Part XIII.

8 See the Constitution, note 3 above, Article 39.

9 A framework legislation lays out major environmental standards and leaves details to subsidiary legislation. The National Environment Management Authority [hereinafter NEMA], which is the principal agency for the management of the environment, is charged with initiating legislative proposals, standards and guidelines on the environment. See NEA, note 4 above, Section 5 and 6(e).

10 See NEA, note 4 above, Section 3(1).

11 *Id.*, Section 3(3).

12 See the Constitution, note 3 above, Article 126(1).

13 *Id.*, Article 128.

a creative application of the right, the judiciary has to some extent held the state, its agencies and private actors accountable for violations of the right. In so doing, the judiciary has contributed to the promotion of sustainable development. The article is divided into five sections. Section one is the introduction. The second section maps out the nature and scope of the right. Through a review of relevant judicial decisions, the third section examines the salient environmental principles accruing from judicial protection of the right in question. The fourth section explores major challenges to judicial protection of the right and the final section is the conclusion.

2 THE NATURE AND SCOPE OF THE RIGHT

2.1 A Synopsis of the Right

Unlike previous constitutions that were largely silent on economic, social and cultural rights, the 1995 Constitution covers some of these rights.¹⁴ For example, it provides for the right to education,¹⁵ workers' rights,¹⁶ women's rights,¹⁷ cultural rights¹⁸ and minority rights.¹⁹ However, there has been minimal judicial protection of economic, social and cultural rights in Uganda.²⁰ This may not be surprising given that historically there has been a profound neglect of this category of rights as compared to civil and political rights.²¹

14 For a discussion of economic, social and cultural rights in Uganda, see Mubangizi, note 3 above. On the justiciability of such rights see Manisuli Ssenyonjo, 'Justiciability of Economic and Social Rights in Africa: General Overview, Evaluation and Prospects', 9 *East Afr. J. Peace & Hum. Rts* 1-36 (2003).

15 See the Constitution, note 3 above, Article 30.

16 *Id.*, Article 40.

17 *Id.*, Article 33.

18 *Id.*, Article 37.

19 *Id.*, Article 36.

20 See Ssenyonjo, note 14 above.

21 Statement by the UN Committee on Economic, Social and Cultural Rights [hereinafter CESCR] to the World Conference on Human Rights, Vienna, UN Doc. E/1993/22, Annex III (1993).

The Constitution expressly provides for the right to a clean and healthy environment.²² Because of this, some may ask: why bother with a synopsis of the right when it is explicitly provided for under the Constitution? It cannot be denied that the complexity of environmental processes and the great variety of environmental circumstances make it difficult to delimit the nature and scope of the right to a clean and healthy environment. Neither the Constitution nor the NEA defines the right. The NEA only defines the environment as:

'...the physical factors of the surroundings of human beings, including land, water, atmosphere, climate, sound, odour, taste, the biological factors of animals and plants and the social factor of aesthetics and includes both the natural and built environment'.²³

Environmental and human rights treaties also neither specifically provide for, nor define the right. However, through a scrutiny of various treaty provisions, general comments or recommendations of treaty bodies and UN consensus documents, it may be possible to delimit some of the major components of the right. The International Covenant on Economic, Social and Cultural Rights²⁴ mentions 'the improvement of all aspects of environmental and industrial hygiene' as one of the steps states parties should take towards the realisation of the right to health.²⁵ The Committee on Economic, Social and Cultural Rights (CESCR) interpreted this provision as comprising *inter alia* of:

'Preventive measures in respect of occupational accidents and diseases; the requirement to ensure an adequate supply of safe and portable water and basic sanitation; the prevention and reduction of the population's exposure to harmful substances

22 See the Constitution, note 3 above, Article 39.

23 See NEA, note 4 above, Section 1 (o).

24 International Covenant on Economic, Social and Cultural Rights, UN Doc. A/6316 (1966) [hereinafter, ICESCR]. Uganda acceded to the ICESCR on 21 January 1987.

25 *Id.*, Article 12 (2)b. For a discussion of the interface between environmental law and public health, see William Onzivu, 'International Environmental Law, the Public Health, and Domestic Environmental Governance in Developing Countries', 21 *Am. U. Int'l L. Rev* 597 (2006).

such as radiation and harmful chemicals or other detrimental environmental conditions that directly or indirectly impact upon human health...'²⁶

States parties to the ICESCR are also obliged to take measures to discourage 'the use of tobacco, drugs and other harmful substances'.²⁷ In the context of the right to water, the CDESCR also talked of, *inter alia*, violations by states parties due to pollution and diminution of water resources affecting health.²⁸ The Convention on the Rights of the Child requires states parties, in the matter of combating disease and malnutrition to take into consideration, 'the damages and risks of environmental pollution'.²⁹

The African Charter on Human and Peoples' Rights provides that 'all peoples shall have a right to a general satisfactory environment favourable to their development'.³⁰ In *Social Economic Rights Action Centre (SERAC) and The Centre for Economic and Social Rights v Nigeria*,³¹ 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 emphasised that the right to a clean and safe environment is critical to the enjoyment of other human rights. According to the Commission, the government was required to take reasonable measures to prevent pollution and ecological degradation, to promote conservation and to secure an ecologically sustainable development and use of natural resources. The Women's Protocol to the ACHPR provides that 'women shall have the right to live in

a healthy and sustainable environment'³² and the states parties shall 'ensure greater participation of women in the planning, management and the preservation of the environment...'.³³

The Special *Rapporteur* on the Prevention of Discrimination and Protection of Minorities lists some of the rights with a bearing on environmental quality, including (a) the right to freedom from pollution, environmental degradation and activities which threaten life, health or livelihood; (b) protection and preservation of the air, soil, water, flora and fauna; and (c) healthy food and water; a safe and healthy working environment.³⁴

It should be noted that the 1972 Stockholm Declaration declares that 'man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations'.³⁵ The 1992 Rio Declaration also stresses that human beings 'are entitled to a healthy and productive life in harmony with nature'.³⁶ The Millennium Development Goals also emphasise environmental sustainability.³⁷

The above mentioned points illustrate the point that the right to a clean and healthy environment involves many things including clean water, air and soil that are free from toxins, wastes or hazards that

26 CDESCR, General Comment No. 14, The Right to the Highest Attainable Standard of Health (Article 12), UN Doc. E/C.12/2000/4 (2000), Para.15.

27 *Id.*, Para. 5.

28 CDESCR, General Comment No. 15, The Right to Water, UN Doc. E/C.12/2002/11 (2002), Paras 8 and 21.

29 Article 24 (2)c, Convention on the Rights of the Child, UN. Doc. A/44/49 (1989) [hereinafter CRC].

30 Article 24, African Charter on Human and Peoples' Rights, 21 *Int'l Leg. Mat.* 58 (1982) [hereinafter ACHPR].

31 Communication No. 39 of 2001 of African Commission on Human and Peoples' Rights. For further details see <http://www.serac.org/African%20Commn%20Communication%20and%20Decision.doc>.

32 Article 18(1), Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa [hereinafter Women's Protocol], available at http://www.achpr.org/english/_info/women_en.html.

33 *Id.*, Article 18(1)a.

34 Final Report of the Special Rapporteur on Prevention of Discrimination and Protection of Minorities, UN Doc. E/CN4/Sub.2/1994/9 (1994).

35 Principle 1, Declaration of the UN Conference on the Human Environment held at Stockholm from 5-16 June 1972, available at <http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=97&ArticleID=1503>.

36 Principle 1, Declaration of the UN Conference on the Environment and Development held at Rio de Janeiro from 3 - 14 June 1992 [hereinafter Rio Declaration], available at <http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=78&ArticleID=1163>.

37 UN Millennium Development Goals, Goal No. 7. For details see <http://www.undp.org/mdg/goallist.shtml>.

threaten human health. It should be noted that the concept of human health moves beyond ‘merely the absence of disease or infirmity’³⁸ and encompasses ‘a state of complete physical, mental and social well-being’.³⁹ In *Uganda Electricity Transmission Co Ltd v De Samaline Incorporation Ltd*,⁴⁰ the applicants sought a declaration that the discharge of unpleasant, noxious and choking dust from the respondent’s premises constituted a violation of the applicant’s employees’ right to a clean and healthy environment under Article 39 of the Constitution. The judge provided an expanded definition of the right as follows:

‘I must begin by stating that the right to a clean and healthy environment must not only be regarded as a purely medical matter. It should be regarded as a holistic social-cultural phenomenon because it is concerned with physical and mental well-being of human beings... a clean and healthy environment is measured in both ethical and medical context. It is about linkages in human well-being. These may include social injustice, poverty, diminishing self-esteem, and poor access to health services. That right is not restricted to a clinical model’.⁴¹

It is important to note that the procedural rights of access to information, public participation and access to justice can enhance protection of the right to a clean and healthy environment. The Rio Declaration expressed the importance of these rights as follows:

‘Environmental issues are best handled with the *participation* of all concerned citizens, at the relevant level. At national level, each individual shall have *appropriate access to*

information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage *public awareness and participation* by making information widely available. Effective *access to judicial and administrative proceedings*, including redress and remedy, shall be provided (emphasis added).⁴²

The procedural rights enable citizens to participate meaningfully in decisions that affect their livelihood thus promoting accountability and transparency in decision-making. An informed public may find it easier to demand the enjoyment of their right to a clean and healthy environment. I now turn to obligations of the state and non-state actors.

2.2 A Note on the Nature of Obligations

As with every human right, the right to a clean and healthy environment entails the obligations to respect, protect and fulfil.⁴³ The obligation to respect requires the state to refrain from interfering directly or indirectly with the enjoyment of the right. The obligation to protect requires the state to prevent third parties such as corporations, from interfering in any way with the enjoyment of the right. The obligation to fulfil requires the state to adopt necessary legislative, administrative and judicial measures to achieve realisation of the right.

The Constitution provides that rights such as the right to a clean and healthy environment, ‘shall be respected, upheld and promoted by all organs and agencies of Government and by all persons’.⁴⁴ Indeed, a government agency such as NEMA is obliged ‘to assure all people living in the country the fundamental right to an environment adequate for their health and well-being’.⁴⁵

38 See Preamble, Constitution of the World Health Organisation, New York, 22 July 1946, available at http://www.who.int/governance/eb/who_constitution_en.pdf.

39 *Id.*

40 Misc. Cause No. 181 of 2004 (High Court of Uganda).

41 *Id.* See also *Advocates Coalition for Development and Environment v Attorney General and NEMA*, Misc. Cause No. 0100 of 2004 (High Court of Uganda), where the judge stated that the right to a healthy environment entitles Ugandans to a right to an environment adequate for their health and well-being. In this case, the applicants challenged the change of use of Butamira forest reserve on grounds that such use violates the right to a clean and healthy environment.

42 See Rio Declaration, note 36 above, Principle 10.

43 On human rights obligations see Henry Shue, *Basic Rights: Subsistence, Affluence and US Foreign Policy* (Princeton: Princeton University Press, 1980).

44 See Constitution, note 3 above, Article 20 (2).

45 See NEA, note 4 above, Section 2 (2) (a).

As pointed out above, the state is under obligation to regulate activities of private actors to ensure that they do not infringe the enjoyment of the right to a clean and healthy environment. But what are the obligations of private actors? It should be noted that environmental degradation and pollution are largely caused by acts of private actors, especially corporations. This is particularly so under the so-called globalisation processes where activities previously regulated or controlled by the state are increasingly taken over by private corporations.⁴⁶ The phrase 'by all persons'⁴⁷ imputes accountability on both natural and artificial persons, local or foreign, for violations of the right to a clean and healthy environment.⁴⁸ The Constitution imposes an obligation on every citizen of Uganda, 'to create and protect a clean and healthy environment'.⁴⁹ In the next section, I reflect on the salient principles accruing from judicial decisions on the right in Uganda.

3

JUDICIAL PROTECTION OF THE RIGHT IN UGANDA

3.1 Access to Environmental Justice: A Relaxation of the 'Rules of Standing'

Access to justice is critical in the struggle to realise human rights generally and the right to a clean and healthy environment in particular. According to the Constitution, any person who claims that his or her

fundamental human right or freedom has been infringed or threatened is entitled to apply to a competent court for redress, including compensation.⁵⁰ But what is a competent court? In *Grace Sentongo v Yakubu Taganza*,⁵¹ the applicant's claim was for a declaration that the respondent's construction of an abattoir was a violation of his right to a clean and healthy environment under Article 39 of the Constitution. The court had to determine whether it had jurisdiction to hear the matter. The court dismissed the case for want of jurisdiction and argued that it is the High Court that is competent to hear matters concerning violations of human rights.

It should be noted that the Constitution demands that justice should be administered without undue regard to technicalities.⁵² This is particularly important in environmental matters, which require urgent and prompt action. However, some judges have not yet appreciated the full import of this provision. In *Byabazaire Grace Thaddeus v. Mukwano Industries*,⁵³ the plaintiff operated a factory adjacent to residential homes including the plaintiff's rented apartment. The plaintiff alleged that the smoke was obnoxious, poisonous, repelling and hazardous to the community around and his health was particularly affected. In reply to the written statement of defence, the plaintiff stated that his right to sue emanates from the right to a healthy environment under section 4 of NEA. The court rejected the plaint on grounds that it does not disclose a cause of action. The judge observed that only NEMA has the power and duty to sue for violations committed under the statute and that the only recourse available to a person whose right is violated is to inform NEMA or the local environmental committee of such a violation. Consequently, the plaintiff had no *locus standi* to sue for any violation under the statute. The judge stated that NEMA has to establish air standards before determining the totality of the right to a healthy environment.

⁴⁶ On globalisation and its impact on the environment see Ronald Labonte et al., *The Fatal Indifference: The G8, Africa and Global Health* (Cape Town: University of Cape Town Press/IDRC, 2004), Chapter 1. See also M. van der Linde, 'Globalisation and the Right to a Healthy Environment: The South African Experience', 6 *East Afr. J. Peace & Hum. Rts* 253 (2000).

⁴⁷ See Constitution, note 3 above, Article 20(2).

⁴⁸ On violations attributable to private actors see Ben K. Twinomugisha, 'Barriers to the Protection of Rural Women's Right to Maternal Health Care in Uganda', 11 *East Afr. J. Peace & Hum. Rts* 67 (2005).

⁴⁹ See Constitution, note 3 above, Article 17 (j).

⁵⁰ *Id.*, Article 50 (1).

⁵¹ Magistrates Court Nakawa, Uganda, Misc App. No. 8 of 2003, arising from Civil Suit No. 16 of 2003.

⁵² See Constitution, note 3 above, Article 126.

⁵³ Misc. App. No. 909 of 2000, arising from Civil Suit No. 466 of 2000 (High Court of Uganda).

It is important to note that before the 1995 constitution, *locus standi*⁵⁴ requirements necessitated the person who had suffered a violation of a right or whose right was threatened to have a personal or direct interest in the matter. In case of a group of persons, the Civil Procedure Rules⁵⁵ require a representative action. The relevant rule provides:

‘Where there are numerous persons having the same interest in one suit, one or more of such persons may, with the permission of the Court, sue or be sued, or may defend in such suit, on behalf of or for the benefit of all persons so interested. But the Court shall in such a case give notice of the institution of the suit to all such persons either by personal service or, where, from the number of persons or any other cause, such service is not reasonably practicable, by public advertisement, as the court in each case may direct’.⁵⁶

The Constitution has introduced the concept of public interest litigation whereby any person or organisation ‘may bring an action against the violation of another person’s or group’s human rights’.⁵⁷ Public interest litigation is a critical tool in the struggle to protect the rights of the indigent, vulnerable or disadvantaged members of society who are neither aware of their rights nor have the ability to enforce them.⁵⁸ Poverty levels in Uganda are estimated at over 38 per cent⁵⁹ and the majority of people are not aware of the mechanisms of

enforcement of their rights.⁶⁰ Yet it is poor people who usually bear the brunt of environmental hazards and degradation.⁶¹

The concept of public interest litigation was considered in a number of cases. In *The Environmental Action Network Ltd v Attorney General & NEMA*,⁶² the applicant, a public interest litigation group filed the application in its own behalf and on behalf of the non-smoking members of the public under Article 50 (2) of the Constitution, to protect their right to a clean and healthy environment, their right to life and the general good of public health in Uganda. In the affidavit in support of the notice of motion, the applicant relied on several medical reports highlighting the dangers of exposure to second hand smoke. The state attorney raised a preliminary objection on behalf of the Attorney General that the applicant cannot claim to represent the Ugandan public and thus should have brought the application under the Civil Procedure Rules. The judge held that an organisation could bring a public interest action on behalf of groups or individual members of the public although the applying organisation has no direct individual interest in the infringing acts it seeks to have addressed. The judge relied on the Tanzanian case of *Rev. Christopher Mtikila v The Attorney General*,⁶³ where the High Court justified the use of public interest litigation on grounds that the vast majority of Tanzanians are extremely poor and cannot afford to engage lawyers even if they may be aware that their rights have been infringed.

In *Greenwatch v Attorney General and NEMA*,⁶⁴ the application was brought under Article 50 (1) and (2) of the Constitution and Rule 3 (1) of the Fundamental Rights and Freedoms (Enforcement Procedure)

54 *Locus standi* is defined as ‘a place of standing; standing in court. Appearance in a court of justice, or before a legislative body, on a given question’. See Henry C. Black, *Black’s Law Dictionary* 941 (West Publishing, 6th ed. 1990).

55 Statutory Instrument 71-3 (Entebbe: Government Printer) [hereinafter CPR].

56 Order 1 rule 8(1) of CPR, note 55 above.

57 See Constitution, note 3 above, Article 50(2).

58 On public interest litigation, see Upendra Baxi, ‘Judicial Discourse: The Dialectics of the Face and Mask’, 35 *Journal of the Indian Law Institute* 1, 7 (1993) and Grace P. Tumwine-Mukubwa, ‘The Promotion and Protection of Human Rights in East Africa’, 6 *East Afr. J. Peace & Hum. Rts* 130, 140 (2000).

59 Ministry of Finance Planning and Economic Development, *Poverty Eradication Action Plan 2004/5-2007/8* xv (Kampala: Government Printer, 2005).

60 Mubangizi, note 3 above and Manisuli Ssenyonjo, ‘The Domestic Protection and Promotion of Human Rights Under the 1995 Constitution’, 20/4 *Netherlands Quarterly of Human Rights* 445 (2002).

61 See Kamugisha, note 1 above and NEMA, *State of Environment Report for Uganda 2004/5* iv (Entebbe: Government Printer, 2005).

62 Misc. Application No. 39 of 2001 (High Court of Uganda).

63 Civil Suit No. 5 of 1993 (High Court of Tanzania).

64 *Greenwatch v. Attorney General and NEMA*, Misc. Application No. 371 of 2002 (High Court of Uganda).

Rules⁶⁵ and sought to regulate the manufacture, use, distribution and sale of plastic bags and bring about a restoration of the environment to the state it was in before the menace caused by the plastic bags. Counsel for the respondents raised a preliminary objection that the applicant had no cause of action since it brought the application under Article 50 of the Constitution instead of the Civil Procedure Rules. The court overruled the objection and held that Article 50 does not require the applicant to have the same interest as the parties he or she seeks to represent or for whose benefit the action is brought. The judge found that the state had failed or neglected its duty towards promotion of the environment on behalf of the citizens of Uganda. Consequently, any concerned Ugandan could sue the government of the Republic of Uganda, for that matter even the Attorney General in his representative capacity, to seek the enforcement of that unfulfilled or neglected duty of the state. The judge stated:

‘There is limited public awareness of the fundamental rights or freedoms provided for in the Constitution, let alone 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 a body like the applicant, comes to 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 this nature is one of the ways of discharging that duty. This court is under an obligation to hear the concerned citizen, in this case the applicant’.⁶⁶

In *The Environmental Action Network Ltd (TEAN) v British American Tobacco Ltd*,⁶⁷ the applicants sought a declaration that as a manufacturer of tobacco, a dangerous product, the respondents were under a legal duty to fully and adequately warn consumers of their product of the full extent of the risks associated therewith. The respondent later filed an application⁶⁸

questioning, *inter alia*, whether Article 50(2) of the constitution authorises the filing of constitutional actions on grounds of ‘public interest’ by private persons or it is confined to the bringing of ordinary representative actions to stop actual violations of specific and identifiable persons or groups. It was argued that Article 50 (2) could not have envisaged public interest litigation to be brought by bodies or groups such as TEAN. Counsel for the respondent vehemently argued that whereas the South African Constitution authorised ‘anyone acting in the public interest’⁶⁹ to bring an action alleging violation of human rights on behalf of others, such could not be read into Article 50 (2) of the Ugandan Constitution. That, to do so would amount to interpretation of the Constitution, thereby usurping the powers of the Constitutional Court. Thus, the counsel asked the court to refer the matter to the Constitutional Court under Article 137 of the constitution. The judge rejected the request and stated that the matter does not involve interpretation of the Constitution. The judge reasoned that, to argue that the Constitution does not recognise the existence of needy and oppressed persons and therefore it cannot allow actions of public interest groups to be brought on their behalf is to demean the Constitution. The judge stated:

‘It cannot be denied that such groups of persons abound in our society and we cannot hide our heads in the sand by saying that the Constitution does not expressly mention them and therefore they must be excluded from the constitutional provision regarding recourse to remedies when their rights are violated. It is to be remembered that such groups cannot be served either directly or indirectly. They have neither postal addresses nor telephones. Their fate depends entirely on the public interest litigation groups or persons and they are not personally identifiable; they can be identified only as a group or groups. The Constitution cannot escape from authorising representative action, without interest sharing with those who represent them... there exists that group of persons who need not necessarily have the

65 The Rules came into effect in 1992 (Entebbe: Government Printer).

66 See *Greenwatch v. Attorney General and NEMA*, note 64 above.

67 Misc. Application No. 70/2002 (High Court of Uganda).

68 *British American Tobacco Ltd v. The Environmental Action Network Ltd*, Civil Application No. 27/2003 (High Court of Uganda).

69 See NEA, note 4 above, Section 38.

same interest with those who institute actions on their behalf'.⁷⁰

It can be stated that the judiciary in Uganda is steadily relaxing the rules of standing in order to grant disadvantaged and vulnerable members of society a voice in environmental matters. Although under NEA, the powers to bring legal action against anyone degrading or polluting the environment is vested in NEMA or local environment committees,⁷¹ the Constitution vests such power in every Ugandan.⁷² Thus, a public-spirited person can utilise Article 50(2) of the Constitution to challenge violations of a right to a clean and healthy environment without necessarily proving a direct or indirect interest in the matter. Such a person can apply to court for an environmental restoration order⁷³ and it shall not be necessary 'to show that he or she has a right of, or interest in, the property, in the environment or land alleged to have been harmed or in the environment or land contiguous to such environment or land'.⁷⁴

It should be noted that one of the major barriers to environmental justice is the cost of legal action. Individuals or organisations may be reluctant to institute public interest actions concerning violations of the right to a clean and healthy environment for fear of being penalised in costs. This fear is not far-fetched. In *Greenwatch and another v Golf Course Holdings Ltd*,⁷⁵ the applicants sought an environmental restoration order against the respondents who were constructing a hotel in a recreational area. Counsel for the respondent applied for security for costs on grounds that the plaintiffs were likely to lose the case and fail to pay costs since the respondent had acquired a lease from Kampala City Council. The court ordered the applicant to

pay 50,000,000 Uganda shillings (approximately US \$ 27,000) before the case could be heard. It should be noted that the money could not be paid and the respondents have gone ahead and developed the land. Insisting on security for costs affects access to environmental justice especially by the poor, indigent and disadvantaged members of society. However, in order to enhance access to justice, most judges have not held public interest litigants or those filing important constitutional cases liable for the other party's costs unless such cases are frivolous and vexatious. The rationale for this was aptly expressed by Oder, JSC in *Besigye Kiiza v Museveni Yoweri Kaguta and the Electoral Commission* as follows:

'...in order to encourage constitutional litigation, parties who go to court should not be saddled with the opposite party's costs if they lose. If potential litigants know that they would face prohibitive costs of litigation, they would think twice before taking constitutional issues to court. Such discouragement would have adverse effect on development of the court's jurisdiction of judicial review of the conduct of authorities or individuals, which are unconstitutional. It would also stifle the growth of our constitutional jurisprudence. The culture of constitutionalism should be nurtured, not stunted in this country, which prohibitive costs would do if left to grow unchecked'.⁷⁶

In the next part, I consider how the right to life may be applied to protect the right to a clean and healthy environment.

3.2 Application of the Right to Life

The right to life is one of the substantive rights that can be applied by an activist court to protect the environment since environmental deterioration or pollution could endanger the life of present and future generations. The Constitution guarantees the

⁷⁰ See *British American Tobacco Ltd*, note 68 above and *Advocates Coalition for Development and Environment*, note 41 above, where the judge stated that Article 50(2) makes all of us our brother's keeper and gives all the power to speak for those who cannot speak for their rights due to their ignorance, poverty or apathy.

⁷¹ See NEA, note 4 above, Section 3(3).

⁷² See Constitution, note 3 above, Articles 39 and 50.

⁷³ See NEA, note 4 above, Section 71(1).

⁷⁴ *Id.*, Section 71(2).

⁷⁵ HCCS No. 834 of 2000 (High Court of Uganda).

⁷⁶ Election Petition No. 1 of 2001 (Supreme Court of Uganda).

right to life.⁷⁷ In *British American Tobacco Ltd v The Environmental Action Network Ltd (TEAN)*,⁷⁸ an attempt was made to establish a link between environmental quality and the right to life. TEAN had in an earlier application⁷⁹ sought a declaration that the respondents' failure to warn consumers and potential consumers of the health risks associated with their smoking its cigarettes constituted a violation of or a threat to such persons' right to life as stipulated under Article 22 (1) of the Constitution. The court was asked to determine whether Article 22 (1) of the Constitution which prohibits 'intentional' taking of life, can be interpreted to apply to an alleged failure of a manufacturer of a commercial product to warn consumers or potential consumers of possible health risks associated with the use of the product. The court was also asked to determine whether Article 22 (1) is capable of being violated by private conduct in the circumstances of this case. The judge stated:

'Clearly Article 22 (1) of the Constitution prohibits deprivation intentionally of a person's life. It follows therefore that whoever wants to bring an action under this provision must first have his right either been violated or are being violated, and such violation must be intentional; in which case the action brought must allege violation, past, present or imminent. He must allege the intention to violate. He must pursuant to order 6 rule 2 of the Civil Procedure Rules, plead the particulars of the violation as well as of the intention to violate. That is he must specifically plead the two with the view to specifically prove them'.⁸⁰

The judge was of the view that failure to make full disclosures of the dangers or risks of smoking

cigarettes to the consumers 'seems to be too remote to taking away the life of such consumers'.⁸¹ I submit that the judge's interpretation of the right to life is too restrictive. The right to life requires that people should live in an environment free from contamination and pollution. Dangers or risks of environmental or passive smoking are well documented. Their impact on life may take long to appear but eventually the concerned persons may die of lung cancer and other related diseases.⁸² Warning persons of possible health risks would be one of the measures to enable such persons make an informed decision on whether to consume tobacco or not. The judge was of the view that the failure to disclose such dangers may have been grounded in the intention not to have adverse economic effects on the Cigarette industry, but not to take away life. It should be noted that in their drive for profits, the manufacturers of tobacco would be subjecting the smoker's life to 'slow poisoning'. In my view, the judge misused an opportunity to creatively apply the right to life in a bid to protect people from tobacco pollution. I now turn to the relevance of access to information to protection of the right to a clean and healthy environment.

3.3 Access to Information

Full, accurate and up to date information is considered to be at the heart of sound environmental protection and sustainable development.⁸³ Access to information enables citizens to participate meaningfully in decisions that directly affect their livelihood and to be able to monitor governmental and private sector activities. The nature of environmental deterioration and its effects may often arise only long after a project is completed and may be irreversible. Consequently, there is a need for early access to complete data to enable those concerned to take informed decisions.

⁷⁷ Article 22(1) of the Constitution provides: 'No person shall be deprived of life intentionally except in execution of a sentence passed in a fair trial by a court of competent jurisdiction in respect of a criminal offence under the laws of Uganda and the conviction and sentence have been confirmed by the highest appellate court'. Article 22(2) provides: 'No person has the right to terminate the life of an unborn child except as may be authorised by law'.

⁷⁸ *British American Tobacco Ltd*, note 68 above.

⁷⁹ *The Environmental Action Network Ltd*, note 67 above.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² See S. Jane Henley et al., 'Association Between Exclusive Pipe Smoking and Mortality From Cancer and Other Diseases', 96/11 *Journal of the National Cancer Institute* 853 (2004).

⁸³ Rose Mwebaza, 'Access to Information, Public Participation and Justice in Environmental Decision Making in Uganda', 9 *East Afr. J. Peace & Hum. Rts* 37 (2003).

Access to information is critical for holding governments accountable for omissions or commissions that are deleterious to the environment. The Universal Declaration on Human Rights (UDHR) guarantees everyone the right to 'seek, receive and impart information and ideas through any media and regardless of frontiers'.⁸⁴ The Constitution provides:

'Every citizen has a right of access to information in the possession of the state or any other organ or agency of the state except where the release of the information is likely to prejudice the security or sovereignty of the state or interfere with the right to the privacy of any other person'.⁸⁵

Pursuant to Article 41 (2) of the Constitution, Parliament passed the Access to Information Act, which provides for the right of access to information and the procedure for obtaining such information.⁸⁶ The main principle behind this Act is to avail citizens with relevant information so as to make informed decisions and thus hold government officials accountable. Accountability means not only answering questions when there is a need, but also ensuring that government documents are available and accessible. In *Paul K. Semogerere and Zachary Olumu v Attorney General*,⁸⁷ the Supreme Court of Uganda reversed the decision of the Constitutional Court that had denied the applicant's access to the Hansard to be used as evidence in a court of law. The judge stated that since Article 41(1) grants every citizen access to information in possession of the state, he could not find any constitutional or legal grounds to prevent the release and use of Hansard as evidence in courts of law.

The right to access information encourages a culture of openness.⁸⁸ In order for the public to effectively

advocate for environmental protection, access to relevant information is important because the public needs to know of the environmental threats and the origins of those threats. Information is critical for environmental advocacy. Consequently, the NEA guarantees 'freedom of access to any information relating to the implementation of this Act submitted to the authority [NEMA] or to a lead agency'.⁸⁹ However, a person who desires to access the information must pay a prescribed fee.⁹⁰ The NEA exempts 'proprietary information which shall be treated as confidential'.⁹¹

The question of access to environmental information was considered in *Greenwatch (U) Ltd v Attorney General and Uganda Electricity Transmission Co Ltd*,⁹² where the applicant, a Non-Governmental Organisation (NGO), whose mission was environmental protection through advocacy and education, failed in its attempt to obtain a copy of a Power Purchase Agreement (PPA) from the Government of Uganda. The government had entered into an Implementation Agreement (IA) with AES Nile Power Ltd covering the building, operation and transfer of a hydroelectric power complex. In consequence of the IA, AES Nile Power Ltd, and Uganda Electricity Board (UEB), a statutory corporation, executed a PPA. It was argued on behalf of government that the PPA is a confidential document with a lot of information including the sponsor's technical and commercial interests and cannot therefore be released to the public. It was also argued that according to Article 41 of the Constitution only citizens are entitled to have access to information in the hands of the state or its agents or organs. That since the applicant was not a natural person, it could not invoke Article 41. It was further argued that the PPA is not a public document within the meaning of the Evidence Act⁹³ and since the second respondent is not a government agency or organ, it cannot be obliged to release information.

The court held that since the Minister of Energy on behalf of the government of Uganda signed the IA,

84 Article 19, Universal Declaration of Human Rights, GA Res. 217A (III), UN Doc A/810 at 71 (1948).

85 See Constitution, note 3 above, Article 41(1).

86 Access to Information Act, Act No. 6 of 2005 (Entebbe: Government Printer) [hereinafter AIA], Section 5.

87 Constitutional Appeal No. 1 of 2000 (Supreme Court of Uganda).

88 Ikoja Odongo and Dick Kawooya, 'Access to Information in Uganda: An Examination of Recent Developments', 12 *East Afr. J. Peace & Hum. Rts* 333 (2006).

89 See NEA, note 4 above, Section 85(1).

90 *Id.*, Section 85(2).

91 *Id.*, Section 85(3).

92 HCCT-00-CV-MC-0139 of 2001 (High Court of Uganda).

93 *Id.*, Para. 8.

it was a public document. The judge noted that the PPA was incorporated by reference to the IA and was in possession of the government and on that account, it was information in possession of the state. The judge stated that in order to determine whether a limited liability company is a government agency or not for the purposes of Article 41 of the Constitution, the court should look at the totality of the circumstances surrounding the company. As to the question of whether a corporate body is a citizen for purposes of access to information, the judge stated:

‘Indeed corporate bodies can enforce rights under the bill of rights for they are taken as persons in law, though not natural persons. Similarly for citizenship, it is possible for a corporate body to be a citizen unless I suppose the provision in question is very clear in stating that it is restricted to natural persons as citizens. This is not the case with Article 41. I therefore find that a corporate body could qualify as a citizen under Article 41 of the Constitution to have access to information in the possession of the state or its organs and agencies’.⁹⁴

However, the judge refused to grant the declaration that the applicant is entitled to access to information in the possession of both respondents. The judge observed that he had not been supplied with evidence as to the membership of the applicant in order to determine whether they meet the requirements of being a ‘citizen’ or not for purposes of Article 41. This case is important in the sense that it reaffirms the importance of access to environmental information in possession of the state or its agents. It points out the need for activists to adduce sufficient technical evidence to court to enable the judge decide in their favour. Counsel for the applicant should have supplied to court details of members of the NGO showing that the majority are citizens of Uganda.

3.4 Prevention and Precautionary Measures

One of the ways of enhancing protection of the right to a clean and healthy environment is through

prevention and precautionary measures. The old adage that prevention is better than cure is still very relevant in the struggle to conserve the environment. Prevention is important for both ecological and economic reasons.⁹⁵ In the majority of cases, it is almost impossible to remedy environmental harm. Some of the harm accruing from pollution of the environment may be irreversible. Even when the harm is remediable, costs of rehabilitation or cleaning up or restoring the environment are usually prohibitive. Consequently, the prevention principle seeks to avoid harm to the environment. The principle calls for prior assessment of harmful or potentially harmful activities to the environment. The state is supposed to exercise due diligence by regulating public and private activities that are possibly harmful to any part of the environment, subject to its jurisdiction and control.

The precautionary principle has been considered as the most developed form of prevention, which remains the general basis for environmental protection measures. The Rio Declaration provides:

In order to protect the environment, the precautionary principle shall be widely applied by states according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost effective measures to prevent environmental degradation.⁹⁶

The state is required to prepare for potential, uncertain, even hypothetical threats, especially when the consequences of inaction would be serious. In *Uganda Electricity Transmission Co Ltd v De Samaline Incorporation Ltd*,⁹⁷ 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. The report indicated that while the acceptable standard was 0.2 milligram per cubic metre, the grain dust level from the respondent’s premises ranged from 1.6 to 8.7

⁹⁵ See Mwebaza, note 83 above.

⁹⁶ See Rio Declaration, note 36 above, Principle 15.

⁹⁷ See *Uganda Electricity Transmission Co Ltd*, note 40 above.

⁹⁴ *Id.*, Para. 31.

milligrams per cubic metre and that at certain intervals it would rise up to 14.8 milligram per cubic metre. The judge stated that when a person complains that his or her right to a clean and healthy environment has been violated, he or she does not necessarily need medical evidence to prove his or her case. All that is required is proof of degradation or threats of degradation. Applying the precautionary principle, the judge stated:

‘The precautionary principle is premised on the notion that it is not always possible to predict with scientific precision the probable impact of activities, processes, technologies or chemicals on the environment. Therefore if preventive and corrective measures were to be based only on the availability of hard and fast scientific evidence, substantial and or irreversible damage would be occasioned before such evidence would be available. Therefore the precautionary principle stipulates that preventive action should be taken notwithstanding the lack of full scientific certainty about the environmental consequences’.⁹⁸

The court found that there was degradation of the applicant’s premises through pollution. The respondents had argued that they were in occupation long before the applicant came into existence. The court found that the applicant was successor in title to the Uganda Electricity Board, which was occupying the property before the respondent built adjacent to it, and rejected the respondent’s argument on grounds that the applicant was entitled to a right to a clean and healthy environment at all times. The court held that the respondent had violated the applicant’s right to a clean and healthy environment. Before concluding this article, it is necessary to briefly reflect on possible challenges to judicial protection of the right. As the discussion below shows, these challenges are not insurmountable.

⁹⁸ *Id.*

4 CHALLENGES TO JUDICIAL PROTECTION OF THE RIGHT

4.1 Limited Scope of Judicial Review

The scope of judicial review of cases concerning environmental pollution or degradation is limited. Some of the environmental cases concern the interpretation of scientific facts and are essentially merits based. The judiciary in Uganda does not seriously inquire into the merits of any public decision, act or omission. As the cases examined above illustrate, the courts largely consider whether the decision or action is lawful and make declarations to that effect. Though this in itself is good, the question remains: to what extent can public officials be held accountable for ‘bad’ environmental decisions that are not necessarily unlawful? A decision may appear reasonable from an economic perspective but bad for the environment. The judiciary should courageously and boldly inquire into the merits of such a decision and quash it where necessary. But all this largely depends on the evidence before the court. Thus, environmental and human rights activists should adduce relevant scientific and technical evidence to the court. In their submissions, lawyers should systematically take the judge through such evidence. This requires fairly extensive reading and training of lawyers and judges in order to appreciate the basic concepts of environmental law and practice. Lawyers should seek expert opinion from other disciplines, such as environmental science, in cases involving scientific facts.

4.2 Lack of Awareness of Environmental Rights and Obligations

It is trite to state that knowledge of the law is important for protection and enforcement of rights. A person cannot enjoy or enforce a right of which he/she is not aware. Thus, for a person to be able to complain about violations of the right to a clean and healthy environment, he/she must not only be aware

of the right, but also of the mechanisms and institutions through which such a right is enforced or protected. As pointed out above, there is a low level of public awareness of human rights generally and of environmental rights and obligations in particular. Yet, the legal maxim *ignorantia legis neminem excusat* (ignorance of the law excuses no one) dictates that all people should have knowledge of the law in order to protect and enforce their rights.

Consequently, it is crucial to educate the public, including private industry, on the importance of protecting the environment generally and the right to a clean and healthy environment in particular. NEMA, environmental and human rights organisations should extend their sensitisation activities on environmental rights and duties to the grassroots. The public should also be sensitised about the available complaint and enforcement mechanisms. If for example a river is polluted or a factory is emitting obnoxious substances, the community should be able to bring it to the attention of the relevant NGO engaged in environmental activism or advocacy. The work of NGOs would be made easier if the rules of procedure were amended to permit the public to informally complain for example by letter to a judge or magistrate or through the media.

4.3 Limited Judicial Capacity

The jurisdiction to hear cases involving violations of the right to a clean and healthy environment is restricted to the High Court and does not extend to magistrates courts. However, the High Court of Uganda has very few judges, who attend to many other urgent and competing interests. The law should be amended to extend jurisdiction to magistrate Grade 1 and Chief Magistrates' courts to entertain matters based on Article 39 and 50 of the Constitution. In any case, these are qualified lawyers, some with long experience on the bench.

5 CONCLUSION

Judicial protection of the right to a clean and healthy environment in Uganda is slowly but steadily gaining momentum. Through a creative application of the right, the judiciary has to some extent held the state, its agencies and private persons/actors accountable for violations of the right. The majority of the judges that have handled cases concerning protection of the environment have relaxed the laws of standing (a right of appearance in a court of law). It can be stated that the concept of public interest litigation is firmly taking root in our jurisprudence. An individual or organisation can now bring an action against the state, its agencies or private actors without fear of the case being dismissed and the applicant penalised with costs. However, the issue of costs should not be left to the discretion of the presiding judge. The Chief Justice should issue rules directing the judiciary not to impose costs on public interest litigants. Separate fees structures should also be developed in the interest of sustainable development.

A favourable decision from the court may not be always sufficient. Environmental and human rights organisations must publicise the court's decision in the media, locally and internationally, and demand its implementation. This requires lobbying with the legislature and the international community, especially where the decision implicates government officials. The World Bank and other donors should make their funding conditional on the government's protection and promotion of human rights, such as the right to a clean and healthy environment.

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