

**REGIONAL OPPORTUNITIES FOR IMPROVING
ENVIRONMENTAL GOVERNANCE THROUGH ACCESS TO
INFORMATION, PUBLIC PARTICIPATION, AND ACCESS TO
JUSTICE**

Carl Bruch

8th Session of the African Ministerial Conference on Environment (AMCEN)
Abuja, Nigeria, 3-6 April 2000

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Ensuring citizens and other members of civil society the rights of access to information, public participation, and access to justice is indispensable to sustainable development. This paper explores ways that these procedural rights can assist governments in protecting their natural patrimony, highlights how international conventions and regional initiatives have given form to the general principles, and outlines opportunities for promoting democratic environmental governance throughout Africa.

How can procedural rights protect the environment and promote sustainable development?

Protecting the environment and promoting sustainable development are cooperative processes, requiring government, private individuals, nongovernmental organizations, universities, businesses, and other sectors of society to work together. Civil society is one of a nation's greatest resources for helping to formulate and implement environmental laws, regulations, policies, and projects. Public involvement enhances these processes in many ways:

- Allowing all members of the public to express their views regarding environmental conditions in their communities and taking those views into consideration in the governmental decisionmaking process *expands the knowledge base for decisions*, resulting in better implementation of environmental goals.
- Public input *supplements scarce government resources* for developing laws, as well as for monitoring, inspection, and enforcement, by identifying environmental threats or violations of applicable laws.
- Public participation can *identify and address problems at an early stage*, saving time, energy, and scarce financial resources in the long run.
- Access to information, public participation, and access to justice *improve the credibility, effectiveness, and accountability of governmental decisionmaking processes*. Public participation at the outset of the decisionmaking process helps to build broad-based consensus for environmental programs.

While there are many ways to advance access to information, public participation, and access to justice, there are generally recognized minimum requirements for implementing these principles. First, broad access to information is the foundation for sound environmental governance, because it enables the public to learn about environmental threats and to decide how best to respond. This principle ensures that citizens have a right to obtain information about the state of the environment and human health; factors affecting or potentially affecting the environment (such as sources of pollution); proposed projects that could affect the environment; and laws, policies, and international agreements potentially affecting the environment. In some cases, governments simply commit to releasing the information on request. In other cases, governments affirmatively collect, synthesize, and disseminate environmental information in the form of periodic “State of the Environment” reports, as well as registries and indexes that track releases of pollutants to the environment, such as the pollutant release and transfer registry (PRTR) pilot program in Nakuru, Kenya.

Second, by allowing for public participation in proposed decisions that could affect the environment, governments can improve the ultimate decisions by broadening the information available and build public support by giving people the opportunity to have their opinions heard. Already, most African countries have started to involve the public through environmental impact assessments (EIA) of specific projects and activities. Additionally, governments can and do incorporate public input into the development of larger programs and plans, as well as drafting rules and regulations. For public participation to be effective, government agencies need to provide citizens with a detailed and timely notice of the proposed project, program, or regulation; access to information about the project and its potential impacts; and an opportunity to submit written or oral comments. Frequently, particularly for projects or activities, governments require agencies to indicate how they accounted for public comments before the agencies make their final decision.

Third, recourse to administrative remedies and judicial review, commonly termed “access to justice,” empowers citizens and civil society organizations to assist governments in enforcing environmental laws and ensuring respect for environmental rights. Under national laws and international agreements, citizens may have access to administrative or judicial review of a private or governmental action that violates a national environmental law. Additionally, countries have guaranteed citizens the right to seek judicial review when access to information or public participation is wrongfully denied or incomplete. To be effective, access to justice should be fair, timely, affordable, and include effective remedies such as injunctive relief.

How are procedural rights emerging as global norms to protect the environment?

Procedural rights of access to information, participation, and justice have evolved from general declarations to more concrete commitments by governments. As early as 1948, the **Universal Declaration on Human Rights** provided the kernels for generalized rights of access to information (Article 19) and justice (Articles 8 and 10). Similarly, Article 19(2) of the **1966 International Covenant on Civil and Political Rights** guarantees citizens the “freedom to seek, receive and impart information and ideas of all kinds.” The **1981 African Charter on Human and Peoples’ Rights** guarantees that citizens have the rights of access to information (Article

9(1)), participation (Article 13), and justice (Articles 3 and 7), as well as “the right to a general satisfactory environment favorable to their development” (Article 24). In fact, many African constitutions have incorporated these provisions explicitly or by reference.

Increasingly, governments have recognized the important role that these procedural mechanisms have for environmental protection. The **1982 World Charter for Nature** requires public disclosure of conservation information “in time to permit effective consultation and participation” (Article 16), as well as “the opportunity [for all persons] to participate, individually or with others, in the formulation of decisions of direct concern to their environment, and [to] have access to means of redress when their environment has suffered damage or degradation” (Article 23). The **1992 Rio Declaration** crystallized emerging public participation norms in its Principle 10:

Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the 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.

Agenda 21, the “Blueprint for Sustainable Development,” was adopted in 1992 to implement the principles in the Rio Declaration, and it has significantly shaped the activities of the United Nations Environment Program and other international organizations. Agenda 21 relied heavily on the role of civil society in developing, implementing, and enforcing environmental laws and policies. Access to information, public participation, and access to justice appear throughout Agenda 21, and particularly in Chapters 12, 19, 27, 36, 37, and 40.

The **1992 Convention on Biological Diversity** (CBD) similarly incorporated public participation principles in Article 14(1)(a) (encouraging public participation in “environmental impact assessment of proposed projects that are likely to have significant adverse effects on biological diversity”) and Article 17 (promoting the exchange of publicly available information). The 2000 Biosafety Protocol to the CBD also relies on access to information (Articles 20, 23(1), and 23(3)) and public participation (Articles 23(2) and 29(8)).

Since 1992, various international conventions addressing specific environmental problems have incorporated public participation principles. For example, the **1994 Convention to Combat Desertification** adopted a model that emphasized “the participation of populations and local communities” in developing and implementing national action programs, which provide a framework for identifying, combating, and mitigating the causes of desertification. Article 10(2) required those programs to “facilitate access by local populations to appropriate information and technology,” and “provide for effective participation at the local, national and regional levels of non-governmental organizations and local populations . . . in policy planning, decision-making, and implementation and review of national action programmes.”

Regional initiatives promoting environmental governance have complemented the development of global norms, and continue to be important in clarifying and implementing those norms. For example, the **1998 United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters** (or the “Aarhus Convention”) provides a clear example of how governments and civil society can jointly develop regional norms for environmental governance. Governments and environmental NGOs from throughout Europe and the former Soviet Union, as well as Canada, participated in the development of the Convention; and 40 European and Central Asian countries and the European Union have signed the Convention.

The Aarhus Convention saw an unprecedented level of NGO involvement in its conceptualization, drafting, signing, ratification, and implementation. The Convention emphasizes three related areas or “pillars” of environmental governance: access to information, public participation in decisionmaking, and access to administrative and judicial redress. In these three areas, the Convention provides minimum standards for the state parties to adopt in their domestic legislation. The Convention emphasizes enforceable citizens’ rights in each of the three areas, and also makes reference to a human right to a healthy environment. This rights-based approach underpins many of the specific provisions expanding public access, as well as providing a basis for citizens to enforce their procedural and substantive environmental rights in court. The Convention also focuses on the obligations of governmental bodies and individuals at the national, sub-national, and local levels, as well as natural and legal persons “performing public administrative functions” and European Union institutions.

Governments and civil society are pressing to ratify the Convention and implement its provisions throughout the UN/ECE region. Thus far, four countries have ratified and two have acceded to the Aarhus Convention. The Convention will enter into force after 16 countries ratify it, which is expected to occur in late 2000 or early 2001. Additionally, the UN/ECE is seeking to coordinate its efforts with other convention secretariats in the region, such as the 1991 Espoo convention on transboundary environmental impact assessments. In fact, the 1999 (London) Protocol on Water and Health became the first international instrument to expressly incorporate the Aarhus Convention provisions, in the context of environmental health.

The **Inter-American Strategy for the Promotion of Public Participation in Decision-Making for Sustainable Development** (or “ISP”) is an independent regional initiative of the Organization of American States (OAS) to promote environmental governance. While the Aarhus Convention is a binding treaty with concrete obligations, the ISP is deemed a “Strategy.” This Strategy encourages, but does not require, signatories to undertake similar legal and institutional reforms. The ISP rests on the commitments that OAS members made to Principle 10 of the 1992 Rio Declaration and Agenda 21. The OAS initially drafted the ISP, which was then frequently revised to incorporate comments from consultations with national “focal points,” from hemispheric conferences, and from public comments received (including from the internet).

The ISP consists of two documents: a short, general Policy Framework and detailed Recommendations for Action. The Policy Framework, which OAS member states will sign in June 2000, establishes the basic elements that the nations are encouraged to implement. It contains the principles, objectives, and policy recommendations of the ISP. The

recommendations urge member states to take action to (1) improve communication mechanisms to share information; (2) establish legal and regulatory frameworks to ensure public access to information, decisionmaking, and justice; (3) promote institutional structures, policies, and procedures for expanding public participation; (4) advance education and training programs; (5) dedicate funding for public participation in decisionmaking; and (6) promote fora for consultation. In contrast, the Recommendations for Action – not signed by the parties – provides many different, specific actions that the nations can adopt.

Other regional organizations have promoted transparency, access, and accountability in environmental matters among their Member States. For example, the North American Commission for Environmental Cooperation (CEC) promotes, and develops recommendations for Canada, Mexico, and the United States regarding: public access to environmental information held by the government and public participation in decision-making processes; transboundary environmental impact assessment; and access to administrative and judicial bodies in transboundary pollution cases. Through the CEC's organic statute, the North American Agreement on Environmental Cooperation, Member States have committed to publicly releasing environmental non-compliance information (Article 5.1(d)), ensuring that interested persons may petition the competent authorities to investigate alleged violations of environmental legislation (Article 6.1), providing persons who have legally cognizable interests with access to judicial, quasi-judicial, or administrative bodies in order to enforce the environmental legislation (Article 6.2), and ensuring that the proceedings are "fair, open and equitable" (Article 7.1). Also, citizens and organizations can file complaints with the CEC alleging that a Member State is not enforcing its environmental laws. The CEC investigates the complaint and can develop a "factual record" that can be made publicly available.

Why is an African initiative on procedural rights important?

In the context of emerging international norms on environmental governance, an African voice is particularly important. Evolving international duties, rights, and procedures on citizen participation have potential impacts for African countries at the national level and at the international level, as countries adopt them in developing and implementing conventions, multilateral development banks incorporate them into their practices, and international trade discussions highlight public participation. And these international fora tend to exert pressure on the national level, as public participation requirements increasingly are attached to international loans and financing and treaties rely on information, participation, and accountability for their implementation. As a result, international norms are not just something "out there," but ultimately can directly impact Africa.

African participation in the development of international norms on access to information, process, and justice is necessary to ensure that the norms are relevant to the African context. On a continent where the first language of the vast majority of people is their tribal language, language poses special challenges for a government that seeks to provide effective access to environmental information. For example, Ethiopia alone has over 80 different recognized languages and dialects. Even in countries with a single official language, rural people frequently have at best a rudimentary grasp of that language. Few governments can afford the resources necessary to translate all the important documents into all relevant languages. There are also

technological challenges, as the possibility of establishing publicly accessible electronic databases is not an option despite lower maintenance costs. The frequent absence of newspapers and other written media outside the cities and low literacy rates mean that other avenues are necessary for disseminating environmental information, such as radio.

African countries also face overwhelming pressures to develop. Eight of the ten poorest countries in the world are in Africa, as are 29 of the 34 countries that the United Nations ranks lowest in terms of human development, accounting for income, life expectancy, and education. Thus, citizens frequently are more concerned about locating firewood, food, water, and forage than they are about participatory principles. Environmental education will be critical in making the link between today's practices and tomorrow's harm.

As a result of Africa's unique and diverse heritage and needs, African nations may emphasize different facets of the various principles. For example, access to information may have a strong component of environmental education. Alternatively, African nations focus on a different set of principles that could include all or some of the three discussed in this paper – access to information, participation, and justice – as well as other principles, such as the freedom of association which is important in the daily operation of civil society organizations.

An African voice on these procedural rights is also important for the rest of the world. The African experience with community participation is very valuable for other regions, and African views of property and community governance can help other regions – particularly the United States and Europe – address environmental challenges. African mechanisms for promoting community participation in a strongly pluralistic society can be particularly illuminating in this age of growing internationalization. However, these African experiences will not find their way into the international norms without active African participation. To be relevant, international norms on access to information, participation, and justice need as much input as possible from practitioners around the world, including Africa.

What are the opportunities for promoting environmental procedural rights in Africa?

Environmental governance in Africa can be promoted by incorporating participatory principles into domestic laws and institutions, acceding to an existing environmental governance convention, developing a specifically African declaration or convention, or participating in the development of a global convention. In fact, the different approaches can complement one another, and a combination of activities can synergistically advance environmental governance locally, nationally, regionally, and globally.

First, improving environmental governance at the national level can borrow from experiences at the local level. Countries throughout Africa increasingly are devolving powers to local authorities to manage natural resources. The increased transparency, access, and accountability have established valuable precedents for environmental governance at the local level. Similarly customary law and institutions can provide models for community participation.

When incorporating participatory principles into domestic legal and institutional frameworks, nations may consider the Aarhus Convention and the ISP as reflective of emerging

norms in international law, but African nations will need to determine how different principles or institutions may best be adapted to their needs and constraints. Indeed, many African countries have already incorporated different participatory provisions in their constitutions, environmental laws, decentralization policies, and institutions. Still, there frequently remains a need to implement the principles in practice, to expand them, and to extend them to other areas. This approach has the benefit of not requiring the participation of other nations. Also, if the nation subsequently accedes to a convention or participates in developing a convention, much of the important implementation will have already been completed, and the nation will be well-prepared to contribute its experiences to developing a regional or subregional instrument.

Second, African nations could accede to the Aarhus Convention, pursuant to Article 19.3. This approach would take advantage of an instrument that includes concrete obligations and that may reflect growing international consensus on the topic; and funding and technical assistance may be available for nations that pursue this path. However, various African environmental advocates have expressed reservations about acceding to a public participation convention in which their governments have not participated. Not only does the Aarhus Convention fail to incorporate the particular African context, these advocates also expressed concern that accession could bypass the collaborative relationship between governments and NGOs that a regional negotiating process could engender.

Third, a group of African nations or an intergovernmental organization may undertake a new regional initiative – whether it is a convention, a “strategy,” or something else – on environmental governance. The United Nations Environment Program in Nairobi has an ongoing program to develop environmental laws in countries throughout Africa, and INFOTERRA, the Global Environmental Information Exchange of the United Nations, has a head start on the informational aspects. Other possible bodies to undertake a regional convention could be the Organization for African Unity (OAU), the UN Economic Commission for Africa (UN/ECA), or the UN African Ministerial Conference on the Environment (AMCEN). If this option is pursued, then one supporting component – which was useful in developing the Aarhus Convention – would be a country-by-country survey of the status of the relevant African laws and institutions, as well as a manual of best practices. Similarly, on-the-ground pilot projects, used effectively in the ISP process, could provide African experiences upon which to build.

Another option is incorporating environmental governance elements into existing conventions, such as the Desertification Convention, which already advances environmental governance principles to some degree. Experiences incorporating procedural rights into existing sectoral conventions could be valuable in the development of a broader African or global instrument. Additionally, convention secretariats may revisit the text of their original documents to ascertain whether they adequately incorporate the principles. For example, the UN/ECE adopted the 1999 (London) Water and Health Protocol, discussed above, to incorporate procedural rights more fully into the 1992 UN/ECE Convention on the Protection and Use of the Transboundary Watercourses and International Lakes. African nations could adopt a similar protocol to the 1968 African Convention on Nature and Natural Resources.

If a pan-African convention is not yet feasible, African nations, NGOs, and international organizations could pursue initiatives through sub-regional bodies, such as the East African

Community, Southern African Development Community (SADC), or Economic Community of West African States (ECOWAS). Thus, the African Centre for Technology Studies and the World Resources Institute have started working with the East African Community to promote public participation principles through sub-regional development of environmental impact assessment. Similarly, SADC could develop a protocol on environmental governance for Southern Africa; in fact, a December 1998 UNEP/INFOTERRA meeting on “Building Bridges for the Aarhus Convention” in Gaborone, Botswana examined the potential relevance of the Aarhus Convention to the SADC region. And while ECOWAS has focused on economic integration and security issues, its mission includes integration of the energy, agriculture, and natural resource sectors, so environmental governance could be within its purview.

Finally, another option is to participate in negotiating a possible global convention on environmental governance, perhaps timed to coincide with the 2002 UN Conference on Environment and Development. A global convention could harmonize the principles developed regionally. It has the added benefit that much of the world – indeed the Americas, Europe, the former Soviet Union, Australia, Israel, and Japan – has already been exploring possible international instruments for promoting environmental governance through procedural rights.

Ultimately, a combination of different approaches may be the best option. Parallel activities at the national, subregional, regional, and/or global levels can complement one another. At the national level, there is the most flexibility to experiment with different mechanisms. Experiences from countries with similar cultural values, legal systems, and states of economic development can provide invaluable political capital for adopting similar mechanisms, let alone for negotiating an international instrument. At the same time, supranational declarations can – even if they are soft law – provide legitimacy for domestic initiatives. And sub-regional initiatives can lead to an overarching regional or global initiative.

Conclusion: The time is ripe for an African voice on environmental governance.

Africa has an opportunity to contribute to the development of emerging international norms on environmental governance. This may be accomplished through simultaneous activities at the national, sub-regional, and regional levels that help clarify the role that access to information, participation, and justice have in environmental protection and sustainable development. While these norms are still taking shape, Africa has the opportunity to highlight its experiences for the rest of the world to learn from and to ensure that the emerging norms take into account the African context and are relevant to Africa. Through this process, African governments and citizens can help promote principles that will protect the environment of Africa as well as the world.