

The Right to Participation in Development: A Case Study of Uganda

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Declaration

I hereby declare that this thesis, submitted for the degree of Doctor of Laws (LLD), at the Centre for Human Rights, Faculty of Law, University of Pretoria, is my own work and has not previously been submitted by me for a degree at this or any other tertiary institution.

Dedication

To the loving memory of my father, Mr. Frederick E.K Karugonjo, who inspired me to become a Lawyer.

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I take full responsibility for any errors and omissions.

Abstract

Participation in development is not just a buzz word for International Financial Institutions, development professionals and civil society: it is a right given the developments at the international, regional and national legal frameworks. Even though the participation methods and its impact on governance and development may be debatable, that does not take away its value as a right which has to be enjoyed and fulfilled. Participation is crucial especially in the formulation, development and implementation of national plans such as the National Development Plan which is one of the key strategies for the development of any country. However, in practice, participation in the development of such plans remains obscure and a privilege reserved for a few. This study seeks to explore the right to participate in development particularly in the formulation of Uganda's National Development Plan. It is argued that the barriers and obstacles to participation in development in Uganda such as the inadequate legal framework; ignorance and lack of awareness of the planning process; limited timelines for participation; poverty; insufficient political will; disregard of input made by those consulted and the negative traditional and cultural norms which discourage participation of certain vulnerable groups should be addressed so that people can participate more effectively. In order to enable people to participate in a more active, free and meaningful manner it may be necessary to strengthen the legal framework; engage in judicial activism; use independent National Institutions; have effective empowerment strategies to enhance participation and consider development compacts, among other things.

List of Acronyms

ACHPR	African Charter on Human and Peoples' Rights
APRM	African Peer Review Mechanism
AU	African Union
CEDAW	Convention on the Elimination of All forms of Discrimination against Women
CERD	Convention on the Elimination of All forms of Racial Discrimination
CRC	Convention on the Rights of the Child
CSOs	Civil Society Organisations
DFID	Department for International Development
DFL	Doctors for Life
EAC	East African Community
EOC	Equal Opportunities Commission
EU	European Union
FAO	Food and Agriculture Organisation
HRW	Human Rights Watch
HURINET	Human Rights Network
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IFI	International Financial Institutions
HIV/AIDS	Human Immunodeficiency Virus/ Acquired Immune Deficiency Syndrome
IDP	Internally Displaced Persons
LGBTI	Lesbian, Gay, Bisexual, Transgender and Intersex
MDGs	Millennium Development Goals
NDP	National Development Plan
NGOs	Non-Governmental Organisations
NPA	National Planning Authority
NRM	National Resistance Movement
OECD	Organisation for Economic Co-operation and Development
PEAP	Poverty Eradication Action Plan
PRSP	Poverty Reduction Strategy Paper
SDGs	Sustainable Development Goals
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNDP	United Nations Development Programme
UPR	Universal Periodic Review
UN OHCHR	UN Office of the High Commissioner for Human Rights
UHRC	Uganda Human Rights Commission
WHO	World Health Organisation
WTO	World Trade Organisation

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Chapter One

Introduction

1.1 Background and context

Uganda is similar to many countries in Africa where human rights are mostly declaratory, that is only proclaimed in constitutions and other laws, rather than conclusive or definite in practice, because of the political and socio-economic context.¹ Even those countries that are considered to be doing well and good examples of 'African democracy' such as Kenya, South Africa, Senegal and Botswana still face several human rights challenges.² People in Africa have to continuously demand for their human rights and oppose with increasing difficulty the dictatorial tendencies by their governments to reduce the transparency and accountability of their leadership.³ Subsequently, human rights are functioning not only as legal entitlements but also as political instruments to marshal rebellion, protest, opposition, defence and collective action against oppression.⁴ The enjoyment of human rights often requires a long, enduring, dangerous and laborious struggle and defence.⁵ Although development has been the aspiration of many African countries after they had been freed from colonial subordination, it still remains a challenge and as has been pointed out by Sachs:

¹ See Amnesty International 'Africa 2017/2018' report available at:

<https://www.amnesty.org/en/countries/africa/report-africa/> (accessed 25 October 2018).

² See Human Rights Watch 'World Report 2018: Kenya and South Africa' (2018) 317 & 489, https://www.hrw.org/sites/default/files/world_report_download/201801world_report_web.pdf (accessed 28 May 2018). Also see Amnesty International 'The State of the World's Human Rights 2017/2018: Botswana and Senegal (2018) 96 & 321 available at: <https://www.amnesty.org/download/Documents/POL1067002018ENGLISH.PDF> (accessed 28 May 2018).

³ See African Commission Resolution on the Situation of Human Rights Defenders in Africa ACHPR/Res.345 (LVIII) 2016 <http://www.achpr.org/sessions/58th/resolutions/345/> (accessed 28 May 2018).

⁴ Also see B De Gaay Fortman 'Poverty as a failure of entitlement: Do rights-based approaches make sense?' in L Williams (Ed) *International Poverty Law: An Emerging Discourse* (2006) 34.

⁵ See M Sekaggya 'UN Special Rapporteur on the Situation of Human Rights Defenders, Final Report to the 25 Session of UN Human Rights Council' (2013) Para 57, A/HRC/25/55 available at: http://www.ohchr.org/EN/HRBodies/HRC/RegularSessions/Session25/Documents/A-HRC-25-55_en.doc (accessed 28 May 2018).

...governments and citizens alike have their eyes fixed on this light flashing just as far away as ever: every effort and every sacrifice is justified in reaching the goal, but the light keeps on receding into the dark.⁶

Despite the fact that Africa has a wealth of natural and human resources, it remains undeveloped because many nations suffer from corruption, political instability, civil unrest, war and poverty.⁷ Nevertheless, development, and the right to participate in development, remains an aspiration and a right. Article 22 of the African Charter on Human and Peoples' Rights (ACHPR)⁸ provides for the right to development including the right to participate in development which the African Commission on Human and Peoples' Rights has affirmed. Thus, the discussion on the right to participation in development in Uganda is pertinent as Uganda is one of the fastest growing economies in East Africa alongside Ethiopia, Kenya and Tanzania.⁹ Uganda's oil and gas sector has the potential to enhance development in the country and be of benefit to neighbouring countries, but all this is dependent on political stability.¹⁰

At the global level, the recognition for the right to development, which includes the right to participate in development, is still a challenge. Although the United Nations (UN) Declaration on the Right to Development, which was adopted more than 30 years ago, clearly provides for the right to development and the right to participate in development, there is still no consensus on the matter. According to the Report of the UN Special Rapporteur on the Right to Development, the European Union (EU) has demanded for further clarity on the right and there are still disagreements and a debate on the nature of State duties – internal and external and the criteria for measuring progress.¹¹ Due to the lack of agreement and clarity at the international level, the intergovernmental debate at the UN by the General Assembly, Human Rights Council

⁶ See W Sachs (Editor) *The Development Dictionary: A Guide to Knowledge as Power* (1992) 1.

⁷ Also see Global Policy Forum *Poverty and Development in Africa* (2018), available at: <https://www.globalpolicy.org/social-and-economic-policy/poverty-and-development/poverty-and-development-in-africa.html> (accessed 28 May 2018).

⁸ For more on development as a right in Africa see SD Kamga, *The Right to Development in the African Human Rights System* (2018).

⁹ See UN *World Economic Situation and Prospects* (2018) 109.

¹⁰ As above.

¹¹ See UN, 'Report of the Special Rapporteur on the Right to Development' (2017) 8, Paragraph 30 (a) A/HRC/36/49 available at: <https://undocs.org/en/A/HRC/36/49> (accessed 23 February 2018).

and the Working Group on the right to development has not gained much momentum. The discussion on the right to development, which includes the right to participate in development, has not advanced as fast as it should at the UN level which limits its respect, protection and fulfillment.

Nevertheless, most countries at the domestic level engage in national development planning in order to promote sustainable development and improve their peoples' quality of life showing that development is a matter of national importance. National development planning is considered vital to generate wealth, eradicate poverty and generally improve the welfare of the people in every country.¹² The national development plan of a country highlights the objectives and priorities of the country giving directions on allocation and use of resources.¹³ Development project failures have been attributed to the fact that the citizenry especially are often kept out of the processes of developing, formulating and implementation of the development plans.¹⁴ It has been shown that whenever people are involved and are actively participating in development projects much more is achieved with much less including in financial terms.¹⁵ Participation by the citizenry is thus recommended as a basic essential policy measure in the formulation and implementation of national development strategies.

Uganda like many other countries has developed several national development plans and has provided a policy and legislative framework favourable to participation in development. There are provisions in Uganda's Constitution requiring that citizens should participate in the development process.¹⁶ It is important to note that, Uganda is a poor developing country and majority of its citizens face numerous challenges in

¹² See M Bentley/UNEP *Planning for Change: Guidelines for National Programmes on Sustainable Consumption and Production* (2008) 34.

¹³ See UNESCO/NE Harrison and IL Murphy (Eds) *National, Regional and Global Institutions, Infrastructures and Governance: Encyclopaedia of Life Support Systems* (2010) 177.

¹⁴ See generally: G Mansuri & V Rao/The World Bank *Localizing Development: Does Participation work?* (2013); CR Taylor, 'The Right of Participation in Development Projects' (1994) Vol. 13: No. 1 *Penn State International Law Review* 69; MSI Diokno, *Human Rights Centred Development: Theory and Practice* (2004) 95; and S Hickey and G Mohan (Eds), *Participation from tyranny to transformation? Exploring new approaches to participation in development* (2004), among others.

¹⁵ Mansuri & Rao n 14 above.

¹⁶ Principle II (i) of the National Objectives and Directive Principles of the 1995 Constitution of the Republic of Uganda (as amended). Objective X of the National Objectives and Directive Principles of the Ugandan Constitution provides as follows: *The State shall take all necessary steps to involve the people in the formulation and implementation of development plans and programmes which affect them.*

terms of access to health services, water, shelter, education and other social amenities.¹⁷ Although the Ugandan economy is growing, the pace is still slow. Uganda has very high rates of corruption which affect business operations and service delivery.¹⁸ Moreover, inflation is high and there is: a decline in agricultural produce and other services; reduction in manufacturing and trading activities; and a weak financial sector unable to fully support economic activity.¹⁹ Recent economic updates indicate that the tax revenue performance is too low to support the country's development needs.²⁰ Tax collection only contributes 14% of Uganda's gross domestic product and according to World Bank, informality, tax exemptions and inefficiencies in revenue collection deny the country up to 40% of revenue.²¹ As such, various recommendations have been made including reduction of tax expenditures so as to raise revenues and enhancing public awareness, transparency, and civil society engagement to increase voluntary tax compliance.²² Although Uganda has had several decades of sustained economic growth and dramatic progress towards poverty reduction, the country has recently experienced a period of economic growth slowdown.²³ It is reported that the recent deceleration in growth affected all sectors of the economy and that the remarkable progress that Uganda had made towards reducing poverty since 1992 has been reversed.²⁴ In the period from 1992 to 2013, the national poverty rate declined from 56 percent to 19.7 percent.²⁵ However since

¹⁷ CIA, *The World Fact Book: Uganda* (2018) available at: <https://www.cia.gov/library/publications/the-world-factbook/geos/ug.html> (accessed 28 May 2018).

¹⁸ See Action Aid, *Corruption and the Service Delivery Tragedy in Uganda Stories from the Eastern Leg of the Anti-Corruption Caravan* (2014) Available at: http://www.actionaid.org/sites/files/actionaid/anti-corruption_report.pdf (accessed 28 May 2018).

¹⁹ See CIA n 17 above.

²⁰ See World Bank Group/RK Sebudde, MM Kajubi, T Stucka, J Maweje & RA Walker 'Uganda economic update, 11th edition: financing growth and development - options for raising more domestic revenues' (2018) 21-22. Available at: <http://documents.worldbank.org/curated/en/425631526323380885/Uganda-economic-update-11th-edition-financing-growth-and-development-options-for-raising-more-domestic-revenues> (accessed 25 May 2018)

²¹ As above.

²² As above.

²³ World Bank Group/RK Sebudde, TQ Wodon, J Maweje, *Uganda economic update: tenth edition –accelerating Uganda's development: ending child marriage, educating girls* (2017) Available at: <http://documents.worldbank.org/curated/en/553381512398131516/Uganda-economic-update-tenth-edition-accelerating-Ugandas-development-ending-child-marriage-educating-girls> (accessed 25 May 2018).

²⁴ As above.

²⁵ As above.

then it has rebounded, increasing to a preliminary 27 percent.²⁶ It has been suggested that for Uganda to again achieve higher rates of economic growth and poverty reduction, it must address two fundamental factors: its low levels of productivity and the vulnerability of its people to poverty.²⁷

For the last 32 years, Uganda has been governed by President Yoweri Museveni who won the last election in 2016 against Colonel Kizza Besigye amidst heavy opposition and concerns about the fairness and transparency of the process by the Commonwealth, United States, EU and African Union (AU) observer missions.²⁸ Although the Presidential elections were challenged by one of the Presidential Candidates, Mr. Amama Mbabazi, the Supreme Court declared that the President was validly elected as President of Uganda but made some recommendations for electoral reforms.²⁹ Recently, the Constitution (Amendment Bill),³⁰ proposed privately by a member of Parliament - Raphael Magyezi, was passed to remove the constitutional age limit for the President and extended the term of Members of Parliament by two years. The bill allows President Museveni to run for another term and was passed amidst protests from the minority opposition members of parliament and civil society.³¹ A constitutional petition was filed against the bill and the Court recently ruled that the

²⁶ As above.

²⁷ As above.

²⁸ See *Report of the Commonwealth Observer Mission, Uganda General Elections 18 February 2016*, <http://thecommonwealth.org/sites/default/files/inline/Uganda%20COG%20Report%20-%20Final%20-%20PRINT.pdf> (accessed 28 May 2018); *US Press Statement on the Results of Uganda's Presidential Elections, 20 February 2016*, available at: <https://ug.usembassy.gov/press-statement-on-the-results-of-ugandas-presidential-elections/> (accessed 28 May 2018); European Union Election Observation Mission, *Final Report Uganda Presidential, Parliamentary and Local Council Elections 18 February 2016*, https://eeas.europa.eu/sites/eeas/files/uganda-fr-forprint-14-04-2016_en_0.pdf (accessed on 28 May 2018); and African Union Commission, *Final Report of the African Union Election Observation Mission of the 18th February 2016 General Elections in The Republic Of Uganda*, https://au.int/sites/default/files/documents/33529-doc-report_of_the_african_union_election_observation_mission_to_the_18_february_2016_presidential_election_in_uganda.pdf (accessed 28 May 2018).

²⁹ *Amama Mbabazi V Museveni & Others* (Presidential Election Petition No. O1 of 2016) [2016] UGSC 3 (31 March 2016).

³⁰ No 2 of 2017.

³¹ See BBC News, 'Uganda MPs vote to scrap presidential age limit' 20 December 2017 available at: <https://www.bbc.com/news/world-africa-42434809> (last accessed on 19 June 2018). Also see: The Observer, '85% of Ugandans opposed to age limit amendment-survey' 9 December 2017 available at: <http://observer.ug/news/headlines/56340-85-of-ugandans-opposed-to-age-limit-amendment-survey.html> (accessed 19 June 2018). Also see Reuters/E Biryabarema, *Ugandan parliament passes law allowing Museveni to seek re-election*, 20 December 2017 available at: <https://www.reuters.com/article/us-uganda-politics/ugandan-parliament-passes-law-allowing-museveni-to-seek-re-election-idUSKBN1EE17D> (accessed 25 May 2018).

removal of the age limit was constitutional but held that the extension of the term of members of parliament was unconstitutional due to insufficient consultation and participation of the people.³²

1.2 Statement of the Problem

Participation is a widely accepted concept in development.³³ The concept of participation in development is not perceived as a threat and has become a politically correct slogan.³⁴ Participation in development is economically appealing to ensure the effectiveness of programmes and has become a good fundraising device that encourages the inclusion of various actors in the development process including business corporations.³⁵ It is thus not surprising that many countries, such as Uganda, have adopted policy, legislative and other measures to support the participation of the citizenry in development.

Although participation in development is a legislative, policy or a national objective directive requirement in Uganda, the practice is not clear. Though Uganda, like many other countries, has developed several national development plans there are questions relating to the practical aspects of participation by the citizenry. Is participation in development a myth or reality in practice? Despite the wide acceptance of participation as a key development policy, there are numerous challenges in its implementation. If the challenges in its implementation are not addressed, there will be difficulties in enjoyment of this right and it will continue to be violated.

1.3 Research Questions

The study thus seeks to answer one overall question: What is the role of law in implementing the right to participate in development?

³² *Male Mabirizi Vs. Attorney General*, Constitutional Petition No. 49/ 2017; *Uganda Law Society Vs. Attorney General*, Constitutional Petition No. 03/ 2018; *Hon Gerald Kafureeka Karuhanga & Others Vs. Attorney General*, Constitutional Petition No. 05/2018; *Prosper Businge & Others Vs. Attorney General*, Constitutional Petition No. 10/ 2018; *Abaine Jonathan Buregyeya Vs. Attorney General*, Constitutional Petition No. 13/ 2018.

³³ Generally, see B Cooke and U Kothari (Editors), *Participation: The New Tyranny?* (2001) and A Cornwall 'Historical perspectives on participation in development' (2006) *Commonwealth and Comparative Politics* Vol. 44 Issue 1 62-83.

³⁴ As above.

³⁵ See M Rahnema, 'Participation' in Sachs (n 6 above) 117-120.

The study will also analyse the practice in Uganda and address other follow-up questions including: What is the conceptual and legal framework for participation in development in Uganda? What are the barriers and obstacles to participation in national development in Uganda? How can participation in development by the citizenry be enhanced?

1.4 Objectives and Relevance of the Study

The purpose and objective of the study is to highlight the importance of the right to participation in development in Uganda. This study advances research on strategies to ensure that national development planning is done in a more participatory manner. Furthermore, the study also clarifies the conceptual links between participation in development and the human rights obligations of states with particular reference to Uganda.

1.5 Assumptions

People's participation in development is key for the success of development planning and projects. Participation in development is thus established as a right³⁶ and confirmed by practice especially in development cooperation.³⁷ The right to participation in development is also part of the general right to take part in the conduct

³⁶ The right to participate in development is specifically provided in article 2 and 8 of the UN Declaration on the Right to Development. It is also implied in articles 1 and 25 of the International Covenant on Civil and Political Rights; article 1 and 15 (1) (a) of the International Covenant on Civil and Political Rights; articles 7 and 14 of the Convention on the Elimination of All forms of Discrimination Against Women; articles 9, 19, 24, 26, 29, 30; article 31 of the U N Convention on the Rights of the Child; articles 3(g), 4 (c) and 17 of the Constitutive Act of the African Union; article 3 (1) of the Amendment to the Constitutive Act of the African Union; articles 13, 17 (2), 22 and 24 of the ACHPR; preamble and articles 2 (1) (c), 9, 18, 19 and 23 of the Maputo Protocol; articles 13 and 14 of the ACRWC; articles 16 (1) (c), 17 (3) of the African Union Convention on the Conservation of Nature; article 12 of the AU Convention on Preventing and Combating corruption; articles 3 (7), 27, 29, 30, 31 of the African Charter on Democracy, Elections and Governance; articles 2 (3) and 5 of the Statutes of the Economic, Social and Cultural Council of the African Union, among others. UN Treaty Bodies have asserted the right to participation in development see: Para 5 of the Human Rights Committee, General Comment 25 (57), General Comments under article 40, Para 4, of the International Covenant on Civil and Political Rights, Adopted by the Committee at its 1510th meeting, U.N. Doc. CCPR/C/21/Rev.1/Add.7 (1996). The African Commission on Human and Peoples' Rights has affirmed it in the *Endorois Case*.

³⁷ See: J Michel *Trends in the Practice of Development Cooperation: Strengthening Governance and the Rule of Law* (2013) 6; Organisation for Economic Cooperation and Development, *Participatory Development and Good Governance* (1995) 8-11 available at: www.oecd.org/dac/governance-development/31857685.pdf (accessed 7 August 2018); OECD, *The Paris Declaration on Aid Effectiveness* (2005) and the *Accra Agenda for Action*, (2008) available at: <http://www.oecd.org/dac/effectiveness/34428351.pdf> (accessed 7 August 2018).

of public affairs, which is not just limited to elections.³⁸ The right to take part in the conduct of public affairs includes aspects of public administration, and the formulation and implementation of policy, including that relating to development, at international, national, regional and local levels.³⁹

Thus, participation in development should not only be guaranteed as a right through comprehensive legal provisions but also specific efforts have to be made to ensure that the right is realised including for vulnerable groups. In particular, it is important to have effective and functioning institutions, among other things. Ensuring participation in development is dependent on many factors including political will, socio-economic conditions and the human rights situation, among other things.

1.6 Methodology

The study was primarily a desk/library research. A desk review was carried out and literature on the subject was perused. This included; treaties, conventions, resolutions, declarations, constitutions, statutes, case law, general comments and concluding observations and recommendations of treaty bodies of the UN and the African Union (AU), policies, development plans, human rights action plans, textbooks, journal articles, reports and any other relevant literature.

The purpose of the desk review was to critically, analyse, compare and contrast various approaches of participation in development globally and regionally with specific reference to Uganda and how participation can be enhanced. Specifically, participation in development was considered in terms of the formulation and implementation of Uganda's National Development Plan and other development policies including those preceding the national development plan such as the Poverty Eradication Action Plan, among others.

³⁸ See General Comment No.25: Article 25 (Participation in Public Affairs and the Right to Vote), 'The right to participate in public affairs, voting rights and the right of equal access to public service' (1996) CCPR/C/21/Rev.1/Add.7.

³⁹ See: article 21 (1) of the UDHR; article 25 of the ICCPR; UN Human Rights Committee, 'General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote), 'The right to participate in public affairs, voting rights and the right of equal access to public service' (1996) CCPR/C/21/Rev.1/Add.7 Para 5.

Some of the information was collected from the researcher's own observations and participation in the national development planning process as the Director of Monitoring and Inspections at the Uganda Human Rights Commission and from her work as a Consultant on the development of the national action plan on human rights which is part of the national development plan.

1.7 Limitations

The study mainly examines the legal principles that underpin participation in development and its implementation particularly with respect to formulation and implementation of the National Development Plans and development projects in Uganda. The study does not delve deep into issues of whether participation works or not or whether it is beneficial to development. The discussion is limited more to the legal requirement of participation and how it is implemented.

1.8 Literature Review

Participation in development has been the subject of several scholars, activists, development professionals, UN, IFI and development partners. The literature is composed of arguments for⁴⁰ and against⁴¹ participation in development and a response⁴² to those arguments. Also, some of the literature is based on the question of whether the right to development, to which participation is central, is a right⁴³ or not⁴⁴ or its 'intermediary'.⁴⁵ Other literature questions the effectiveness of the methodologies used in participation and makes proposals for improvements so as to fully reap the benefits of participation.⁴⁶ In a nutshell, the arguments for participation

⁴⁰ See: UN, Department of Economic and Social Affairs Division for Public Administration and Development Management, *Participatory Governance and the Millennium Development Goals (MDGs)* (2008); A Cornwall and J Gaventa, *From Users to Makers and Shapers: Repositioning Participation in Social Policy* (2001).
www.eldis.org/vfile/upload/1/document/0708/doc2894.pdf (accessed 21 June 2014).

⁴¹ See Cooke and Kothari (n 33 above).

⁴² S Hickey and G Mohan (Eds.) *Participation from Tyranny to Transformation* (2004).

⁴³ See UN Human Rights, Office of the High Commissioner for Human Rights, *Realizing the Right to Development, Essays in Commemoration of 25 Years of the United Nations Declaration on the Right to Development*, 2013. Also see UN, Department of Economic and Social Affairs Division for Public Administration and Development Management, n 36 above.

⁴⁴ F Kirchmeier 'The Right to Development-where do we stand? State of the debate on the Right to Development, Dialogue on Globalization' (2006) 11 *Occasional Papers* No.23.

⁴⁵ BA Andreassen and SP Marks 'Conclusions' in BA Andreassen and SP Marks (Eds) *Development as a Human Right: Legal, Political and Economic Dimensions*, (2006) 305.

⁴⁶ SC White *Depoliticising development: the uses and abuses of participation, Development NGOs and Civil Society* (1996) available at www.rrojasdatabank.info/eade142-155.pdf

in development are that if it is correctly done it can improve the situation and resolve issues, for example, of wealth inequality and a diverse community.⁴⁷ The arguments against participation are that: 'participation has failed to deliver on its promises and even served to legitimise a perpetuation of the status quo'.⁴⁸ In response to the arguments against participation, it has been submitted and argued by some authors that participation has delivered on its transformative potential and, that under particular conditions, participation is able to bring about change and somewhat address issues of exclusion, injustice or unequal power relations.⁴⁹ In particular, transformative participation must be able to challenge authority, raise issues relating to discrimination to change the status quo and ultimately depends on the environment and capacity i.e. knowledge base and the ability to engage of the citizens.⁵⁰ The discussion of the literature below is a sample of the literature that focuses on various issues relating to the right to participation in development including definition, scope, importance, recognition, factors that enhance the right, participation in development in Africa and the right to participate in development in Uganda.

Definition

The UN Commission on human rights defined participation in development as: 'the principal means by which individuals and peoples collectively determine their needs and priorities and ensure the protection and advancement of their rights and interests.'⁵¹

Participation in development is thus deemed central for any decision making that relates to people's wellbeing and this is echoed by various authors.⁵² Diokno, in a similar way also defines participation in development as something that involves 'more than mere consultation.'⁵³ She argues that: 'participation is about directing, owning,

(accessed 21 June 2014). A Cornwall, 'Unpacking 'Participation': models, meanings and Practices' (2008) 269-283 *Oxford University Press and Community Development Journal* Vol. 43 No. 3 269.

⁴⁷ See generally Mansuri and Rao n 14 above.

⁴⁸ Cooke and Kothari (n 33 above).

⁴⁹ Hickey and Mohan (n 42 above).

⁵⁰ As above.

⁵¹ UN Commission on Human Rights 'Global Consultation on the Right to Development as a Human Right,' 46th Sess., Agenda Item 8, at 65-66, U.N. Doc. E/CN.4/1990/9/Rev.1 (1990) Para 150.

⁵² See Taylor (n 14 above) 69; P Oakley 'The Concept of Participation in Development' (1991) 20 *Landscape and Urban Planning* 115-116.

⁵³ MSI Diokno *Human Rights Centred Development: Theory and Practice* (2004) 93.

managing, and controlling the course of development that is aimed at strengthening people's claims to and the realisation of human rights.⁵⁴ Participation in development is considered as a fundamental right through which the right to development can be enjoyed and fulfilled.⁵⁵

Participation in development has also been defined in the context of empowerment of marginalised groups. Participation in development has been referred to by Wolfe as: 'the organised efforts to increase control over resources and regulative institutions in given social situations, on the part of groups and movements hitherto excluded from such control.'⁵⁶

Scope

Gaventa asserts that the scope of participation in development goes beyond just involvement or engagement in development projects to participation in the formulation of development policy.⁵⁷ Participation in development is thus not just limited to the economic, social and cultural issues but also delves into political matters including democratic governance.⁵⁸ Indeed Cornwall and Gaventa, considering participation in development in relation to citizenship, associate it with rights especially civil and political rights but also deem economic, social and cultural rights as necessary for their fulfilment.⁵⁹

Also, in terms of scope, Diokno states that people may participate in the development process either directly, individually, through advocates and collectively through organisations.⁶⁰ Gaventa and Valderrama argue that participation in development takes various forms including: in the activities of development agencies, political participation of citizens in elections and decentralization.⁶¹

⁵⁴ As above.

⁵⁵ UN Commission on Human Rights (n 51 above) Paras 82 & 110.

⁵⁶ M Wolfe *Participation: The View from Above* (1983) 2 cited by D Goulet 'Participation in Development: New Avenues' in VK Pillai & LW Shannon *Developing Areas: A Book of Readings and Research* (1995) 319.

⁵⁷ Cited in Norad 'A framework for analyzing participation in development' 2013 6.

⁵⁸ As above. Also see generally A Cornwall and J Gaventa 'From Users and Choosers to Makers and Shapers: Repositioning Participation in Social Policy' (2001) 127.

⁵⁹ Cornwall and Gaventa above.

⁶⁰ Diokno (n 53 above).

⁶¹ Generally, see J Gaventa and C Valderrama 'Participation, Citizenship and Local Governance' Background note prepared for workshop on Strengthening participation in local governance (1999).

Importance of participation in development

According to the United Nations Development Programme (UNDP), Human Development Report 2000, participation in development is key for prevention of conflict and human rights protection.

Economic policy-making behind closed doors violates the right to political participation—and is susceptible to the corrupting influences of political power and big money. It creates a disabling environment, ripe for human rights failures.⁶²

Claridge highlights the work of several other authors such as Chamala,⁶³ Kelly and Van Vlaenderen,⁶⁴ Kolavalli and Kerr,⁶⁵ Price and Mylius,⁶⁶ Stiglitz,⁶⁷ Gow and Vansant,⁶⁸ White,⁶⁹ Curry,⁷⁰ Storey⁷¹ and Golooba-Mutebi⁷² and discusses the importance of participation in development and in a nutshell it is for efficiency; empowerment of communities; promoting ownership of development efforts; motivation for sustainability; use of local knowledge; and promoting accountability, among other things.⁷³

Mansuri and Rao, in a World Bank Study, state that participation in development is important for poverty reduction, building social capital and increasing accountability in governance.⁷⁴ Furthermore, they argue that participation is supposed to enable the

⁶² See UNDP *Human Development Report* (2000) 8.

⁶³ S Chamala 'Overview of participative action approaches in Australian land and water management' in K Keith (ed), *Participative approaches for land care* (1995) 5-42.

⁶⁴ K Kelly and H Van Vlaenderen 'Evaluating participation processes in community development' (1995) 18 *Evaluation and Program Planning* 371-383.

⁶⁵ S Kolavalli and J Kerr J 'Scaling up participatory watershed development in India' (2002) 33 *Development & Change* 213-235.

⁶⁶ S Price and B Mylius *Social analysis and community participation: guidelines and activity cycle checklist* (1991).

⁶⁷ JE Stiglitz 'Participation and development: perspectives from the comprehensive development paradigm' 6 (2002) *Review of Development Economics* 163-182.

⁶⁸ D Gow and J Vansant 'Beyond the rhetoric of rural development participation: How can it be done?' (1983) *World Development* 11, 427-443.

⁶⁹ A White *Community participation in water and sanitation: concepts, strategies and methods* (1981).

⁷⁰ M Murray and J Greer *Rural development in Ireland: a challenge for the 1990s* (1993).

⁷¹ D Storey 'Issues of integration, participation and empowerment in rural development: The case of LEADER in the Republic of Ireland' (1999) 15 *Journal of Rural Studies* 307-315.

⁷² F Golooba-Mutebi 'Reassessing popular participation in Uganda' (2004) 23 *Public Administration and Development in Press* (2004) 289-304.

⁷³ T Claridge 'Designing social capital sensitive participation methodologies' *Social Capital Research* (2004) 26-27.

⁷⁴ See Mansuri & Rao/The World Bank (n 14 above) 15.

participants to state their preferences which can then be aligned in service delivery.⁷⁵ They argue that participation in development has the potential for transformation and the realisation of various development goals but for it to work certain conditions would have to be fulfilled.⁷⁶ They assert that participation must be 'practical', 'bottom up' and 'deliberative' and that for it to work the state must be 'strong and functioning,' among other things.⁷⁷ They assert that participation in development on its own has its 'intrinsic value' and that people may just appreciate having their views heard.⁷⁸ Moreover, they say that participation has the capacity to make agents of the state forego their own private interests for the public good.⁷⁹ Also, that participation is often used to increase the provision of public goods and services and to reduce marginalisation and discrimination.⁸⁰

Similarly, Hickey and Mohan argue that participation can assist in addressing issues of exclusion, injustice and unequal power relations especially if people have the knowledge, skills, capacity and the support to participate in development.⁸¹ White also asserts that participation in development is a political process that can bring about change in terms of who has control but also cautions that it could also cement and replicate the prevailing power-relations.⁸² Cornwall and Gaventa aver that recognising people as citizens and engaging them as the 'makers and shapers' of social policies can generate policies that are more responsive to people's everyday concerns, more responsive government and have positive effects on citizens' experiences of and contributions to service provision.⁸³

Recognition of participation in development as a right

Most literature on the subject of participation in development is from a development perspective and it is often discussed as a development practice and not necessarily

⁷⁵ Mansuri & Rao/The World Bank (n 14 above) 73.

⁷⁶ Mansuri & Rao/The World Bank (n 14 above) 87.

⁷⁷ As above.

⁷⁸ Mansuri & Rao/The World Bank (n 14 above) 89.

⁷⁹ Mansuri & Rao/The World Bank (n 14 above) 90.

⁸⁰ As above.

⁸¹ Generally, see S Hickey and G Mohan (Eds) 'Participation from tyranny to transformation? Exploring new approaches to participation in development' (2004).

⁸² Generally, see SC White 'Depoliticizing Development: the uses and abuses of participation' *Development in Practice* (1996) Vol.6, No.1.

⁸³ Generally, see Cornwall and Gaventa (n 58 above).

as a right. Nevertheless, some authors such as Cornwall and Zillman, among others have argued that, participation in development is not only necessary for development but is a right stipulated under the legal framework and solidified in practice.⁸⁴

Other authors such as Wang dismiss participation in development as a right in the context of the right to development on the basis of the fact that there is no consensus yet on the right to development at the global level. They argue that the right to development, which is central to the right to participation in development, is expounded in a declaration that is soft law and not necessarily legally binding.⁸⁵ However, it is important to stress that the right to participate in development is a binding right in Uganda as provided in the Constitution, as discussed earlier and also given the fact that Uganda is party to the African Charter.

Nevertheless, the subject of the right to development and the right to participate in development is still not settled especially at the global level. As such Andreassen and Marks assert that the right to development is an 'intermediary' right and argue that: although the right to development is grounded in international law, it has not yet advanced to establish clear obligations for States and that it is still evolving.⁸⁶ Following Andreassen and Marks argument would mean that the right to participate in development as enunciated in the UN Declaration on the Right to Development is still sprouting.

Miller, VeneKlasen and Clark⁸⁷ argue that in order to enhance the right to participation in development there would be need for clarification in the concept. Furthermore, they

⁸⁴ Generally, see: A Cornwall 'Historical Perspectives on Participation in Development,' *Commonwealth and Comparative Politics* (2006) 62 Vol. 44, No.1; DM Zillman, DM, A Lucas, and GR Pring (Eds) *Human Rights in Natural Resource Development: Public Participation in the sustainable Development of Mining and Energy Resources* (2002); and Global Initiative for Economic, Social and Cultural Rights 'A rights-based approach to participation: A practitioners Guide' (2014).

⁸⁵ See X Wang 'On the Right to Sustainable Development: Foundation in Legal Philosophy and Legislative Proposals' in SP Marks (Editor) *Implementing the Right to Development: The Role of International Law* (2008) 46.

⁸⁶ See BA Andreassen and SP Marks 'Introduction' and 'Conclusions' in BA Andreassen and SP Marks (Eds) *Development as a Human Right: Legal, Political and Economic Dimensions*, (2006) 49, 305-306.

⁸⁷ Generally, see V Miller, L VeneKlasen and C Clark 'Rights-based Development: Linking Rights and Participation – Challenges in Thinking and Action,' (2005) *IDS Bulletin* 36.1 *Developing Rights*.

state that in order to recognise and fulfil the right there is need to have changes in strategy and skillsets so as to strengthen the human rights framework and achieve legal reform. They recommend increased organisation by the citizenry to advocate for legal and policy change. Similarly, Wang, asserts that in order for any right to be recognised and realised it can only be through positivism and not just natural law.⁸⁸ She emphasises the need to create legal principles and legal systems to enforce the right to sustainable development, which includes the right to participate in development, instead of having it as ‘soft law’.⁸⁹ Wang also argues that there should be remedies available where the right is violated.⁹⁰

Factors that affect participation in development

Mansuri and Rao emphasise the importance of institutions and mechanisms to ensure accountability besides having local civil society.⁹¹ They note the importance of donors and effective CSOs but emphasise that these cannot erode the need for a ‘functional state’ to promote participation in development.⁹² Moreover, they stress the need for interventions which promote judicial and independent oversight over the development process and right to access information and freedom of media.⁹³ They argue that participation in development works best where the state is responsive, democratic and creates a conducive environment.⁹⁴ As such they note that the context is key and that development projects must have strong inbuilt mechanisms for learning and adjustment as may be required in the circumstances.⁹⁵ They recommend that in order for participation in development to have any transformative effect, in terms of changing social and political systems, there must be a flexible development approach suitable to the local context with an efficient monitoring and evaluation mechanism, among other things.⁹⁶

Diokno similarly argues that people must be organised and that independent institutions and organisations at the local, regional and national levels must be

⁸⁸ Wang n 85 above.

⁸⁹ As above.

⁹⁰ As above.

⁹¹ Mansuri & Rao (n 14 above) 88.

⁹² Mansuri & Rao (n 14 above) 287.

⁹³ Mansuri & Rao (n 14 above) 147.

⁹⁴ Mansuri & Rao (n 14 above) 88 and 288.

⁹⁵ Mansuri & Rao (n 14 above) 288, 289, 290, 295.

⁹⁶ Mansuri & Rao (n 14 above) 288-290, 304.

respected and promoted.⁹⁷ She also asserts that there must be formal or legal mechanisms so that people can question decisions or challenge decisions that have been taken in terms of raising complaints including demanding for compensation, restitution and holding duty bearers accountable.⁹⁸ She also states that the involvement of all actors relevant to the development process such as the claim holders, duty holders and other actors including media, religious organisations, nongovernmental organisations, trade unions and federations, women's organisations, political parties, business or professional bodies, among others.⁹⁹

Uvin¹⁰⁰ argues that it is more important to have an enabling and conducive political environment than the establishment of new human rights institutions and legislation in order to promote the human rights-based approach to development, in which participation in development is key. He emphasises that the various principles propounded by the human rights-based approach including participation in development for the empowerment of the marginalised and vulnerable groups, confronting discrimination and tyranny and promoting accountability cannot all be resolved just within the ambit of the law and that they also require political engagement which he regards as more relevant.

Cooke and Kothari argue that the proponents of participatory development are naïve about the complexities of power and power relations in the development process including: between facilitators and participants, among participants, between donors and beneficiaries and in terms of knowledge and social norms.¹⁰¹ Similarly, others have also pointed out barriers to participation in development such as power relations; absence of genuine political will and the quality of participation.¹⁰²

Cornwall and Gaventa recommend that participation in development should be part of citizenship and that policy makers and researchers have to: explore more avenues to ensure people-centred planning; ensure that decentralization is accompanied by resources; and learn from other successful citizen-driven participation in development

⁹⁷ Diokno (n 53 above) 94.

⁹⁸ As above.

⁹⁹ As above.

¹⁰⁰ P Uvin 'From the right to development to the rights-based approach: how 'human rights' entered development' (2007) Vol. 17, No. 4/5 *Development in Practice* 597-606.

¹⁰¹ Cooke and Kothari (n 33 above).

¹⁰² SIDA 'Participation in Democratic Governance' (2002) 17-18.

practices.¹⁰³ Furthermore, Cornwall and Gaventa caution against foreign models of participation in development that do not consider the realities and condition of the states in which they are applied including the structure and capacity of the state and non-state actors to deliver services.¹⁰⁴

Gaventa and Valderrama recommend that for effective participation in development barriers of power relations, weak citizen organisation, poor participatory skills, lack of political will, insufficient levels of participation and inadequate financial resources have to be overcome.¹⁰⁵ They thus propose various strategies including: increased participatory planning; civic education; capacity building including training for officials, advocacy, establishment of alliances and collaboration, participatory budgeting and increased accountability of elected officials to citizens.¹⁰⁶

Participation in development in Africa

With regard to participation in development in Africa, Bugnicourt¹⁰⁷ argues that it is a 'pre-condition for African development'. Bugnicourt explores the issue of whether popular participation can constitute a decisive element in the future of development of Africa. He discusses the constraints of popular participation in Africa and alludes to the imposition of a simplified model which does not fit the different realities, the top-down organisation of participation, the varying cultural responses to participation, the distortion of the concept by governments, the anti-participatory orientation of the educational and administrative systems, past scorn for traditional knowledge, and the heavy burden participation places on the poorest. Bugnicourt proposes some of the areas for priority attention such as social development and public services in order for popular participation to become a generalized and effective reality in Africa. He recommends that a new policy has to be put into effect.

Olowu¹⁰⁸ argues that the remedial implementation of human rights in Africa requires an integrative approach which includes popular participation. Olowu, contends that the promotion of broader and direct participation is key for any African agenda for

¹⁰³ Cornwall and Gaventa (n 58 above).

¹⁰⁴ As above.

¹⁰⁵ Gaventa and Valderrama (n 61 above).

¹⁰⁶ As above.

¹⁰⁷ J Bugnicourt 'Popular Participation in Development in Africa' (1982) 58-77 in UNICEF, *Assignment Children*, 59/60.

¹⁰⁸ D Olowu *An integrative rights-based approach to human development in Africa* (2009).

development to be successful and sustainable.¹⁰⁹ He asserts that Structural Adjustment Programmes and Highly Indebted Poor Countries Initiatives were applied in African States without much popular participation and that this created disparities between their objectives and results.¹¹⁰ He insists that proactive citizen participation in the decision making process provides an opportunity for violations of economic, social and cultural rights to be exposed, remedied and prevented.¹¹¹ He emphasises that civil society plays an important role given the levels of illiteracy and ignorance in Africa because they have to raise awareness, mobilise masses and carry out education to enhance the participation of citizens.¹¹²

Killander¹¹³ discusses participation in the context of the African Peer Review Mechanism (APRM). He argues that participation, transparency and accountability are as important as human rights. He cautions against the use of participation to stifle minority views as this would conflict with other rights. He recommends the human rights-based approach which requires consensus building with consideration for all the human rights implications of all policy prescriptions. He highlights the challenges of participation in development initiatives including the APRM such as lack of awareness, limited time frames and disregard of input given. He concludes that although participation during the APRM process is vital, stakeholder participation was difficult and the APRM was criticised for not being participatory.

Mukamunana¹¹⁴ asserts that participation is a mechanism for promoting good governance in developing nations. She argues that participation is a means of strengthening relevance, quality and sustainability of development projects. Furthermore, she states that the centralised system is inadequate in terms of participation, equity, efficiency and effectiveness and that in order to enhance participation developing countries have decentralised decision making. She notes that

¹⁰⁹ Olowu (n 108 above) 283.

¹¹⁰ Olowu (n 108 above) 256-257.

¹¹¹ Olowu (n 108 above) 238.

¹¹² Olowu (n 108 above) 281.

¹¹³ UM Killander 'The Role of the African Peer Review Mechanism in inducing compliance with Human Rights' unpublished LLD Thesis, University of Pretoria, 2009, 83-117.

¹¹⁴ R Mukamunana 'Challenges of the New Partnership for Africa's Development: A Case Analysis of the African Peer Review Mechanism' unpublished PhD Thesis, University of Pretoria, 2006.

the weak civil society in most African States affects the meaningful participation in and contribution to the APRM process.

Kamga,¹¹⁵ while examining the impact of the decision of the African Commission on Human and Peoples' Rights in the *Endorois* case,¹¹⁶ on the realisation of the right to development, argues that the case explains the threshold of people's participation needed in development endeavors especially in the case of indigenous people. Kamga argues that this particular case set the benchmark for participation needed for the realisation of the right to development and that "prior informed consent" is the minimum standard to be achieved by states before undertaking any development endeavours in indigenous peoples' communities. Kamga also argues that the right to participation is an inalienable right and a cornerstone of development which everyone is entitled to without discrimination.¹¹⁷

The authors on participation in development in Africa thus contend that participation in development is essential and necessary as it enhances the enjoyment of human rights especially economic, social and cultural rights. However, they also note challenges such as the fact participation has to be adopted to fit the African context, the lack of awareness, limited timelines, and weak civil society, among others that need to be addressed.

Participation in development in Uganda

Mbyemeire and others¹¹⁸ note that there is a linkage between participation in development and the development programmes in Bushenyi District in Uganda. They argue that the participation of people in various programmes actually led to improvement in the well-being of the people in terms of access to basic social services such as access to education, improvement in income and infrastructure, among other things. They assert that participation in development is necessary for the

¹¹⁵ SAD Kamga 'The right to development in the African human rights system: The Endorois case' (2011) *De Jure* 23 381-391.

¹¹⁶ *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) Vs. Kenya*, Communication No. 276/03 (*Endorois Case*).

¹¹⁷ SAD Kamga 'Human Rights in Africa: Prospects for the realization of the right to development under the New Partnership for Africa's development,' unpublished LLD Thesis, University of Pretoria, 2011.

¹¹⁸ Generally, see D Byabashaija, M Tumwesigye, L Mbabazi, AM Kahara, CA Afikwu-Abba, 'Community 'Participation and Rural Development in Bushenyi District, Western Uganda' (2016) 21 *Journal of Asian Development* ISSN Vol. 2, No. 2.

implementation of community development projects and programmes. Furthermore, that participation also helps in promoting accountability, sustainability, efficiency and availability of resources including finances. They commend the collaborative efforts taken by the district in development planning, implementation and monitoring and evaluation of development projects. They argue that this promotes 'ownership' of the development projects.

The available literature does not adequately cover participation in development as a right. Moreover, there is not much written particularly in relation to participation in the development of national development plans, more so with specific reference to Uganda. This study will argue that participation in development is a right especially under the African human rights instruments. However, the study concedes that in some respects the right to participation in development is still evolving as a practice and as a legal right especially at the international level. In Uganda, the right is provided in the national objectives and directive principles of the Constitution and not necessarily in the Bill of Rights. However, even where participation in development is not particularly provided for, the practice affirms it. Furthermore, the study asserts that the right to participate in development is dependent on strong political will, capacity of the citizens to participate, the methodologies used and resources available for its implementation.

The study covers the issue of participation in development beyond the political and legal commitments made at the global and regional levels to the realities at the national level. The study identifies the challenges facing the implementation of the right to participate in development and explores the opportunities for its implementation in relation to national development plans and other development projects. The right to participation in development is traced from the UN and African human rights systems right up to the national level including an examination of other African Constitutions and National Development Plans and other appropriate documentation and literature.

1.9 Structure of the Study

The study is divided into six chapters.

Chapter 1 is the introduction to the study which spells out the study's background, context, research problem, hypothesis, methodology and approach, significance, literature review, scope and limitations, among other things.

Chapter 2 covers the conceptual framework of participation in development. It also covers the legal framework of participation in development at the international and regional levels. The study affirms that participation is not only important for democracy, rule of law, social inclusion, development and human rights protection but is also a right. Participation in development is deeply embedded in the legal human rights framework at the UN and the regional levels.

Chapter 3 generally covers the right to participate in development in Uganda and particularly discusses the legal framework and the general practice. This Chapter provides a background of participation in development in Uganda right from the pre-colonial times to the present. It also discusses: the framework for participation in development through decentralization; the current national legal framework; operations of the national Human Rights Institutions and the National Planning Authority; and participation by affected individuals, Non-Governmental Organisations, vulnerable groups and development partners.

Chapter 4 covers the barriers or obstacles to participation in development in Uganda. The study identifies several factors including: inadequacies of the law and its weak implementation, lack of understanding of the development planning process, lack of resources, lack of access to information, lack of resources, limited timelines, poverty, lack of political will, culture and traditional values, lack of special measures to enhance the participation of vulnerable groups and the relationship between CSOs and government.

Chapter 5 covers best practices and strategies on how participation in development can be enhanced in Uganda. The study identifies several practices such as: comprehensive legislation and its effective enforcement; independent institutions including national development planning authorities; national human rights institutions; civil society and the judiciary. Furthermore, the study propounds the need for temporary special measures to enhance participation for vulnerable groups;

independent media; human rights education; use of international and regional mechanisms; and development compacts. It is argued that each of the proposed practices is not sufficient on its own and can only work in an interdependent manner with the others, among other factors.

Chapter 6 has the conclusion and recommendations. The study asserts that participation in development is a right and makes several recommendations on how to enhance the right to participate in development in Uganda including legislation; strengthening key institutions; capacity building for CSOs; human rights education and use of the media; special measures; strategic litigation; use of the African Commission and African Court on Human and Peoples' Rights and development compacts, among other things.

Chapter Two

Conceptual and legal framework for participation in development

2.1 Introduction

This chapter covers the conceptual and legal framework of participation in development. It starts off with a discussion of the concept of participation and its linkages with other principles before delving into the legal framework at the UN and the regional levels.

2.2 Concept of participation

Participation is generally regarded as a political activity which has influence on governmental activities and policies either directly or indirectly at the various levels of the political system.¹ Participation enables those who are affected to take part in decision making not only through the vote where they chose their leaders, but also in general determining how they want to be governed in terms of formulation of public policies, plans and laws, among other things.² Participation has been widely accepted and has been described using several words which are often used interchangeably such as: 'citizen involvement'; 'political participation'; 'popular participation'; 'community involvement'; and 'stakeholder participation', to mention but a few.

Participation in the conduct of public affairs and in the cultural life of the community has been a matter of concern for centuries. Aristotle, a famous Greek Scholar, said that participation of a citizen in the affairs of the state is essential to the development and fulfilment of the human personality.³ He argued that to be excluded from politics, as was often the case for slaves during his time, meant that one did not fully develop

¹ C Pateman *Participation and Democratic Theory* (1970) 1 and PJ Conge 'Review Article: The Concept of Political Participation: Toward a Definition' (1988) *20(2) Comparative Politics* 242.

² Conge as above.

³ See JM Cohen and NT Uphoff 'Participation's place in rural development: seeking clarity through specificity' (1980) Vol. 8(3) *World Development* Elsevier 214 and I Hadiprayitno *Hazard or Right? The Dialectics of Development Practice and Internationally Declared Right to Development with Special Reference to Indonesia* (2009) 102.

the faculty of reason or sense of responsibility for other peoples' welfare and a disposition toward prudent and balanced judgements.⁴ Participation is also regarded as an important aspect of development which contributes to the enjoyment of human rights ensuring the wellbeing and affirming the dignity and worth of human beings. Participation is asserted as an important factor and condition for development.

2.3 Linkages between participation in development and other principles

Participation in development cannot be considered in isolation. The effectiveness of citizen participation in development is dependent on several factors such as democracy, rule of law, social inclusion and respect for human rights, among other things. In practice and theory, the concept of participation in development is grounded and linked to other principles such as: democracy and decentralization, rule of law, social inclusion, development and respect for and protection of human rights⁵ which are interlinked and will further be discussed below.

2.3.1 Participation in development, democracy and decentralization

Participation in development has its foundations in democracy and is an important part of democracy. A quick connection can be drawn from the simple definition of a democratic government by the US President Abraham Lincoln: '...government of the people, by the people, for the people'.⁶

Such government as described by Lincoln definitely requires participation of its citizens and their input in decisions that affect their lives. Citizens play a major role in democracy such as: voting; being voted for; debating public issues; attending community meetings; petitioning government; protesting; and active membership in independent non-governmental organisations (NGOs) and CSOs. Participation in a democracy has been affirmed by many others.⁷

⁴ Cohen and Uphoff (n 3 above) 215.

⁵ See S Mcinerney-Lankford 'Human Rights and Development: A Comment on Challenges and Opportunities from a Legal Perspective' (2009) Vol. 1:1 *Journal of Human Rights Practice* 53.

⁶ See Abraham Lincoln Online 'The Gettysburg Address' 19 November 1863 available at: <http://www.abrahamlincolnonline.org/lincoln/speeches/gettysburg.htm> (accessed 21 June 2018). Also see: Democracy Building *A Short Definition of Democracy* available at <http://www.democracy-building.info/definition-democracy.html> (accessed 6 April 2016).

⁷ See: EE Schattschneider *The Semi sovereign People: A Realist's View of Democracy in America* (1960) 141; N Bobbio & R Griffin 'The Future of Democracy' (1987) Vol 13, Issue 1 *Capital & Class* 156 -161; SE Finer *The History of Government* (1997) 1568-1570; and GB

It has been suggested that democratization can be determined or assessed by the levels of participation by the citizens in decisions that affect their lives.⁸ Participation, it has been argued, makes democracy more democratic because it enhances involvement in public affairs based on the equal worth of all human beings and encourages individuals to learn to value and deal with disagreements, conflict and differences as they have to take account of the interests of others.⁹ Participation was also core in the conduct of affairs in traditional African societies as most decisions were reached by consensus and after consultations with some elders and leaders in the community.¹⁰ Participation in development like democracy is inspired by the ancient Athenian politics and African traditions. Notably, there were limits and exception in the definition of citizens or of those who could participate in the past. Nevertheless, in all these practices, the need for all citizens to have an equal say in the direction of state policy was emphasised.¹¹ However, participation in development just like democracy still faces challenges in application and implementation.¹²

Democracy is closely linked to decentralization which encourages citizens to participate in decision making at local levels. Thus, participation in development is also closely linked with decentralization as it also includes involvement in decision making processes specific to development. Decentralization involves mechanisms for enhancing shared responsibilities between institutions of governance at the central,

Powell *Contemporary Democracies: Participation, Stability and Violence* (1982) 3; among others.

⁸ Democracy Barometer 'Democracy Barometer at a glance: Concept' available at: http://www.democracybarometer.org/concept_en.html (accessed 6 July 2015).

⁹ J Pearce 'What Makes Participation Democratic?' in T Noorani, C Blencowe and J Brigstocke (Eds) *Problems of Participation: Reflections on Authority, Democracy, and the Struggle for Common Life* (2013) 59 and 64.

¹⁰ See CJ Okeke & AJ Nnaemeka 'The nemesis of individualistic ontology of globalization to the practice of liberal democracy in the Post-Colonial Africa,' in IS Aderibigbe, RW Omotoye and LB Akande (Eds.) *Contextualizing Africans and Globalization: Expressions in Social Political and Religious Contents and Discontents* (2016) 54. Also see CC Gould 'Negotiating the Global and Local: Situating Transnational Democracy and Human Rights' in DK Chatterjee (Ed.) *Democracy in a global world: Human Rights and Political Participation in the 21st Century* (2008) 83.

¹¹ See RK Sinclair *Democracy and Participation in ancient Athens* (1988) 106-114. Also see M Marinetto 'Who wants to be an Active Citizen? The Politics and Practice of Community Involvement' (2003) Volume 37(1) *Sociology* 105.

¹² See: B Cooke and U Kothari (Eds) *Participation: The New Tyranny?* (2001); S Hickey and G Mohan (Eds) *Participation from tyranny to transformation? Exploring new approaches to participation in development* (2004).

regional and local levels which has an impact on good governance as it provides people with opportunities to participate in decision making including on economic, social and political matters.¹³ Decentralization also helps in developing people's capacities and augmenting government transparency, accountability and responsiveness.¹⁴ Decentralization is thus also linked to democratization and greater political participation and is considered essential for achieving human development.¹⁵ Human development involves expanding people's choices and enlarging their freedoms and opportunities to improve their well-being.¹⁶ Participation in political and communal life, which includes participation in development, is one of the conditions for enhancing human development.¹⁷

2.3.2 Participation in development and rule of law

Participation in development is linked to the rule of law. The rule of law has various definitions which have evolved since Dicey described it.¹⁸ Simply stated, the rule of law is the principle that individuals, persons and government shall submit to, obey and be regulated by law, and not arbitrary action by an individual or a group of individuals.¹⁹ In a society governed by the rule of law it is envisioned that such a society will adopt or maintain a set of good, just, and fair laws by which it and its government will be governed.²⁰ It has been stated in reference to the rule of law as "...a government of laws, and not of men or women" specifically referring to the rule of persons bound by law and not subject to the arbitrary will of tyrants in an environment where no one,

¹³ UNDP, Management Development and Governance Division, Bureau for Development Policy 'Decentralized Governance Programme: Strengthening Capacity for People-Centred Development' (1997) 4.

¹⁴ UNDP above 1.

¹⁵ UNDP 'Decentralization: A sampling of definition' (1999) 15.

¹⁶ UNDP 'Human Development Report' (1990) 10-11.

¹⁷ UNDP 'What is Human Development?' (2015) available at: <http://hdr.undp.org/en/content/what-human-development> (accessed 30 October 2018).

¹⁸ See MJ Trebilcock and RJ Daniels *Rule of Law Reform and Development: Charting the Fragile Path of Progress* (2008) 15.

¹⁹ See *Duhaime's Law Dictionary* available at: <http://www.duhaime.org/LegalDictionary/R/RuleofLaw.aspx> (accessed 6 June 2015). For more on the rule of law see: J Møller and S Skaaning *The Rule of Law: Definitions, Measures, Patterns and Causes* (2014) and T Bingham *The Rule of Law* (2011).

²⁰ BZ Tamanaha 'A concise Guide to the Rule of Law' in G Palombella & N Walker *Relocating the Rule of Law* (2008) 3 and 4. Also see: Rule of Law Restoration 'What do we mean by rule of law?' available at: <http://www.ruleoflawrestoration.com/about/defining-rule-of-law/> (accessed 6 June 2018).

including the leader, is above the law and everyone is subject to and equal before the law.²¹

Participation in development, in this regard, is linked to the rule of law in the sense that, more often than not, it is required by law. Furthermore, participation in development is also necessary in the rule of law for citizens to make an input in the laws and policies which govern them. Participation is thus part of the rule of law, as was expressed quite eloquently in the report of the UN Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies:²²

The “rule of law” is a concept at the very heart of the Organization’s mission. It refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.

2.3.3 Participation in development and social inclusion

Participation in development is very closely related to social inclusion. The World Bank defines social inclusion, which is a central tenet in its goal of ending extreme poverty and promoting shared prosperity, in two ways:

1. The process of improving the terms for individuals and groups to take part in society, and
2. The process of improving the ability, opportunity, and dignity of those disadvantaged on the basis of their identity to take part in society.²³

Social inclusion is aimed at empowering poor and marginalised people to take advantage of increasing global opportunities especially in making decisions which affect their lives and enjoying equal access to markets, services and political, social and physical spaces.²⁴ Any country strategy or plan to eradicate or reduce poverty

²¹ See FG Whelan *Hume and Machiavelli: Political Realism and Liberal Thought* (2004) 88.

²² S/2004/616 Para 6.

²³ See World Bank Brief ‘Inclusion Matters: The Foundation for Shared Prosperity’ (2013) available at: <http://www.worldbank.org/en/topic/socialdevelopment/brief/inclusion-matters>. Also available at <http://www.worldbank.org/en/topic/social-inclusion> (accessed 25 May 2018).

²⁴ As above.

must involve the citizenry and be owned by all stake holders including the poor and marginalised groups who must effectively participate in the process of formulation of such policy. Participation in development is therefore part of the process of enhancing social inclusion.

2.3.4 Participation in development and development

Participation has been accepted as orthodoxy in development.²⁵ Participation in development has specifically been widely accepted as a development practice by International Financial Institutions (IFI), development professionals and civil society. Participation in development is a process by which people from affected communities including civil society, minorities, indigenous peoples and women, among others, are involved in, consulted and have influence on decisions relating to developmental activities that will affect them.²⁶ Development activities should be aimed at improving peoples' wellbeing and address their specific needs which can only be expressed when they are actively, meaningfully and freely involved, consulted and their views are considered in the planning and actual development of their community.²⁷ States have the obligation 'to formulate appropriate national development policies that aim at the constant improvement of the wellbeing of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom.'²⁸

Participation in development from a human rights perspective is a process by which people from affected communities including civil society, minorities, indigenous peoples and women, among others, are involved in, consulted and have influence on decisions relating to developmental activities that will affect them.²⁹ Participation can thus also be described as a process through which members of the community take

²⁵ See Cooke and Kothari (n 12 above) 175.

²⁶ See JK Hansen and H-O Sano 'The Implications and Value Added of a Rights Based Approach' in BA Andreassen and SP Marks (Eds) *Development as a Human Right: Legal, Political and Economic Dimensions* (2006) 49.

²⁷ See Preamble and Article 2(3) of the UN Declaration on the Right to Development. Declaration. Also see UN OHCHR *Frequently Asked Questions on the Human Rights-Based Approach to Development Cooperation* (2006) 26. Also see Communication 276/03: *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) Vs. Kenya (Endorois Case)*.

²⁸ Article 2(3) of the UN Declaration on the Right to Development.

²⁹ See Hansen and Sano (n 26 above).

part or are involved and have an influence on decisions that affect them such as: the conduct of public affairs; elections; access to public service; cultural life; scientific advancement; education; health; environment; natural resources management; formulation and implementation of government policy; development and development planning and in all activities of the community including at the national, regional and global level.³⁰ Efforts have to be made to ensure that all participate including groups which are often marginalised such as: women; children; youth; persons with disabilities; minorities; indigenous people and non-government organisations or CSOs.³¹

Development activities should be aimed at improving peoples' wellbeing and address their specific needs which can only be expressed when they are actively, meaningfully and freely involved, consulted and their views are considered in the planning and actual development of their community.³² States therefore have the obligation to make suitable or appropriate national development policies which are aimed at the constant improvement of the lives and wellbeing of the entire population and of all individuals on the basis of their 'active, free and meaningful' participation in development and in the fair distribution of all the benefits resulting from development.³³

³⁰ Definition adapted from various international law treaties and conventions including: Articles 1 and 25 of the International Covenant on Civil and Political Rights; Article 1 and 15 (1) (a) of the International Covenant on Civil and Political Rights; Articles 7 and 14 of the Convention on the Elimination of All forms of Discrimination Against Women; Articles 9, 19, 24, 26, 29, 30; Article 31 of the UN Convention on the Rights of the Child; Articles 3(g), 4 (c) and 17 of the Constitutive Act of the African Union; Article 3 (1) of the Amendment to the Constitutive Act of the African Union; Articles 13, 17 (2), 22 and 24 of the ACHPR; preamble and Articles 2 (1) (c), 9, 18, 19 and 23 of the Maputo Protocol; Articles 13 and 14 of the ACRWC; Articles 16 (1) (c), 17 (3) of the African Union Convention on the Conservation of Nature; Articles 12 of the AU Convention on Preventing and Combating corruption; Articles 3 (7), 27, 29, 30, 31 of the African Charter on Democracy, Elections and Governance; Articles 2 (3) and 5 of the Statutes of the Economic, Social and Cultural Council of the African Union, among others.

³¹ See: Convention on the Elimination of All forms of Discrimination Against Women; UN Convention on the Rights of the Child and the Convention on the Rights of Persons With Disabilities above. Also see: UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities; UN Declaration on the Rights of Indigenous Peoples; UN Declaration on the Right to Development; and the UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally recognized Human Rights and Fundamental Freedoms, among others.

³² See Preamble of the UN Declaration on the Right to Development and Article 2(3) of the Declaration. Also see: UN OHCHR *Frequently Asked Questions on the Human Rights-Based Approach to Development Cooperation* (2006) 26 and *Centre for Minority Rights Development and Others v Kenya* (2009) AHRLR 75 (ACHPR 2009).

³³ Article 2 (3) of the UN Declaration on the Right to Development.

Participation requires a conducive and an enabling environment in which citizens can play an active role by being involved and consulted in public planning, management and decision making processes.³⁴ Participation is dependent on several factors such as: an enabling environment; awareness of rights and the opportunity to engage; and the existence of structures to enable participation including representatives and active civil society.³⁵ An enabling environment is a set of factors or conditions including the legal, political, economic, social and cultural which may affect the capacity of individuals or their representatives or CSOs to participate in decision making in a sustained and effective manner.³⁶ Such an environment requires the existence of transparent, open and responsive state institutions with a legal and policy framework and socio-economic conditions conducive to participation as well as structures, procedures and opportunities that allow the public to engage in the conduct of public affairs.³⁷ Furthermore, it is important to have individuals that are aware of their rights and have the ability and opportunity to engage and participate in their local affairs to bring about improvements.³⁸ Moreover, it is also necessary to have structures including representative structures and an active civil society that can ensure the availability of information and mass communication on issues of public interest and allow the basis for collective action and dialogue with the state.³⁹

Participation in development, which is considered vital for development, is established as both as part of the general right to participate in the conduct of public affairs⁴⁰ and as a specific right (albeit in soft law at the international level).⁴¹ Participation in development is confirmed by practice especially in development cooperation.⁴²

³⁴ See Hadiprayitno (n 3 above).

³⁵ U Spliid/Danish Institute for Human Rights 'NHRIS and Public Participation' (2013)) 9.

³⁶ Adapted from J Thindwa 'Enabling environment for Civil Society in CDD Projects' (2001) available at:

www.worldbank.org/participation/enablingenvironment/EnablingenvironmentCECDD.pdf (accessed 30 June 2018).

³⁷ See Spliid (n 35 above).

³⁸ As above.

³⁹ As above.

⁴⁰ Article 25 of the International Covenant on Civil and Political Rights.

⁴¹ The right to participate in development is specifically provided in Article 2 and 8 of the UN Declaration on the Right to Development.

⁴² See: J Michel *Trends in the Practice of Development Cooperation: Strengthening Governance and the Rule of Law* (2013) 6; Organisation for Economic Cooperation and Development (OECD) 'Participatory Development and Good Governance' (1995) 8-11 available at www.oecd.org/dac/governance-development/31857685.pdf (accessed 30 June 2018); OECD, *The Paris Declaration on Aid Effectiveness* (2005) and the Accra Agenda for Action, 2008 available at:

Participation in development: is empowering; prevents marginalisation especially of vulnerable groups and is necessary for efficiency in development.⁴³ In some instances, participation in development, protects against damages and injuries from the development processes.⁴⁴ A study on participatory development projects of the World Bank found that participation and inclusion of the community in decision making related to development actually improves the sustainability of resources and the infrastructure quality.⁴⁵

Development is a broad concept but for purposes of this thesis, the definition inspired by the United Nations (UN) Declaration on the Right to Development is adopted and used. Development is therefore regarded as:

...a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom.⁴⁶

Development is thus much more than economics as it also covers social, cultural and political processes and is particularly intended for 'constant improvement' which means progressive regular advancements in terms of people's welfare, health, security, safety and prosperity, among other things.⁴⁷ Development therefore includes social, economic, political and human advancement and enrichment of the lives of the people. The definition of development above goes beyond the conventional definitions of development in terms of basic increase of the gross national product or industrialisation or exports growth or capital inflows. Development, from a human rights perspective and as provided by the UN Declaration on the Right to Development, entails much more than economic growth and poverty reduction and

<http://www.oecd.org/dac/effectiveness/parisdeclarationandaccraagendaforaction.htm> (accessed 30 June 2018); and Hickey & Mohan (n 14 above) 3.

⁴³ See JE Stiglitz 'Participation and Development: Perspectives from the Comprehensive Development Paradigm' (2002) 6(2) *Review of Development Economics* 168.

⁴⁴ See Hadiprayitno (n 3 above) 123-127.

⁴⁵ See G Mansuri & V Rao/The World Bank, *Localizing Development: Does Participation work?* (2013) 222.

⁴⁶ See Preamble of the UN Declaration on the Right to Development.

⁴⁷ See A Sengupta 'The Human Right to Development' in BA Andreassen and SP Marks, *Development as a Human Right: Legal, Political and Economic Dimensions* (2006) 11.

requires that all human rights and fundamental freedoms be fully realised.⁴⁸ Moreover, it also requires that individuals participate and benefit from it.⁴⁹

The Right to Development, under the UN Declaration, includes: full sovereignty over natural resources; self-determination; popular participation in development; equality of opportunity and the creation of favourable conditions for the enjoyment of other civil, political, economic, social and cultural rights.⁵⁰ Development as a right includes the right to a process as well as to progressive outcomes aiming at the full realisation of all human rights for equitable growth and the general improvement of the capabilities of the population.⁵¹ The development process therefore must be participatory with fair and equitable distribution of benefits and also be guided on the principles of equity, non-discrimination, accountability and transparency which contribute to the human rights-based process of development.⁵²

Citizens may participate directly or through representation. As such they can be involved and contribute to decision-making through public debates and dialogue with their elected representatives or through their organisations. Citizens participate, while exercising their freedom of expression, assembly and association, on various issues relating to the conduct of public affairs, including development. Participation in development is interlinked with the rights to: hold opinions;⁵³ freedom of expression;⁵⁴ access to information⁵⁵ and freedom of association.⁵⁶ The respect for and fulfilment of the right to hold opinions, freedom of expression, access to information and freedom of association in the context of development contributes towards a conducive environment for participation.⁵⁷

⁴⁸ See Article 1 of the UN Declaration on the Right to Development.

⁴⁹ See Articles 1 and 2 of the UN Declaration on the Right to Development.

⁵⁰ See the UN Declaration on the Right to Development particularly Articles 1 (2), 2, 5, 6 and 8 (1), (2), among others.

⁵¹ BA Andreassen and SP Marks 'Conclusions' in BA Andreassen and SP Marks (Eds), *Development as a Human Right: Legal, Political and Economic Dimensions* (2006) 305.

⁵² See: Sengupta (n 47 above) and 'The Report of the Independent Expert on the Right to Development, Dr. Arjun Sengupta, pursuant to General Assembly resolution 54/175 and Commission on Human Rights resolution' 2000, E/CN.4/RES/2000/5, E/CN.4/2000/WG.18/CRP.1.

⁵³ See: Article 19 UDHR; Article 19 (1) of the ICCPR and Article 9 (2) of the ACHPR.

⁵⁴ See Article 19(2) of the ICCPR and Article 9(1) of the ACHPR.

⁵⁵ See Article 19(2) of the ICCPR and Article 9(1) of the ACHPR.

⁵⁶ See Article 22 (1) of the ICCPR; Article 10 of the ACHPR.

⁵⁷ See Report of the Study by the Secretary-General on the regional and national dimensions of the Right to Development as a human right (1980, 1981) E/CN.4/1421 and E/CN.4/1488.

Thus, participation has been widely accepted, not only as a right but as a key development practice and has been described using several words which are often used interchangeably to mean the same thing such as: ‘citizen involvement’; ‘political participation’; ‘popular participation’; ‘community involvement’; and ‘stakeholder participation’, to mention but a few.

2.3.5 Participation in development and human rights

Human rights have been defined as legal, moral and ethical entitlements that are inherent to all human beings without discrimination.⁵⁸ Participation in development is interlinked with human rights in the sense that not only is participation in development a legal right on its own but it is also a key and central part of the rights-based strategy to prevent inequality and discrimination on any ground.⁵⁹ Participation in development as a legal right is derived from the international bill of rights including: Article 21 of the Universal Declaration of Human Rights (UDHR); Article 25 of the International Covenant on Civil and Political Rights (ICCPR); and Article 15 (1) of the International Covenant on Economic, Social and Cultural Rights, among many others which will be discussed in the legal framework below.

Suffice it to say that participation in development is included in the right to participate in the conduct of public affairs which includes various attributes including public administration, the development and implementation of policy at various levels including at the international, regional, national and local levels.⁶⁰ Citizens can take part directly or through their representatives and organisations to put pressure on the authorities through public discussions including debates and dialogues, among other things, to act on policy matters or other issues relating to the conduct of public affairs.⁶¹

⁵⁸ See: A Brendalyn *Democratization and the protection of human rights in Africa* (1995) 29 cited in M Mbondenyi *International Human Rights and their enforcement in Africa* (2011) 15; J Donnelly *Universal Human Rights in theory and practice* (2013) 7; and UN OHCHR, *What are human rights?* <http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx> (accessed 31 October 2015).

⁵⁹ See Report of the UN High Commissioner for Human Rights ‘Factors that impede equal political participation and steps to overcome those challenges’ (2014) A/HRC/27/29 3.

⁶⁰ Article 25 of the International Covenant on Civil and Political Rights. Also see: Human Rights Committee, *General Comment 25 The right to participate in public affairs, voting rights and the right of equal access to public service (Article 25)*, 07/12/1996 CCPR/C/21/Rev.1/Add.7. Para 5.

⁶¹ Human Rights Committee (n 60 above) Para 8.

As such the right to participate in development is linked to various electoral rights including the right to vote and stand. However, participation in development can only be effectively done where they are able to enjoy other rights such as the rights: to hold opinions, freedom of expression; access to information and freedom of association which helps in creating a conducive environment.⁶²

Participation in development is fundamental in the human rights-based approach to development. The human rights-based approach to development refers to the means and methods of fulfilling human rights obligations through development policies and practices.⁶³ Participation, which is paramount in the human rights based approach to development, requires the creation of an enabling environment in which citizens can play an active role in development by being involved and consulted in various public planning, management and decision-making processes.⁶⁴ A crucial component of this enabling environment is the legal framework.

2.4 Legal framework on participation in development

Participation in development is rooted in the legal framework of the UN and at the regional and national levels. It is affirmed in various international, regional and national laws. It is important to note that the right to participate in development is also closely linked with the right to equality and non-discrimination, freedom of peaceful assembly, association, opinion and expression and the right to access to information and education. In order for one to enjoy the right to participate in development it is important that they are not discriminated against or left out of the development process. They must be able to assemble and associate with others to discuss issues that affect their communities and effectively participate in the development of their communities. This can only be done in an environment where there is adequate access to information and people can freely express themselves.

⁶² Report of the UN High Commissioner for Human Rights above 7.

⁶³ See BA Andreassen and SP Marks 'Conclusion' in BA Andreassen and SP Marks (Eds) *Development as a Human Right: Legal, Political and Economic Dimensions*, (2006) 304.

⁶⁴ See Hadiprayitno (n 3 above).

2.4.1 UN legal framework

Participation in development is an implicit right in many of the UN international human rights instruments including treaties and declarations, among others. What is contained in the treaties is binding while that which is contained in the declarations is soft law and provides guidance. The discussion of the legal framework on participation in development is highlighted in terms of the provisions in the treaties including how those treaties have been interpreted by the various treaty monitoring bodies. There is also a discussion of the soft law on participation in development including guidance being provided by the special procedures. Special procedures comprise independent experts, Special Rapporteurs and Working Groups appointed by the Human Rights Council, to examine and report back with appropriate recommendations on a country situation or specific human rights theme.⁶⁵ Their recommendations are based on their interpretations of the various human rights treaties.

2.4.1.1 Treaties

There are various treaties that affirm the right to participate in development starting right from the UN Charter to the most recent human rights treaty which is the Convention on the Rights of Persons with Disabilities.

a) Charter of the United Nations

The right to participation in development is implicit in the 1945 Charter of the United Nations (UN Charter) particularly in articles 1, 55 and 56. States are urged to establish a stable environment for the well-being of the people which ensures peaceful and friendly relations among the nations which is grounded in the respect of the principle of 'equal rights and self-determination of peoples.'⁶⁶ The UN Charter mandates the UN to promote: 'improvements in standards of living'; 'full employment and conditions of economic and social progress and development'; 'solutions to international economic, social, health and related problems'; 'international cultural and educational cooperation'; and 'universal respect for, and observance of human rights and

⁶⁵ See UN OHCHR 'Special Procedures of the Human Rights Council' available at: <https://www.ohchr.org/en/hrbodies/sp/pages/introduction.aspx> (accessed on 25 July 2018).

⁶⁶ See Article 1 of the UN Charter.

fundamental freedoms for all without distinction as to race, sex, language or religion.⁶⁷ Furthermore, in Article 56 of the UN Charter, States commit to taking action in cooperation with the UN to achieve those purposes, in the mandate, which are obviously developmental in nature and participation in development is inevitably implied.

b) Universal Declaration on Human Rights

The 1948 UDHR was adopted and proclaimed by the General Assembly as a common standard of achievement for all peoples and all nations.⁶⁸ The UDHR was adopted by States after a voting process where: forty-eight States voted in favour; no votes against it; and 8 abstentions.⁶⁹ The UDHR is remarkable because it was the first occasion on which the UN had made a Declaration of human rights and fundamental freedoms.⁷⁰ The UDHR has been domesticated by most countries, which have adopted it in their own national laws especially constitutions, and most people turn to it for guidance and inspiration in the promotion and protection of human rights.⁷¹ Owing to the fact that the UDHR has attracted wide acceptance and entrenchment into most national, regional and international law, it has evolved into customary international law.⁷² Although, there is a debate on whether the UDHR is customary international law as a whole or in part, it is the foundation of international human rights treaties.⁷³ Most scholars acknowledge that key parts of the UDHR have the status of customary international law such as the prohibition of systematic racial discrimination,⁷⁴ right to life,⁷⁵ freedom from slavery,⁷⁶ freedom from torture,⁷⁷ and prolonged arbitrary imprisonment.⁷⁸ The UDHR has influenced legislative processes, decisions of national courts including working as aid to constitutional and statutory interpretation and

⁶⁷ See Article 55 of the UN Charter.

⁶⁸ Preamble of the UDHR.

⁶⁹ UN OHCHR *The International Bill of Human Rights*, Fact Sheet No.2 (Rev.1) accessed at <http://www.ohchr.org/Documents/Publications/FactSheet2Rev.1en.pdf> on 11 April 2016.

⁷⁰ As above.

⁷¹ See UN 'Human Rights Law: The foundation of International Human Rights Law' available at: <http://www.un.org/en/sections/universal-declaration/human-rights-law/index.html> (accessed 25 July 2018).

⁷² L Henkin *The Age of Rights* (1990) 19.

⁷³ See P Alston and R Goodman *International Human Rights* (2013) 144.

⁷⁴ Article 2.

⁷⁵ Article 3.

⁷⁶ Article 4.

⁷⁷ Article 5.

⁷⁸ Articles 9, 10 and 11.

international discussions on human rights.⁷⁹ It has also been translated into 508 different languages and is recorded to have set a world record in 1999 for being the most translated document in the world.⁸⁰

Participation is one of the six cross cutting themes of the UDHR.⁸¹ Others include dignity and justice, development, environment and culture.⁸² According to the UN Office of the High Commissioner for Human Rights, participation is a basic and fundamental right without which we cannot experience or enjoy any other rights and freedoms that the UDHR seeks to guarantee.⁸³ Article 21 of the UDHR explicitly says everyone has the right to take part in government, equal access to public service and elections. It specifically provides as follows:

1. Everyone has the *right to take part in the government of his country, directly or through freely chosen representatives.*
2. Everyone has the right to equal access to public service in his country.
3. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

This article has been described as a ‘revolution within the revolution’ as it asserts the rights of individuals against their state and prescribes how the state must operate, emphasising that governments must be subject to the will of the people and the right to democracy.⁸⁴ Specifically, in terms of participation in development the article provides for democratic participation of citizens in their government and this can be done either directly or through their chosen representatives who are presumably elected in periodic and genuine elections.

⁷⁹ See generally H Hannum ‘The Status of the Universal Declaration of Human Rights in National and International Law’ (1996) Vol.25 *Georgia Journal of International and Comparative Law* 287 available at: <http://digitalcommons.law.uga.edu/gjicl/vol25/iss1/13> (last accessed 23 June 2018).

⁸⁰ See UN OHCHR ‘The Universal Declaration of Human Rights’ available at: <https://www.ohchr.org/EN/UDHR/Pages/UDHRIndex.aspx> (accessed 25 June 2018).

⁸¹ See UN OHCHR ‘Universal Declaration of Human Rights in six cross-cutting themes’ available at: <http://www.ohchr.org/EN/UDHR/Pages/CrossCuttingThemes.aspx> (accessed 7 June 2018).

⁸² As above.

⁸³ As above.

⁸⁴ A Rosas ‘Article 21’ in G Alfredsson and A Eide (Eds.) *The Universal Declaration of Human Rights: A Common Standard of Achievement* (1999) 431.

Furthermore, the right to participation should be enjoyed without distinction or discrimination under Article 2 and 7 of the UDHR. This means that the people who are often excluded should be included in decision making, especially those who are marginalised or discriminated against because of their disability, race, religion, gender, descent, age or on other grounds. They should be empowered to influence their own destiny by taking part in decisions that affect them.

Moreover, Article 27(1) of the UDHR provides that:

Everyone has the right *freely to participate in the cultural life of the community*, to enjoy the arts and to share in scientific advancement and its benefits.

Article 27 of the UDHR thus prescribes the enjoyment of cultural rights and emphasises that everyone has the right to participate in all forms of cultural life. The provisions of the UDHR relating to participation particularly in Articles 2, 7, 21 and 27(1) reflect some of the most important purposes and principles of the UN as described in the UN Charter Article 1.

c) International Convention on the Elimination of All Forms of Racial Discrimination

State parties under the 1965 International Convention on the Elimination of All Forms of Racial Discrimination (CERD) guarantee the right of everyone without distinction on the basis of any status including: race, colour or national or ethnic origin, to equality before the law in the enjoyment of rights.⁸⁵ CERD specifically provides in Article 5(c) for:

Political rights, in particular the *right to participate* in elections-to vote and stand for election-on the basis of universal and equal suffrage, *to take part in the Government as well as in the conduct of public affairs at any level* and have equal access to public service.

The Committee on the Elimination of All Forms of Racial Discrimination (CERD Committee), which is responsible for interpreting and monitoring the implementation of the Covenant has affirmed the right to participate in the conduct of public affairs for

⁸⁵ See Article 5 CERD.

refugees, displaced persons and indigenous people. The CERD Committee emphasised that when refugees and displaced persons return to their homes of origin they have a right to participate fully and equally in public affairs and at all levels including having access to public services.⁸⁶

The CERD Committee has also urged States to make sure that indigenous peoples are not discriminated against and have equal rights in terms of effective participation in public life and emphasising that no decisions that directly relate to their rights and interests should be taken without their informed consent.⁸⁷ Furthermore, the CERD Committee has also urged States to take special measures to eliminate discrimination against persons on grounds of their descent and to formulate and implement a comprehensive national strategy with participation of members of affected communities.⁸⁸

The CERD in its General Comment on the meaning and scope of special measures in the convention states that:

“Measures” include the full span of legislative, executive, administrative, budgetary and regulatory instruments, at every level in the State apparatus, as well as plans, policies, programmes and preferential regimes in areas such as employment, housing, education, culture and *participation in public life for disfavoured groups*, devised and implemented on the basis of such instruments.⁸⁹

Furthermore, the CERD Committee recommended that special measures should be carried out after appraisals on the basis of accurate data that is disaggregated by race, colour, descent and ethnic or national origin, which incorporates a gender perspective on the socio-economic status and, conditions of the various groups and their participation in the social and economic development of the country.⁹⁰ The CERD

⁸⁶ CERD *General Recommendation 22: Refugees and displaced persons* (1996) U.N. Doc. A/51/18, annex VIII Para 2 (d).

⁸⁷ CERD *General Recommendation 23: Rights of indigenous peoples* (1996) U.N. Doc. A/52/18, annex V Para 4 (d).

⁸⁸ CERD *General Recommendation 29: Discrimination Based on Descent* (2002) U.N. Doc. A/57/18 Para 1 (e).

⁸⁹ CERD *General recommendation No. 32: The meaning and scope of special measures in the International Convention on the Elimination of All Forms Racial Discrimination* (2009) CERD/C/GC/32. Para 13.

⁹⁰ CERD *General recommendation No. 32, The meaning and scope of special measures in the*

Committee also recommended that States should ensure that they design and implement special measures after prior consultation and active participation of the affected communities.⁹¹

The CERD Committee has made various specific recommendations to enhance the participation of the Roma people in public life including special measures.⁹² The CERD Committee made recommendations including: availing equal opportunities to secure their participation; developing modalities and structures of consultation on decisions that affect them; and involving them in the formulation and implementation of policies and programmes that affect them in a conducive environment of transparency.⁹³ The CERD Committee also made recommendations related to: promoting more awareness among their communities including of the need for their increased active participation in public and social life in order to promote their own interests.⁹⁴ The CERD Committee also made recommendations to ensure their future participation such as: ensuring their children's education; their own participation in professional training; and the organisation of training programmes for their public officials and representatives, including upcoming candidates for those positions in order to enhance their political, policy-making and public administration skills.⁹⁵

Although the CERD Committee can hear individual communications, where a State Party has made a declaration under article 14, it has not yet heard a specific complaint on violations on issues of participation including the right to participate in the conduct of public affairs.⁹⁶

d) International Covenant on Civil and Political Rights

The 1966 International Covenant on Civil and Political Rights (ICCPR) is in line with the UN Charter and UDHR.⁹⁷ Article 25 of the ICCPR, which has been described as

International Convention on the Elimination of All Forms Racial Discrimination (2009) CERD/C/GC/32, Para 17.

⁹¹ Above Para 18.

⁹² Above Para 41

⁹³ Above Para 42.

⁹⁴ Above Para 43.

⁹⁵ Above Paras 44-45.

⁹⁶ See UN OHCHR *Selected Decisions of The Committee on The Elimination of Racial Discrimination* (2012) Vol.1.

⁹⁷ See Preamble of the ICCPR.

laying at the core of democratic government and the Covenant,⁹⁸ provides for the right of every citizen to take part in the conduct of public affairs, the right to vote and to be elected and the right to have access to public service. The ICCPR, in Article 25, particularly provides that every citizen shall have the right and the opportunity, without any distinctions and without unreasonable restrictions:

- (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
- (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;
- (c) To have access, on general terms of equality, to public service in his country.

In General Comment No. 25, the Human Rights Committee, which is responsible for monitoring the implementation of the ICCPR, made several key points. The Committee emphasised that the rights in Article 25 should be enjoyed without any distinction and discrimination and that the conditions and restrictions which apply to the exercise of the rights under the article such as age must be based on objective and reasonable criteria.⁹⁹ Furthermore, the Committee urged that any discriminatory requirements such as education, residence or descent, or by reason of political affiliation are discouraged.¹⁰⁰ The Committee also held that the conduct of public affairs is:

...a broad concept relating to the exercise of political power such as legislative, executive and administrative powers covering all aspects of public administration, and the formulation and implementation of policy at international, national, regional and local levels.¹⁰¹

Moreover, the Human Rights Committee also asserted that citizens can take part in the conduct of public affairs by exerting influence through public debate and dialogue with their representatives or through their capacity to organise themselves and this participation would be supported by ensuring freedom of expression, assembly and association, among other things.¹⁰² In terms of implementation, measures have to be

⁹⁸ See Human Rights Committee *General Comment No. 25* Para 2.

⁹⁹ See Human Rights Committee *General Comment No. 25* Paras 3 and 4.

¹⁰⁰ See Human Rights Committee *General Comment No. 25* Para 15.

¹⁰¹ See Human Rights Committee *General Comment No. 25* Para 5.

¹⁰² See Human Rights Committee *General Comment No. 25* Para 8.

taken to overcome specific difficulties hindering participation such as illiteracy, language barriers, poverty or impediments to freedom of movement.¹⁰³

Nevertheless, it is important to note that the Human Rights Committee in General Comment No. 25 focused more on voting and the electoral process for choosing representatives. The Committee's discussion on taking part in the conduct of public affairs was not as exhaustive but provides some guidance. Guidance is especially provided in relation to the meaning of taking part in the conduct of public affairs particularly with regard to extending it to the formulation and implementation of policy at international, national, regional and local levels. The formulation and implementation of policy at the national level would also include national development planning. However, the obligation of the State in facilitating such participation is not specifically prescribed. The Human Rights Committee only emphasised that certain rights such as freedom of expression, freedom of assembly and association, and freedom of movement should be enjoyed and recommended that the challenges of participation such as illiteracy, language barriers, and poverty should be addressed. General Comment No. 25 does not provide particulars of how the State can facilitate and enhance participation for example in the provision of resources, which are necessary, for citizens to take part in the conduct of public affairs through public debate and dialogue with their representatives or through their organisations. However, it is implicit that the State would have to facilitate such participation.

The Human Rights Committee has affirmed the right to participate in public affairs by urging states in its concluding observations to respect the right of citizens to participate in public affairs especially in the context of elections¹⁰⁴ and in terms of increasing women's participation in public life.¹⁰⁵ The Committee in its concluding observations has also emphasised the participation of indigenous peoples including their prior consultation to obtain their free, prior with regard to land rights, political and decision-

¹⁰³ See Human Rights Committee *General Comment No. 25* Para 12.

¹⁰⁴ See Human Rights Committee 'Concluding observations on the fourth periodic report of the Democratic Republic of the Congo' (2017) CCPR/C/COD/CO/4 Paras 16 and 48;

¹⁰⁵ As above; Human Rights Committee 'Concluding observations on the second periodic report of Thailand' (2017) CCPR/C/THA/CO/2 Paras 15-16 and Human Rights Committee 'Concluding observations on the second periodic report of Burundi' 2014. CCPR/C/BDI/CO/2 Para 10.

making processes.¹⁰⁶ Moreover, the Committee has also stated that the denial of all convicted prisoners' rights to vote is a violation of the right to participate in public affairs.¹⁰⁷

The Human Rights Committee has heard several cases relating to the conduct of public affairs in the electoral process and access to public service. However, there have not been many decisions with specific reference to violations of the right to take part in the conduct of public affairs in terms of formulation and implementation of policy specific for participation in development. Most of the cases that have been decided by the Human Rights Committee have been on the denial of political rights including: the barring of taking part in the conduct of public affairs through loss of membership of parliament; denial of participation in the electoral process; and the right to be elected and to stand in elections.¹⁰⁸ The Committee has also handled cases relating to access to public office.¹⁰⁹

In Communication No. 205/1986 against Canada, the Human Rights Committee for the first time, directly discussed the issue of taking part in the conduct of public affairs by individuals and/or their representatives in the context of Article 25 (a). In that case, the complainants sought unsuccessfully, to be invited to attend the constitutional conferences as representatives of the Mikmaq people. They wanted to attend just like the aboriginal people who had been invited in addition to their elected representatives to take part in the deliberations on aboriginal matters. They argued that the refusal infringed their right to take part in the conduct of public affairs, in violation of Article

¹⁰⁶ See Human Rights Committee 'Concluding observations on the initial report of Bangladesh' (2017) CCPR/C/BGD/CO/1 Para 11; Human Rights Committee 'Concluding observations on the second periodic report of Thailand' (2017) CCPR/C/THA/CO/2 Paras 43-44.

¹⁰⁷ Human Rights Committee 'Concluding observations on the second periodic report of Turkmenistan' (2017) CCPR/C/TKM/CO/2 Para 51.

¹⁰⁸ See *Moriana Hernandez Valentini De Bazzano, Luis Maria Bazzano Ambrosini, Martha Valentini De Massera And Jose Luis Massera V. Uruguay* Communication No.5 of 1977; *Alice and Victor Hugo Altesor V. Uruguay*, Communication No. 10/1977; *Weinberger Weisz V. Uruguay*, Communication No. 28/1978; *Jorge Landinelli Silva, Luis E. Echave Zas, Omar Patron Zeballos, Niurka Sala Fernandez And Rafael Guarga Ferro V. Uruguay*, Communication No. 34/1978; *Alba Pietraroia And Rosario Pietraroia V. Uruguay* Communication No. 44/1979; *Ngalula Mpandanjila et al. v. Zaire*, Communication No. 138/1983; *Marshall and ors v Canada*, Communication No. 205/1986 and *Peter Chiiko Bwalya V. Zambia*, Communication No. 314/1988.

¹⁰⁹ Communications Nos. 422/1990, 423/1990 and 424/1990 Vs. Benin; Communication 552/1993 Vs. Poland; Communication No. 933/2000 Vs. the Democratic Republic of Congo; and Communication No. 884/1999 vs. Russia.

25(a) of the ICCPR. The issue before the Committee was whether the constitutional conferences constituted a “conduct of public affairs” and if so, whether the authors of the communication, or any other representatives chosen for that purpose by the Mikmaq tribal society, had the right, by virtue of Article 25(a) of the ICCPR, to attend the conferences. The Committee held that the constitutional conferences as described by Canada constituted a conduct of public affairs. They noted that as a general rule in Canada, constitutional conferences are attended only by the elected leaders of the federal and 10 provincial governments and decided that the even though an exception was made by inviting representatives of aboriginal peoples, this did not change the fact that this was conduct of public affairs. In determining the scope of the right of every citizen, without unreasonable restrictions, to take part in the conduct of public affairs, directly or through freely chosen representatives, the Committee held that:

Surely, it cannot be the meaning of article 25(a) of the Covenant that *every citizen may determine either to take part directly in the conduct of public affairs or to leave it to freely chosen representatives. It is for the legal and constitutional system of the State party to provide for the modalities of such participation.* It must be beyond dispute that the conduct of public affairs in a democratic State is the task of representatives of the people, elected for that purpose, and public officials appointed in accordance with the law. Invariably, the conduct of public affairs affects the interest of large segments of the population or even the population as a whole, while in other instances it affects more directly the interest of more specific groups of society. Although prior consultations, such as public hearings or consultations with the most interested groups may often be envisaged by law or have evolved as public policy in the conduct of public affairs, article 25(a) of the Covenant cannot be understood as meaning that any directly affected group, large or small, has the unconditional right to choose the modalities of participation in the conduct of public affairs. That, in fact, would be an extrapolation of the right to direct participation by the citizens, far beyond the scope of article 25(a).¹¹⁰

The Committee thus concluded that the failure of Canada to invite representatives of the Mikmaq tribal society to the constitutional conferences on aboriginal matters did not infringe their rights under article 25 or any other provisions of the ICCPR.

¹¹⁰ UN OHCHR *Selected Decisions of the Human Rights Committee under the Optional Protocol of the International Covenant on Civil and Political Rights* (2004) Vol.4 42 Paras 5.4 and 5.5.

This case is important as it discusses the scope of participation in the conduct of public affairs, which also includes participation in development. The Human Rights Committee already defined the conduct of public affairs to include the formulation and implementation of policy and no doubt this includes policies relating to development including national development plans or development policies in general. In particular, and of relevance to this thesis, the Committee interpreted the ICCPR to indicate that Article 25 (a) does not require each and every citizen to take part directly in the conduct of public affairs. The Committee gave guidance that participation in the conduct of public affairs, which would also include participation in development, in a democracy is the duty of the representatives of the people. The Committee stated that although interested groups can be consulted the ICCPR did not imply that every one that is directly affected should participate. In the context of Uganda, it would mean that the elected members of parliament and other local government leaders would be the ones entitled to participate in the conduct of public affairs relating to national development.

e) International Covenant on Economic, Social and Cultural Rights

The 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR), which is also in line with the UN Charter and UDHR as is the case for ICCPR, recognises the importance of participation. The Committee on Economic, Social and Cultural Rights (CESCR) particularly highlights that education enables persons to participate effectively in a free society¹¹¹ and also provides for the right to participate in cultural life. In particular Article 15 (1) (a) of the ICESCR provides that:

The States Parties to the present Covenant recognize the right of everyone:

(a) *To take part in cultural life.*

CESCR, which interprets and monitors the implementation of the Covenant, has stated that in accordance with the ICESCR and other international instruments dealing with human rights and the protection of cultural diversity, Article 15 (1) (a) of the ICESCR entails at least the obligation to create and promote an environment within which a person individually, or in association with others, or within a community or group, can participate in the culture of their choice, which includes various core obligations which

¹¹¹ Article 13 (1).

are applicable with immediate effect.¹¹² One of the core obligations is to allow and encourage the participation of persons belonging to minority groups, indigenous peoples or to other communities in the design and implementation of laws and policies that affect them. In particular, the CESCR stated that, States parties should obtain their free and informed prior consent when the preservation of their cultural resources, especially those associated with their way of life and cultural expression, are at risk.¹¹³

With regard to individual communications, the CESCR has not had as much opportunity to handle cases. Unlike the Human Rights Committee, the CESCR was not set up until the UN Economic and Social Council (ECOSOC) decided to do so in 1985.¹¹⁴ Even then, ECOSOC set up the CESCR simply to monitor States' compliance with their obligations. As such, the CESCR was initially only able to review reports, without being entitled to receive any complaints whether of an individual, collective or interstate nature. When the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights entered into force on 5 May 2013 the CESCR could then not only just review reports but also hear individual complaints. The CESCR has only heard a few complaints and recently a decision was taken affirming an Ecuadorian woman's right to pension.¹¹⁵ There are no decisions yet on the issue of participation.

Nevertheless, the CESCR has also emphasised the importance of participation in policy making in relation to the rights to water, health, education, food and the economic, social and cultural rights of older persons and adequate housing.

Water

Participation is key to the enjoyment of the right to water. The CESCR has stated that the formulation and implementation of national water strategies and plans of action

¹¹² CESCR *General Comment No. 21: Right of everyone to take part in cultural life (art. 15, Para 1 (a), of the International Covenant on Economic, Social and Cultural Rights)* E/C.12/GC/21 Para 55.

¹¹³ As above.

¹¹⁴ See UN Resolution 1985/17.

¹¹⁵ UN OHCHR 'Ecuador violated a woman's right to social security, UN experts find' June 2018 available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23192&LangID=E> (accessed 25 July 2018).

should respect, inter alia, the principles of non-discrimination and people's participation.¹¹⁶ Furthermore that the right of individuals and groups to participate in decision-making processes that may affect their exercise of the right to water must be an integral part of any policy, programme or strategy concerning water and that individuals and groups should be given full and equal access to information concerning water, water services and the environment, held by public authorities or third parties.¹¹⁷

Health

The right to health comprises the right to participation. The CESCR has emphasised that the formulation and implementation of national health strategies and plans of action should respect, inter alia, the principles of non-discrimination and people's participation.¹¹⁸ In particular, the CESCR stated that: the right of individuals and groups to participate in decision-making processes, which may affect their development, must be an integral component of any policy, programme or strategy developed to discharge governmental obligations under Article 12.¹¹⁹ Furthermore, the CESCR said that promoting health must involve effective community action in setting priorities, making decisions, planning, implementing and evaluating strategies to achieve better health and that effective provision of health services can only be assured if people's participation is secured by States.¹²⁰ The CESCR also emphasised that children with disabilities should be given the opportunity to enjoy a fulfilling and decent life and to participate within their community.¹²¹ Similarly, the CESCR also urged States parties to provide a safe and supportive environment for adolescents that ensures the opportunity to participate in decisions affecting their health, to build life-skills, to acquire appropriate information, to receive counselling and to negotiate the health-behaviour choices they make.¹²² More recently the CESCR has asserted that the core content of the right to sexual and reproductive health includes: the adoption and implementation of a national strategy and action plan, with

¹¹⁶ CESCR *General Comment No. 15, The right to water (arts. 11 and 12 of the International Covenant on Economic, Social and Cultural Rights)*, E/C.12/2002/11 Para 48.

¹¹⁷ As above.

¹¹⁸ CESCR *General Comment No. 14, The right to the highest attainable standard of health (article 12 of the international Covenant on Economic, Social and Cultural Rights)* E/C.12/2000/4, Para 54.

¹¹⁹ CESCR *General Comment No. 14* Para 54.

¹²⁰ CESCR *General Comment No. 14* Para 54.

¹²¹ CESCR *General Comment No. 14* Para 22.

¹²² CESCR *General Comment No. 14* Para 23.

adequate budget allocation, on sexual and reproductive health, which is devised, periodically reviewed and monitored through a participatory and transparent process, disaggregated by the prohibited grounds of discrimination.¹²³ The emphasis on a participatory and transparent process requires the participation of affected people which in terms of national development plans would require people to participate either directly or through representatives to make their input on sexual and reproductive health matters.

Education

The right to education also requires participation. The CESCR in General Comment No.13 emphasised that participation is a key principle in the enjoyment of the right to education.¹²⁴ Furthermore, the CESCR stressed the importance of education as a right in itself but also an indispensable means of empowerment to realizing other rights.¹²⁵ The CESCR observed that education is the main medium by which economically and socially marginalised children and adults can come out of poverty and be able to overcome the barriers to participate fully in their communities.¹²⁶ The CESCR has also stated that participation of all sections of civil society in the drawing up of the plan of action for education is vital and that some means of periodically reviewing progress and ensuring accountability are essential.¹²⁷ The CESCR asserts that without the elements of participation and accountability, the significance of Article 14 of the ICESCR, which provides for free compulsory education, would be undermined.¹²⁸

Food

The CESCR has stressed that the formulation and implementation of national strategies for the right to food requires full compliance with the principles of accountability, transparency, people's participation, decentralization, legislative

¹²³ CESCR *General Comment No. 22: The Right to sexual and reproductive health (article 12 of the International Covenant on Economic, Social and Cultural Rights)* (2016) Para 49 (b).

¹²⁴ See CESCR *General Comment No. 13: The Right to Education (Art. 13)* (1999) E/C.12/1999/10) Para 30.

¹²⁵ See CESCR *General Comment No. 13* Para 1.

¹²⁶ As above.

¹²⁷ CESCR *General Comment 11 Plans of action for primary education (article 14 of the International Covenant on Economic, Social and Cultural Rights)* (1999) E/C.12/1999/4, Para 8.

¹²⁸ As above.

capacity and the independence of the judiciary and that good governance is essential to the realisation of all human rights, including the elimination of poverty and ensuring a satisfactory livelihood for all.¹²⁹

Housing

The CESCR has linked the right to adequate housing to other rights including the right to participate in decision making.¹³⁰ The CESCR has also emphasised the importance of genuine consultations with those affected by forced evictions in terms of the implementation of the right to adequate housing.¹³¹

Participation of vulnerable persons

The CESCR has also referred and appealed to States to comply with the 1991 UN Principles of Independence, Dignity, Self-fulfilment, Participation and Care of Older Persons. Principle 7 particularly provides for: the active participation of older persons in the formulation and implementation of policies which affect them; their service to the community and the formation of their movements or associations.¹³² The CESCR in its most recent Concluding Observations has asked States to take some measures to ensure the full participation of women in decision making in all aspects of political and public life.¹³³ The CESCR has also expressed concern about the low participation of women and other vulnerable groups in the labour market and recommended their empowerment including through training, gender quotas and addressing sociocultural barriers which affect them.¹³⁴ The CESCR has encouraged that the Sustainable Development Goals (SDGs) be implemented on the basis of the principles of

¹²⁹ CESCR *General Comment 12: The right to adequate food (article 11 of the International Covenant on Economic, Social and Cultural Rights)* (1999) E/C.12/1999/5 Para 23.

¹³⁰ CESCR *General Comment No. 4, The right to adequate housing (art. 11 (1) of the Covenant)* (1991) Para 9.

¹³¹ CESCR *General Comment No. 7: The right to adequate housing (Art. 11.1): forced evictions* (1997) Paras 13 and 15.

¹³² See Articles 7, 8 and 9.

¹³³ See CESCR 'Concluding observations on the initial report of the Niger' (2018) E/C.12/NER/CO/1 Para 26. See CESCR 'Concluding observations on the combined fifth and sixth periodic reports of Mexico' (2018) E/C.12/MEX/Co/5-6 Para 22 (b).

¹³⁴ See CESCR 'Concluding observations on the initial report of the Niger' (2018) E/C.12/NER/CO/1 Para 33; CESCR 'Concluding observations on the fourth periodic report of New Zealand' (2018) E/C.12/NZL/CO/4 Paras 9 and 24; See CESCR 'Concluding Observations on the Initial report of Bangladesh (2018) E/C.12/BGD/CO/1 Para 32 (c); CESCR 'Concluding observations on the combined fifth and sixth periodic reports of Mexico' (2018) E/C.12/MEX/Co/5-6 Paras 26 and 27.

'participation, accountability and non-discrimination' so as not to leave any one behind.¹³⁵ The Committee has also recommended that participation of indigenous people in decision making.¹³⁶ The Committee has expressed concern regarding violations of freedom of expression for the media which prevents them from enjoying their right to participation in the cultural life of the country.¹³⁷ The Committee has also recommended for the participation of affected communities and civil society in climate change and disaster management.¹³⁸ The Committee has also urged participation in cultural and scientific activities.¹³⁹

f) Convention on the Elimination of All Forms of Discrimination against Women

The 1979 Convention on the Elimination of All forms of Discrimination against Women (CEDAW) clearly states in its preamble that:

...the full and complete development of a country, the welfare of the world and the cause of peace require the *maximum participation of women on equal terms with men in all fields.*

According to CEDAW, apart from participation in elections and public referenda women also have the right to participate in: the formulation of government policy and its implementation; NGOs and associations; and in the work of international organisations including representing their governments. CEDAW also provides that women have the right to participate in and benefit from rural development and in the

¹³⁵ See: CESCR 'Concluding observations on the initial report of the Niger' (2018) E/C.12/NER/CO/1 Para 63; CESCR 'Concluding observations on the initial report of the Central African Republic (2018) E/C.12/CAF/CO/1 Para 44; CESCR 'Concluding observations on the fourth periodic report of New Zealand' (2018) E/C.12/NZL/CO/4 Paras 9 (d) and 53; and CESCR 'Concluding observations on the Initial report of Bangladesh, 2018 E/C.12/BGD/CO/1 Para 74.

¹³⁶ See: CESCR 'Concluding observations on the initial report of the Central African Republic (2018) E/C.12/CAF/CO/1 Para 22; CESCR 'Concluding observations on the fourth periodic report of New Zealand' (2018) E/C.12/NZL/CO/4 Paras 8 and 9 (d); CESCR 'Concluding observations on the Initial report of Bangladesh (2018) E/C.12/BGD/CO/1 Para 16 (b); CESCR 'Concluding observations on the combined fifth and sixth periodic reports of Mexico' (2018) E/C.12/MEX/Co/5-6 Para 67.

¹³⁷ See CESCR 'Concluding observations on the initial report of the Central African Republic' (2018) E/C.12/CAF/CO/1 Para 41.

¹³⁸ See CESCR 'Concluding observations on the Initial report of Bangladesh (2018) E/C.12/BGD/CO/1 Para 14.

¹³⁹ See CESCR 'Concluding observations on the combined fifth and sixth periodic reports of Mexico' (2018) E/C.12/MEX/Co/5-6 Paras 69 and 70.

elaboration and implementation of development planning and in all community activities. In this regard Article 7 of CEDAW specifically provides as follows:

States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right:

- (a) To vote in all elections and public referenda and to be eligible for election to all publicly elected bodies;
- (b) To *participate in the formulation of government policy and the implementation thereof* and to hold public office and perform all public functions at all levels of government;
- (c) To *participate in non-governmental organizations and associations* concerned with the public and political life of the country

The Committee on the Elimination of Discrimination Against Women (CEDAW Committee), which is responsible for interpreting and monitoring the implementation of the Covenant, requires State Parties to ensure that women have the right to participate fully in and be represented in public policy formulation in all sectors and at all levels as this would facilitate the mainstreaming of gender issues and contribute a gender perspective to public policy-making.¹⁴⁰ Additionally, the CEDAW Committee has recommended that State parties ensure the active participation of women in primary health care and take measures to enhance their role as care providers, health workers and educators in the prevention of infection with the Human Immunodeficiency Virus (HIV).

The CEDAW Committee has stressed that States have a responsibility both to appoint women to senior decision-making roles and, as a matter of course, to consult and incorporate the advice of groups which are broadly representative of women's views and interests.¹⁴¹ The CEDAW Committee also asserts that States parties have a further obligation to ensure that barriers to women's full participation in the formulation of government policy are identified and overcome.¹⁴² Similarly, the CEDAW Committee said that it is the Government's fundamental responsibility to encourage

¹⁴⁰ CEDAW *General Recommendation No. 23, Political and public life* (1997) UN Doc. A/52/38 (General Recommendation No. 23) Para 25.

¹⁴¹ CEDAW *General Recommendation No. 23* Paras 26 and 28.

¹⁴² CEDAW *General Recommendation No. 23* Paras 27 and 48.

initiatives to lead and guide public opinion and change attitudes that discriminate against women or discourage women's involvement in political and public life.¹⁴³

Moreover, the CEDAW Committee has urged States parties to encourage NGOs and public and political associations to adopt strategies that encourage women's representation and participation in their work.¹⁴⁴ Article 8 of CEDAW provides that:

States Parties shall take all appropriate measures to ensure to women, on equal terms with men and without any discrimination, the opportunity to represent their Governments at the international level and to *participate in the work of international organizations*.

The CEDAW Committee has recommended that in the implementation of this article States parties should take further direct measures in accordance with Article 4 of the Convention to ensure its full implementation and to ensure to women, on equal terms with men and without any discrimination, the opportunities to represent their Government at the international level and to participate in the work of international organisations.¹⁴⁵

Finally, Article 14 (2) of CEDAW provides that:

States Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women that *they participate in and benefit from rural development* and, in particular, shall ensure to such women the right:

- a) *To participate in the elaboration and implementation of development planning at all levels;*
- b) *To participate in all community activities;*

CEDAW requires measures that aim at equal rights for women including their participation in political processes and decision making and this is clearly provided for in Article 7. Article 14 (2) particularly emphasises the requirement for women to participate in development planning unlike other treaties which are not so specific on this matter.

¹⁴³ CEDAW *General Recommendation No. 23* above Para 28.

¹⁴⁴ CEDAW *General Recommendation No. 23* above Para 47.

¹⁴⁵ CEDAW *General Recommendation No. 23* above Paras 15 and 35.

The CEDAW Committee in its recent concluding observations has recommended that States put in place temporary special measures to enable women's equal participation in political and public life, education, employment and the health sector.¹⁴⁶ The CEDAW specifically requested States to collect data on the representation of indigenous women, women with disabilities, rural women, and women with a migration background, among others, in political and public life.¹⁴⁷ The Committee has also expressed concern over the failure to have sufficient participation of stakeholders in strengthening the national machinery for promoting the advancement of women.¹⁴⁸ Furthermore the Committee has recommended the participation of women in the development and implementation of climate action plans to deal with disaster risk reduction in the context of climate change.¹⁴⁹ The Committee has also recommended women's participation in peace efforts.¹⁵⁰ Moreover, the Committee also urges the

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- ¹⁴⁶ See: Committee on the Elimination of Discrimination against Women 'Concluding observations on the eighth periodic report of Australia' (2018) CEDAW/C/AUS/CO/8 Paras 22 and 42; Committee on the Elimination of Discrimination against Women 'Concluding observations on the combined second and third periodic reports of the Cook Islands' (2018) CEDAW/C/COK/CO/2-3 Paras 18 b; Committee on the Elimination of Discrimination against Women 'Concluding observations on the combined second and third periodic reports of the Cook Islands' (2018) CEDAW/C/COK/CO/2-3 Paras 27-28, 33-34, 37-38; Committee on the Elimination of Discrimination against Women 'Concluding observations on the eighth periodic report of Cyprus' (2018) CEDAW/C/CYP/CO/8 Paras 23, 30,35, 36, 37; Committee on the Elimination of Discrimination against Women 'Concluding observations on the fifth periodic report of Liechtenstein' (2018) CEDAW/C/LIE/CO/5 Paras 29 and 30; Committee on the Elimination of Discrimination against Women 'Concluding observations on the ninth periodic report of Mexico' (2018) CEDAW/C/MEX/CO/9 Paras 17, 18, 33, 34; Committee on the Elimination of Discrimination against Women 'Concluding observations on the eighth periodic report of New Zealand' (2018) CEDAW/C/NZL/CO/8 Paras 29 and 30; Committee on the Elimination of Discrimination against Women 'Concluding observations on the initial report of the State of Palestine' (2018) CEDAW/C/NZL/CO/8 Paras 30, 31, 34, 35, 36, 37; and Committee on the Elimination of Discrimination against Women 'Concluding observations on the fifth periodic report of Turkmenistan' (2018) CEDAW/C/TKM/CO/5 Paras 16, 17, 26, 27, 34
- ¹⁴⁷ See: Committee on the Elimination of Discrimination against Women 'Concluding observations on the eighth periodic report of Australia' (2018) CEDAW/C/AUS/CO/8 Paras 35-36; Committee on the Elimination of Discrimination against Women 'Concluding observations on the initial report of the State of Palestine' (2018) CEDAW/C/NZL/CO/8 Paras 41 and 42; Committee on the Elimination of Discrimination against Women 'Concluding observations on the fifth periodic report of Turkmenistan' (2018) CEDAW/C/TKM/CO/5 Paras 44 and 45.
- ¹⁴⁸ Committee on the Elimination of Discrimination against Women 'Concluding observations on the eighth periodic report of Cyprus' (2018) CEDAW/C/CYP/CO/8 Paras 18 and 19.
- ¹⁴⁹ See: Committee on the Elimination of Discrimination against Women 'Concluding observations on the eighth periodic report of Cyprus' (2018) CEDAW/C/CYP/CO/8 Paras 44-45 and Committee on the Elimination of Discrimination against Women 'Concluding observations on the eighth periodic report of New Zealand' (2018) CEDAW/C/NZL/CO/8 Paras 41 and 42.
- ¹⁵⁰ See: Committee on the Elimination of Discrimination against Women 'Concluding observations on the eighth periodic report of Cyprus' (2018) CEDAW/C/CYP/CO/8 Para 10 and 11; Committee on the Elimination of Discrimination against Women 'Concluding observations on the ninth periodic report of Mexico' (2018) CEDAW/C/MEX/CO/9 Paras 25-26; Committee on the Elimination of Discrimination against Women 'Concluding observations on the eighth

participation of women in awareness raising of women's rights;¹⁵¹ design and monitoring of public policies on gender equality and mechanisms for women's protection against violence.¹⁵²

Although the CEDAW Committee can hear individual communications alleging violations of CEDAW by State Parties to the Optional Protocol to the Convention on the Elimination of All forms of Discrimination against Women, it has not yet substantially heard and made a finding on cases relating to participation of women under articles 7, 8 and 14 (2).

g) UN Convention on the Rights of the Child

The 1990 UN Convention on the Rights of the Child (UN CRC) provides for children's participation¹⁵³ and it also recognises the child's freedom of expression including freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice.¹⁵⁴ The Committee on the Rights of the Child (CRC), which interprets and monitors the implementation of the UN CRC, has made a General Comment on Article 12 and situations of emergency and armed conflict. The CRC asserted that children who are affected by emergencies should be encouraged and enabled to participate in analysing their situation and future prospects.¹⁵⁵ The Committee noted that children's participation not only helps them to regain control over their lives or enhance rehabilitation but that it also develops organisational skills and reinforces a sense of identity.¹⁵⁶ The CRC thus encourages States to support mechanisms that enable children to play an active role in post-emergency reconstruction and post conflict resolution processes.¹⁵⁷ Nevertheless the CRC

periodic report of New Zealand' (2018) CEDAW/C/NZL/CO/8 Paras 15 and 16; Committee on the Elimination of Discrimination against Women 'Concluding observations on the initial report of the State of Palestine' (2018) CEDAW/C/NZL/CO/8 Paras 18 and 19.

¹⁵¹ See Committee on the Elimination of Discrimination against Women 'Concluding observations on the ninth periodic report of Mexico' (2018) CEDAW/C/MEX/CO/9 Para 10.

¹⁵² See: Committee on the Elimination of Discrimination against Women, 'Concluding observations on the ninth periodic report of Mexico' (2018) CEDAW/C/MEX/CO/9 Paras 15 -16, 24; Committee on the Elimination of Discrimination against Women 'Concluding observations on the fifth periodic report of Turkmenistan' (2018) CEDAW/C/TKM/CO/5 Paras 22 and 23.

¹⁵³ Article 12.

¹⁵⁴ Articles 13 and 17.

¹⁵⁵ CRC *General Comment No. 12: The right of the child to be heard* (2009) (*General Comment No.12*) Paras 125 and 126.

¹⁵⁶ See CRC *General Comment No.12* Para 125.

¹⁵⁷ See CRC *General Comment No.12* Para 125.

cautions that care must be taken to protect children from ‘exposure to situations that are likely to be traumatic or harmful.’¹⁵⁸

However, the UN CRC also provides that the right may be subject to certain restrictions, but these shall only be such as: are provided by law and are necessary; for respect of the rights or reputations of others; or for the protection of national security or of public order, or of public health or morals.¹⁵⁹ Moreover, the UN CRC also recognises the rights of the child to freedom of association and to freedom of peaceful assembly, with restrictions which are in conformity with the law and are necessary in a democratic society in the interests of national security or public safety, public order, the protection of public health or morals or the protection of the rights and freedoms of others.¹⁶⁰ The UN CRC also specifically provides that:

States Parties shall respect and promote the right of the *child to participate fully in cultural and artistic life* and shall encourage the provision of appropriate and equal opportunities for cultural, artistic, recreational and leisure activity.¹⁶¹

The CRC has stated that the right of children to participate freely in cultural life and the arts requires States parties to respect and abstain from interfering in the child’s access to, choice of and engagement in such activities, subject to the obligation to ensure the protection of the child and the promotion of the child’s best interests.¹⁶² Furthermore, that States parties must also ensure that others do not restrict that right. The child’s decision to exercise or not exercise this right is his or her choice and, as such, should be recognized, respected and protected.¹⁶³ The CRC also asserts that participation requires that concrete opportunities are guaranteed for children, individually or as a group, to express themselves freely, to communicate, act and engage in creative activities, with a view to the full development of their personalities.¹⁶⁴ The CRC recommends that the participation and involvement of children in school activities should be promoted as part of the process of learning and

¹⁵⁸ See CRC *General Comment No.12* Para 126.

¹⁵⁹ Article 13 (2) (b).

¹⁶⁰ Article 15.

¹⁶¹ Article 31.

¹⁶² CRC *General Comment No. 17, The right of the child to rest, leisure, play, recreational activities, cultural life and the arts (article 31)* (2013) CRC/C/GC/17 Para 14 (g).

¹⁶³ As above.

¹⁶⁴ Para 15 (a) (ii) CRC *General comment No. 17*.

fulfilling human rights.¹⁶⁵ The CRC has also noted that girls' participation is negatively affected by gender discrimination including unsafe or unfriendly environments.¹⁶⁶

The CRC in its most recent Concluding Observations has asked States to allow children to participate in decision making especially relating to issues that concern them including in development of national policies.¹⁶⁷ The CRC can also consider individual complaints on violations of the UN CRC and its optional protocols but has not yet heard a violation relating to participation.

h) International Convention on the Protection of All Migrant Workers and Members of their Families

The 1990 International Convention on the Protection of All Migrant Workers and Members of their Families (ICMW) provides for migrant workers and their families the right to participate in the public affairs of their State of origin. States of employment also have the duty to enhance their participation in decisions concerning the life and administration of their communities. Article 41 provides as follows:

1. Migrant workers and members of their families shall have the *right to participate in public affairs of their State of origin* and to vote and to be elected at elections of that State, in accordance with its legislation.
2. The States concerned shall, as appropriate and in accordance with their legislation, facilitate the exercise of these rights.

Article 42 provides:

1. States Parties shall consider the establishment of procedures or institutions through which account may be taken, both in States of origin and State of employment, of special needs, aspirations and obligations of migrant workers and members of their families and shall envisage, as appropriate, the possibility for migrant workers and members of their families to have their freely chosen representatives in those institutions.

¹⁶⁵ See CRC *General Comment No.1: The aims of education* (2001) (*General Comment No.1*) Para 8.

¹⁶⁶ See *General Comment No.1* Para 10.

¹⁶⁷ CRC 'Concluding observations on the combined fifth to seventh periodic reports of Angola' (2018) CRC/C/AGO/CO/5-7 Paras 16 and 17; CRC 'Concluding observations on the second periodic report of Lesotho' (2018) CRC/C/LSO/CO/2 Paras 22-23; CRC 'Concluding observations on the combined second and third periodic reports of Montenegro' (2018) CRC/C/MNE/CO/2-3 Paras 25 and 26.

2. States of employment shall facilitate in accordance with their national legislation, *the consultation or participation of migrant workers and members of their families in decisions concerning the life and administration of local communities.*
3. Migrant workers may enjoy political rights in the State of employment if that State, in the exercise of its sovereignty, grants them such rights.

The Committee on Migrant Workers (CMW), which is responsible for monitoring the implementing the Convention, has so far issued two general comments on migrant domestic workers¹⁶⁸ and on the rights of migrant workers in an irregular situation and members of their families.¹⁶⁹ The CMW emphasised the importance of participation, in terms of genuine consultations, of migrant domestic workers and civil society in the development and implementation of legislative and other measures related to migrant domestic workers and the protection of their rights.¹⁷⁰ The CMW also affirms the right to participation by migrant workers in the General Comment No.2 on the rights of migrant workers in an irregular situation and members of their families.¹⁷¹

The CMW in its most recent concluding observations emphasised the participation of civil society organisation's in the implementation of the convention.¹⁷² The CMW can also consider individual complaints on violations of the ICMW but has not yet heard a violation relating to participation. This is because the provisions allowing the hearing of individual communications will only become operative when 10 states parties have made the necessary declaration under article 77. So far five countries: Ecuador, El Salvador, Mexico, Turkey and Uruguay have made that declaration.¹⁷³

¹⁶⁸ General Comment No. 1 on Migrant Domestic Workers.

¹⁶⁹ General Comment No. 2 on the Rights of Migrant Workers in an Irregular Situation and Members of their Families.

¹⁷⁰ General Comment No. 1 on Migrant Domestic Workers, Para 65.

¹⁷¹ See Paras 10 and 65.

¹⁷² See: Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families, 'Concluding observations on Saint Vincent and the Grenadines in the absence of a report' (2018) CMW/C/VCT/CO/1 Paras 24 and 25; Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families 'Concluding observations on the initial report of Guyana' (2018) CMW/C/GUY/CO/1 Paras 22 and 23.

¹⁷³ See UN, 'Status of ratifications' available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-13&chapter=4&lang=en (accessed 26 June 2018).

i) Convention on the Rights of Persons with Disabilities

The 2010 Convention on the Rights of Persons with Disabilities (CRPD) provides for their participation in: decision-making processes to implement their rights; political and public life including NGOs and representation at various levels; and monitoring the implementation of the Convention at the national level.

Article 4 (3) of the CRPD provides that:

In the development and implementation of legislation and policies to implement the present Convention, and in other decision-making processes concerning issues relating to persons with disabilities, *States Parties shall closely consult with and actively involve persons with disabilities, including children with disabilities, through their representative organizations.*

Article 29 also provides:

States Parties shall guarantee to persons with disabilities political rights and the opportunity to enjoy them on an equal basis with others, and shall undertake:

- a) To ensure that persons with disabilities can *effectively and fully participate in political and public life on an equal basis with others*, directly or through freely chosen representatives, including the right and opportunity for persons with disabilities to vote and be elected, inter alia, by:

Ensuring that voting procedures, facilities and materials are appropriate, accessible and easy to understand and use;

Protecting the right of persons with disabilities to vote by secret ballot in elections and public referendums without intimidation, and to stand for elections, to effectively hold office and perform all public functions at all levels of government, facilitating the use of assistive and new technologies where appropriate;

Guaranteeing the free expression of the will of persons with disabilities as electors and to this end, where necessary, at their request, allowing assistance in voting by a person of their own choice;

- b) To promote actively an *environment in which persons with disabilities can effectively and fully participate in the conduct of public affairs*, without discrimination and on an equal basis with others, and encourage their participation in public affairs, including:

Participation in non-governmental organizations and associations concerned with the public and political life of the country, and in the activities and administration of political parties;

Forming and joining organizations of persons with disabilities to represent persons with disabilities at international, national, regional and local levels.

Furthermore, Article 33 (3) provides in relation to national implementation and monitoring that: ‘Civil society, in particular persons with disabilities and their representative organisations, shall be involved and participate fully in the monitoring process.’

The CRPD comprehensively provides for the participation of persons with disabilities in terms of decision making, the electoral process and national implementation and monitoring. Interesting to note, is the fact that the CRPD provides for participation in decision making specifically through the persons with disabilities representative organisations. It is only in the context of the electoral process and national implementation and monitoring that their direct participation can be inferred.

The Committee on the Rights of Persons with Disability in its most recent concluding observations emphasised the participation of persons with disabilities, including through their representative organisations’, in decision making including: legislative and policy formulation;¹⁷⁴ accessibility plans;¹⁷⁵ emergency and disaster risk reduction

¹⁷⁴ Committee on the Rights of Persons with Disabilities ‘Concluding observations on the initial report of Seychelles’ (2018) CRPD/C/SYC/CO/11 Para 8 and 9.

¹⁷⁵ Committee on the Rights of Persons with Disabilities ‘Concluding observations on the initial report of Oman’ (2018) CRPD/C/OMN/CO/1 Paras 8 and 9.

strategies and plans;¹⁷⁶ in judicial and other administrative proceedings;¹⁷⁷ and in public and political life.¹⁷⁸ The Committee urged States to ensure the participation of women and children with disabilities.¹⁷⁹ The Committee has also considered a number of cases relating to the rights of persons with disability. A few of these cases have related to the right to participate especially in public affairs and in relation to voting.

In the case of *Gemma Beasley v Australia*, the Committee on the Rights of Persons with Disability held that the performance of jury duty is an integral part of the Australian judicial system that constitutes participation in legal proceedings.¹⁸⁰ The Committee asserted that Article 29 (b) requires States to actively promote an environment in which persons with disabilities can effectively and fully participate in the conduct of public affairs without discrimination and on an equal basis with others and that this included participation in the justice system. The Committee pointed out that it did not matter whatever capacity the participation was, including jury service where persons with disability should also participate on an equal basis with others. The Committee thus decided that the failure to provide Auslan-interpretation violated Article 29 (b), among other articles. Therefore, the Committee recommended that the State provide Ms. Beasley with an effective remedy including the reimbursement of the legal costs and compensation to enable her participation in jury duty and to provide her with reasonable accommodation in terms of Auslan-interpretation. Moreover, the Committee also urged the State to take measures to prevent such similar violations in the future by carrying out objective and comprehensive assessment of requests for

¹⁷⁶ See: Committee on the Rights of Persons with Disabilities ‘Concluding observations on the initial report of Oman’ (2018) CRPD/C/OMN/CO/1 Paras 23 and 24; Committee on the Rights of Persons with Disabilities ‘Concluding observations on the initial report of Seychelles’ (2018) CRPD/C/SYC/CO/11Paras 8 and 9.

¹⁷⁷ See: Committee on the Rights of Persons with Disabilities ‘Concluding observations on the initial report of Oman’ (2018) CRPD/C/OMN/CO/1 Para 28; and Committee on the Rights of Persons with Disabilities ‘Concluding observations on the initial report of Seychelles’ (2018) CRPD/C/SYC/CO/11Para 26 and 27.

¹⁷⁸ See: Committee on the Rights of Persons with Disabilities ‘Concluding observations on the Initial report of Oman’ (2018) CRPD/C/OMN/CO/1 Paras 51 and 52; Committee on the Rights of Persons with Disabilities ‘Concluding observations on the initial report of Slovenia’ (2018) CRPD/C/SVN/CO/1Paras 49, 50 and 51; and Committee on the Rights of Persons with Disabilities ‘Concluding observations on the initial report of Seychelles’ (2018) CRPD/C/SYC/CO/11Para 49, 50 and 51.

¹⁷⁹ Committee on the Rights of Persons with Disabilities ‘Concluding observations on the initial report of Oman’ (2018) CRPD/C/OMN/CO/1 Paras 13, 14, 19, 20 and 51- 54 and Committee on the Rights of Persons with Disabilities, ‘Concluding observations on the initial report of Slovenia’ (2018) CRPD/C/SVN/CO/1Para 9, 10 and 11.

¹⁸⁰ *Gemma Beasley v Australia*, Communication No. 11/2013.

adjustments to act as juror and providing reasonable accommodations and amending relevant laws, regulations and policies with the involvement of persons with disabilities and their representative organisations. Furthermore, the Committee recommended the training of public officials, the Sheriff, judicial officers and other staff who are involved. In terms of participation in development, this case is relevant in the sense that similar requirements would have to be made to ensure that persons with disability can participate in the conduct of public affairs relating to development planning including providing reasonable accommodation.

The CRPD Committee in the case of *Zsolt Bujdosó and five others v Hungary* emphasised that article 29 does not envisage any reasonable restriction or allow an exception for any group of persons with disabilities in relation to the right to vote.¹⁸¹ The Committee held that an exclusion on the right to vote on the basis of a perceived or actual psychosocial or intellectual disability even a restriction pursuant to an individualised assessment amounted to discrimination on the basis of disability. The Committee emphasised that States had to adopt urgent legislative measures, as was made in the Concluding Observations on Tunisia, to ensure that persons with disabilities who are under guardianship or trusteeship can vote and participate in public life on an equal basis with others. The Committee emphasised as they had, in the Concluding Observations on Spain, that the right to vote of persons with intellectual or psychosocial disability should not be deprived and that doing so is in breach of Article 29 of the CRPD. Hungary was urged to adapt its voting procedures to ensure that they appropriate, accessible and easy to understand and use with provision where necessary for assistance in voting upon request for the person with disability, among other things. In terms of participation in development this case is relevant as a similar requirement would be envisaged in terms of the participation of persons with disabilities in development planning.

j) UN Convention on the Law of the Non-navigational Uses of International Watercourses

Article 5 of the 1997 UN Convention on the Law of the Non-navigational Uses of International Watercourses provides for cooperation, participation and equitable and

¹⁸¹ *Zsolt Bujdosó and five others v Hungary*, No. 4/2011.

reasonable utilization of international watercourse. Watercourse states are entitled to participate in the ‘use, development and protection’ of international watercourse.¹⁸² This creates an implicit right of states in terms of participation in development relating to the use of the watercourse.

2.4.1.2 Soft law

There are various declarations, charters, goals, guiding principles and other soft law that affirm the right to participate in development ranging from the 1969 UN Declaration on Social Progress and Development, the UN Declaration on the Right to Development, to the recent 2015 Paris Climate Change Agreement, among others. The soft law from the various instruments and guidance from the UN special procedures provides for participation in the context of the right to development, civil and political rights, economic, social and cultural rights, specific groups of people that should not be excluded from decision-making and in the operations of business corporations for the promotion and protection of human rights.

a) The right to development

The right to development has African roots and first came up for discussion at the global level in 1966 at the UN General Assembly.¹⁸³ It is reported that the then-Foreign Minister of Senegal, Doudou Thiam, discussed the right as the right to development of the “Third World” before the General Assembly.¹⁸⁴ He discussed this right in light of the decades of the failure by States to meet the goals of the first UN Development Decade suggesting that this was brought on by the inequalities and economic imbalance between the developing States, which were emerging from colonialism, and the developed States.¹⁸⁵ The right to development was further advanced by Justice Keba M’Baye of Senegal, who in 1972 urged that development should be regarded as a right and following this discussion the Commission on Human Rights endorsed a study on the right to development in 1977.¹⁸⁶ Since then support for the right grew

¹⁸² Article 5 (2).

¹⁸³ Report of the Special Rapporteur on the Right to Development (2017) A/HRC/36/49.

¹⁸⁴ Report of the Special Rapporteur on the Right to Development above Para 5.

¹⁸⁵ As above.

¹⁸⁶ The study was entitled: ‘The international dimensions of the right to development as a human right in relation with other human rights based on international cooperation, including the right to peace, taking into account the requirement of the New International Economic Order and the fundamental human needs.’ It was commissioned under resolution 4 (XXXIII) of 21

and some of the achievements were the adoption of the Declaration on the Right to Development which was adopted by the General Assembly on 4 December 1986 and supported by a great majority of States.

Although the UN Declaration on the Right to Development only has the status of a declaration and is not a binding treaty, it has important legal and political ramifications. The Declaration has been overwhelmingly supported by the international community and provides inspiration for development goals and policy. The Declaration specifically provides that all human beings are entitled to participate in economic, social, cultural and political development and that the human being should be an active participant in development. Participation in development must be active, free and meaningful. This would mean that persons must be involved in decision making in a process that has no obstructions, restrictions or impediments and where their ideas are valued and considered. It further provides that States have to encourage popular participation in all spheres of development and as part of the process to promote and protect human rights. The specific provisions are highlighted below.

Article 1 (1) provides that:

The right to development is an inalienable human right by virtue of which *every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development*, in which all human rights and fundamental freedoms can be fully realized.

Article 2 (1) and (3):

The human person is the central subject of development and *should be the active participant* and beneficiary of the right to development.

States have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population

February 1977. See UN OHCHR, 'Development - Right to development' available at <https://www.ohchr.org/EN/Issues/Development/Pages/Backgroundrtd.aspx> (accessed 28 July 2018.)

and of all individuals, *on the basis of their active, free and meaningful participation in development* and in the fair distribution of the benefits resulting therefrom.

Article 8 (2):

States should encourage *popular participation in all spheres* as an important factor in development and in the full realization of all human rights.

The participatory rights in the UN Declaration on the Right to Development are already provided for in many international human rights treaties,¹⁸⁷ other UN Declarations¹⁸⁸ and Charters¹⁸⁹ and affirmed in several international conferences.¹⁹⁰ Furthermore, in line with the Declaration, the Vienna Declaration and Programme of Action¹⁹¹ emphasised that democracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing.¹⁹² The Conference asserted that democracy is based on the freely expressed will of the people to determine their own political, economic, social and cultural systems and their full participation in all aspects of their lives.¹⁹³ The Conference urged the international community to support the strengthening and promoting of democracy, development and respect for human rights and fundamental freedoms in the entire world.¹⁹⁴ The Conference also reaffirmed the universal and inalienable right to development, as established in the Declaration on the Right to Development and urged that it must be implemented and realised.¹⁹⁵

Alston has also stated that, under international human rights law, the existence of the right to development (which includes the right to participate in development), is a *fait*

¹⁸⁷ ICCPR, ICESCR, CERD, CEDAW, CRC, ICMW and CRPD, among others.

¹⁸⁸ UDHR, UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, UN Declaration on the Rights of Indigenous Peoples, UN Declaration on Social Progress and Development, UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms, Durban Declaration and Programme of Action, Declaration of Alma Ata, Rio Declaration on Environment and Development and the Millennium Declaration, among others.

¹⁸⁹ 1982 World Charter for Nature.

¹⁹⁰ 1993 World Conference on Human Rights in Vienna.

¹⁹¹ Adopted by the World Conference on Human Rights in Vienna on 25 June 1993.

¹⁹² Vienna Declaration and Programme of Action (1993) Para 8.

¹⁹³ As above.

¹⁹⁴ As above.

¹⁹⁵ Vienna Declaration and Programme of Action (n 163 above) Paras10 and 11.

accompli.¹⁹⁶ Alston proposes that whatever misgivings various stakeholders may have as to the legality, practicability or value of the right to development, they have to be given up and all attention and focus should be shifted to making every effort to guarantee the right through a productive and constructive exercise.¹⁹⁷ Indeed, according to the UN Special Rapporteur on the Right to Development, the right to development stems right from the 1945 UN Charter and the 1986 Declaration on the Right to Development and is affirmed in various global, regional and national instruments.¹⁹⁸ He asserts that this right has been reaffirmed in the 1992 Rio Declaration on Environment and Development, the 1993 Vienna Declaration and Programme of Action, 1994 Programme of Action of the International Conference on Population and Development and the 2012 UN Conference on Sustainable Development, entitled “The Future We Want.”¹⁹⁹ He notes that in 2015, the right to development was explicitly recognized in four key internationally agreed policy documents: the Addis Ababa Action Agenda of the Third International Conference on Financing for Development; the Sendai Framework for Disaster Risk Reduction 2015-2030; “Transforming our world: the 2030 Agenda for Sustainable Development”, which included the SDGs; and the Paris Agreement on climate change.²⁰⁰ Furthermore, he says the right to development is recognised and is routinely mentioned in several Human Rights Council resolutions.²⁰¹ On the 25th Anniversary of the Declaration on the Right to Development the UN High Commissioner for Human Rights called for measures to ensure that people can benefit from their country’s natural resources and participate meaningfully in decision making as stipulated in the Declaration, among other things.²⁰²

¹⁹⁶ P Alston ‘Development and the Rule of Law: Prevention Versus Cure as a Human Rights Strategy’ in International Commission of Jurists (Eds) *Development, Human Rights and the Rule of Law* (1981) 31 at 106 cited in ID Bunn *The Right to Development in International Economic Law: Legal and Moral Dimensions* (2012) 127.

¹⁹⁷ As above.

¹⁹⁸ See Report of the Special Rapporteur on the Right to Development (n 183 above) Paras 6 and 7.

¹⁹⁹ As above.

²⁰⁰ As above.

²⁰¹ As above. Also see Resolutions 4/4, 6/7, 7/23, 8/5, 17/14, 18/6, 19/20, 20/10, 21/11, 35/8 and 35/21.

²⁰² Navi Pillay, UN High Commissioner for Human Rights, on the 25 Anniversary of the Declaration on the Right to Development accessed at un.org on 11 April 2016.

However, the status of the right to development, including the right to participate in development, as provided for by the Declaration is still a subject of debate as was pointed out in Chapter one. The Special Rapporteur on the right development has also observed several concerns relating to the right to development that need to be addressed including: politicisation; lack of engagement and the adverse global trends.²⁰³

Nevertheless, there is evidence of the UN commitment to the right to development which can also be traced in the earlier UN Declaration on Social Progress and Development²⁰⁴ which asserts that social progress and development require:

1. The full utilization of human resources including the *active participation of all elements of society*, individually or through associations, in defining and in achieving the common goals of development with full respect for the fundamental freedoms embodied in the Universal Declaration of Human Rights.²⁰⁵
2. The *participation of all members of society* in productive and socially useful labour and the establishment, in conformity with human rights and fundamental freedoms and with the principles of justice and the social function of property, of forms of ownership of land and of the means of production which preclude any kind of exploitation of man, ensure equal rights to property for all and create conditions leading to genuine equality among people.²⁰⁶

The Declaration provides for the education of youth in, and promotion among them of, the ideals of justice and peace, mutual respect and understanding among peoples and the promotion of full participation of youth in the process of national development.²⁰⁷

Article 15 specifically provides for:

- a) The adoption of measures, to ensure the *effective participation*, as appropriate, of all the elements of society *in the preparation and execution of national plans and programmes of economic and social development*;

²⁰³ See Report of the Special Rapporteur on the Right to Development (n 183 above) Para 30.

²⁰⁴ G.A. res. 2542 (XXIV), 24 U.N. GAOR Supp. (No. 30) at 49, U.N. Doc. A/7630 (1969).

²⁰⁵ Article 5 (c).

²⁰⁶ Article 6.

²⁰⁷ Article 11 (d)

- b) The adoption of measures for an increasing rate of *popular participation* in the economic, social, cultural and political life of countries through national governmental bodies, non-governmental organizations, co-operatives, rural associations, workers' and employers' organizations and women's and youth organizations, by such methods as national and regional plans for social and economic progress and community development, with a view to achieving a fully integrated national society, accelerating the process of social mobility and consolidating the democratic system;

Article 20 (a) provides for the full democratic freedoms to trade unions including the growing participation of trade unions in economic and social development and the effective participation of all members in trade unions in the deciding of economic and social issues which affect their interests.

Article 21 (c) provides for raising the general level of education; development and expansion of national information media, and their rational and full use towards continuing education of the whole population and towards encouraging its participation in social development activities, among other things.

Moreover, there were commitments made in the Millennium Development Goals (MDGs) which were set to eradicate poverty and improve the lives of the poorest people under the Millennium Declaration which was signed by leaders of 189 Countries.²⁰⁸ The international community stated that they would spare no effort to promote democracy and strengthen the rule of law, as well as respect for human rights and fundamental freedoms including the right to development.²⁰⁹ The Declaration set out eight goals with measurable targets and clear deadlines which included: eradication of extreme poverty and hunger; achieve universal primary education; promotion of gender equality and empower women; reduce child mortality; improve maternal health; and develop a global partnership for development.²¹⁰ The MDGs represented a set of development objectives which required good governance:

²⁰⁸ UNICEF, 'Millennium Development Goals Monitoring' available at: https://www.unicef.org/statistics/index_24304.html (accessed 5 August 2018).

²⁰⁹ See Article 24 of the Millennium Declaration 2000.

²¹⁰ See the UN Millennium Declaration, 2000.

including conducive legal, policy and institutional frameworks; sufficient resources; and an enabling environment conducive for the participation of citizens, among other things.²¹¹ The MDGs were meant to be fulfilled in 15 years. There were major improvements in the lives of people and a number of targets were met but additional goals had to be set in terms of the SDGs.

The SDGs, which were adopted by the UN Sustainable Development Summit in New York in September 2015, replaced the MDGs. The SDGs which are meant to cover the next 15 years until 2030 are intended to ensure: the end of poverty and hunger; healthy lives and the well-being of all; inclusive and equitable education and life learning opportunities for all; gender equality; clean water and sanitation; affordable and clean energy; decent work and economic growth; industry, innovation and infrastructure; reduced inequalities among countries; sustainable cities and communities; responsible consumption and production; action to combat climate change; conservation and sustainable use of water sources; sustainability of life on land by combatting desertification, and halting and reversing land degradation and halting biodiversity loss; peace, justice and strong institutions and partnership for the goals. Notably, the SDGs, particularly SDG 16, explicitly provides for governance, inclusion, participation, rights and security. The aim of the goal is to 'promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels.' The goal provides for the development of effective, accountable and transparent institutions at all levels and ensuring responsive, inclusive, participatory and representative decision-making at all levels.²¹²

In the last few years various frameworks have been established including the Sendai Framework for Disaster Risk Reduction 2015-2030 which was adopted at the Third UN World Conference in Sendai, Japan, on 18 March 2015 and is the successor instrument to the *Hyogo Framework for Action (HFA) 2005-2015: Building the*

²¹¹ See UNDP/S Jahan, *Achieving Millennium Development Goals: Partnership and Participation*, (2003) 4 available at: <http://www.undp.org/content/dam/aplaws/publication/en/publications/poverty-reduction/> (accessed 6 April 2016).

²¹² See goals 16.6 and 16.7. of the *UN Sustainable Development Goals* available at: <http://www.un.org/sustainabledevelopment/sustainable-development-goals/> (accessed on 6 April 2016).

Resilience of Nations and Communities to Disasters. The HFA was conceived to give further impetus to the global work under the *International Framework for Action for the International Decade for Natural Disaster Reduction of 1989*, and the *Yokohama Strategy for a Safer World: Guidelines for Natural Disaster Prevention, Preparedness and Mitigation and its Plan of Action, adopted in 1994* (Guidelines) and the *International Strategy for Disaster Reduction of 1999*. The guiding principles for the implementation of the Framework recognise the right to development and emphasise empowerment and inclusive, accessible and non-discriminatory participation especially by those disproportionately affected by disasters.²¹³ The Guidelines also provide for the participation of women and other stakeholders in the private sector, civil society, professional associations, scientific organisations and the UN.²¹⁴

b) Civil and Political Rights

Participation has been also commended as crucial for the promotion of civil and political rights especially of the poor. The Special Rapporteur on extreme poverty and human rights, whose mandate is to identify strategies for removing obstacles to the full enjoyment of human rights of those living in extreme poverty by issuing recommendations to the UN Human Rights Council, has stated that the poor cannot effectively participate in the conduct of public affairs. Philip Alston, the current UN Special Rapporteur on extreme poverty and human rights, has highlighted that the civil and political rights of people living in poverty are often disregarded in development or human rights frameworks.²¹⁵ He asserts that the poor experience violations of civil and political rights disproportionately and differently from others.²¹⁶ He argues that political participation as a right is a real challenge for the poor due to practical and legal obstacles.²¹⁷ He points out that voting can be undermined by the poor being engrossed in their subsistence challenges, illness, long waiting lines and registration problems.²¹⁸ He argues that while such factors do not only apply to the poor, the implications are

²¹³ See Guideline 19 (c) and (d).

²¹⁴ See Guidelines 14, 26, 27 (j), 33 (a) and 36 (a) (i).

²¹⁵ Report of the Special Rapporteur on extreme poverty and human rights, Philip Alston, submitted in accordance with Human Rights Council resolution 35/19 (2017) A/72/502 available at: <http://undocs.org/A/72/502> (accessed 27 June 2018).

²¹⁶ Report of the Special Rapporteur on extreme poverty and human rights above para 26.

²¹⁷ As above.

²¹⁸ As above.

greater on them.²¹⁹ He contends that this is because: they are likely to be in precarious employment where they cannot be able to take time off to vote or have no transportation to the polling stations; they are often less educated and most likely unaware of the administrative processes in the electoral process; and are more affected by health problems making it difficult for them to go and vote.²²⁰ He also observes that majority of those in prison are individuals from lower socioeconomic strata and that most countries still restrict the voting rights of prisoners or ex-prisoners.²²¹ He notes that as such the poor have a lower turnout during electoral processes than other groups which inevitably affects their participation in key decision making processes.²²² He recommends that relevant data be collected to be able to identify the extent to which the poor are affected by violations of civil and political rights, which includes the right to participation, so that specific measures can be taken to address their violations.²²³

c) Economic, Social and Cultural Rights

Participation is also crucial for the enjoyment of economic, social and cultural rights and soft law from the special procedures and various declarations and charters, among other things, has emerged encouraging participation to enhance various rights including water, food, health and the environment.

Water

Participation is key in the fulfilment of the right to water. The former UN Special Rapporteur on the human right to safe drinking water and sanitation, Catarina de Albuquerque, has emphasised the importance of participation in the fulfilment of the right to water.²²⁴ The Special Rapporteur has the duty to examine issues related to the rights to water and sanitation and to provide recommendations to governments, the

²¹⁹ As above.

²²⁰ As above.

²²¹ Report of the Special Rapporteur on extreme poverty and human rights above Para 27.

²²² Report of the Special Rapporteur on extreme poverty and human rights above Paras 28 and 29.

²²³ Report of the Special Rapporteur on extreme poverty and human rights above Paras 73 and 74.

²²⁴ Report of the Special Rapporteur on the human right to safe drinking water and sanitation, Catarina de Albuquerque, in accordance with Human Rights Council resolutions 16/2 and 21/2 (2014) A/69/213.

UN, and other stakeholders, among other things. The Special Rapporteur asserted that the right to participation is a legal right even though she expressed concern that sometimes participation is just a 'façade'.²²⁵ In order to make it meaningful she makes several recommendations including: the participation of people in the formulation of guidelines for their engagement; allowing them the opportunity to participate; making the participatory processes accessible to all; ensuring free, equal and safe participation for; availing relevant information; and being responsive to the issues being raised.²²⁶ She noted that there are various challenges in ensuring participation, that should be addressed by States, such as: complementing representative democracy with direct participation; implementing the state duty to oversee community development; ensuring a balance of professional expertise with input from participants with knowledge and experience; factoring in the costs of the participatory processes; balancing competing interests; ensuring inclusion; and balancing direct participation and representation of groups.²²⁷ She emphasised that participation must be at all levels of decision making including: planning and formulation of policy and legal frameworks; financing and budgeting; service provision; on projects that have a negative impact on human rights; and on monitoring, evaluation and accountability.²²⁸

The UN Special Rapporteur stressed that participation is a human right that States have to fulfil because it is necessary for democracy and for guaranteeing people's autonomy, agency and dignity.²²⁹ She argued that participation is not a 'one-off' exercise but has to be embedded in the political culture and that it should not only be given 'token' attention.²³⁰ She stated that when participatory processes fail to tackle the established power structures and discrimination, they risk reinforcing and "legitimizing" inequalities.²³¹ Furthermore, she said that where participatory processes

²²⁵ Report of the Special Rapporteur on the human right to safe drinking water and sanitation above Paras 3 and 4.

²²⁶ Report of the Special Rapporteur on the human right to safe drinking water and sanitation above paras 18-31.

²²⁷ Report of the Special Rapporteur on the human right to safe drinking water and sanitation above Paras 32-54.

²²⁸ Report of the Special Rapporteur on the human right to safe drinking water and sanitation above Paras 55-86.

²²⁹ Report of the Special Rapporteur on the human right to safe drinking water and sanitation above Paras 87-88.

²³⁰ Report of the Special Rapporteur on the human right to safe drinking water and sanitation above Paras 18 and 88.

²³¹ Report of the Special Rapporteur on the human right to safe drinking water and sanitation above Para 88.

are meaningful and inclusive, sustainability and empowerment are significant.²³² She therefore urged States to take various measures including: providing for the right to participation in national constitutions; providing comprehensive guidance on the processes, responsible institutions and other details of participatory processes in legislation and policies; including the costs of participation in the initial design of any measures; training and building the capacity of institutions to facilitate participation and having the personnel equipped with the interpersonal skills necessary for participatory engagement; and balancing technical expertise with knowledge gained through experience by supporting technical experts to act as facilitators so that the people are able to make informed choices.²³³

She also urged States to take specific and calculated measures to ensure that every one can participate without discrimination.²³⁴ She suggested that this can be done through: recognition of groups that are usually left out; being innovative in reaching out to the various marginalised groups; removing institutional, physical, economic, attitudinal, and social or other barriers that specific groups face that discourage their participation; confronting gender stereotypes; and creating safe spaces for deliberation, where appropriate.²³⁵

Health

According to the 1978 Declaration of Alma-Ata, people have “the right and duty to participate individually and collectively in the planning and implementation of their health care.”²³⁶ Primary health care, among other things, necessitates and upholds maximum participation particularly in the planning, organisation, operation and control of primary health care, making the most of available local, national and other resources; which is made possible through appropriate education which enhances the ability of communities to participate.²³⁷ Similarly, the former UN Special Rapporteur on

²³² Report of the Special Rapporteur on the human right to safe drinking water and sanitation above Paras 4 and 91.

²³³ Report of the Special Rapporteur on the human right to safe drinking water and sanitation above Para 91.

²³⁴ As above.

²³⁵ As above.

²³⁶ Para V of the Declaration of Alma-Ata, International Conference on Primary Health Care, Alma-Ata, USSR, 6-12 September 1978.

²³⁷ Para VII (5).

the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover has emphasised the importance of participation in terms of the right to health.²³⁸ That mandate requires the Special Rapporteur to monitor the situation of the right to health around the world and make recommendations on how to ensure its protection. Grover pointed out that participation has been frequently utilised in development without adoption of a human rights-based approach.²³⁹ He noted that the benefits of participation have already been acknowledged by the World Bank since the 1970s and that “participation” as a concept is not exclusive to human rights or new to development.²⁴⁰ He emphasised that in terms of the right to health participation is an entitlement and not a privilege that can occasionally be granted.²⁴¹ He recommends that opportunities should be availed for the active and informed participation of individuals and communities in decision-making that is related to their health.²⁴² He, therefore, urged States to take various measures to ensure that information on the right to health, including the need for transparency, accountability and participation of individuals and communities in decision-making that has a bearing on their health, is disseminated and that its use is also promoted.²⁴³

Food

With regard to the right to food, the Voluntary Guidelines to support the progressive realisation of the right to adequate food in the context of national food security and the UN Special Rapporteur all emphasise people’s participation. The Food and Agricultural Organisation (FAO) Voluntary Guidelines to support the progressive realisation of the right to adequate food in the context of national food security²⁴⁴ recognise the importance of participation in realising the right to food. In particular, the

²³⁸ Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, Anand Grover’ (2011) A/HRC/17/25.

²³⁹ Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health above Para 51.

²⁴⁰ As above.

²⁴¹ As above.

²⁴² Report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health Para 60.

²⁴³ As above.

²⁴⁴ Adopted by the 127th Session of the FAO Council November 2004.

Guidelines emphasise the participation of the poor in economic policy decisions.²⁴⁵ States are encouraged to enhance private sector and civil society participation.²⁴⁶ The Guidelines also emphasise the participation of all stakeholders, farmers, women and youth associations.²⁴⁷ States are urged to allow the participation of local and indigenous communities and farmers in making national decisions on matters related to the conservation and sustainable use of genetic resources for food and agriculture.²⁴⁸ Moreover, States are also encouraged to cooperate with all stakeholders, including regional and international consumer organisations, in addressing food safety issues, and consider their participation in national and international fora where policies with impact on food production, processing, distribution, storage and marketing are discussed.²⁴⁹ Participation is particularly emphasised in situations where food assistance is provided as part of the safety nets.²⁵⁰ In such circumstances, food assistance has to be provided with the ‘fullest possible participation’ of those who are affected.²⁵¹ Finally, the Guidelines also provide for the assessment of the extent of political and social participation in the process of realizing the right to food and that there should be indicators and benchmarks in this regard.²⁵² The UN Special Rapporteur on the right to food, Olivier de Schutter, has also emphasised that the fulfilment of the right to adequate food requires the participation of stakeholders including those affected and civil society, among others.²⁵³

Housing

Just like the CESCR, the UN Special Rapporteur on adequate housing as a component of the right to an adequate standard of living and on the right to non-discrimination in this context, Leilani Farha, has also emphasised the importance of participation in relation to rights-based housing strategies.²⁵⁴ She urges that such

²⁴⁵ See Guideline 2.6.

²⁴⁶ See Guidelines 3.7, 3.8, 5.4.

²⁴⁷ See Guidelines 3.8, 3.9, 8.6, 8.12, 9.9.

²⁴⁸ See Guideline 8.12.

²⁴⁹ See Guidelines 9.9.

²⁵⁰ See Guidelines 14.5.

²⁵¹ See Guidelines 14.5.

²⁵² See Guidelines 17.4.

²⁵³ UN GA HRC ‘Report of the Special Rapporteur on the right to food, Olivier De Schutter: Final report: The transformative potential of the right to food’ 2014 A/HRC/25/57 Paras 5, 35 and 39.

²⁵⁴ UN GA HRC ‘Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context’

strategies must firmly commit to ensuring the meaningful participation of affected persons right from the design, implementation and monitoring so as to avoid violations. She distinguishes between participation and consultation. She avers that rights-based participation is different for consultation in the sense that during consultations, governments may solicit input but decision-making rests with them and they can disregard input from relevant stakeholders. On the other hand, she asserts that rights-based participation emerges from community action and is led by rights holders who identify what is lacking and what needs to change, and the government must act accordingly. In order to ensure meaningful participation, she urges participation through various specific mechanisms such as housing councils, commissions, committees or panels. She insists that meaningful participation must be guaranteed in the design, implementation and monitoring of the strategy and that support must be provided for the participation of marginalised groups.

Environment

Under the 1972 Declaration of the United Nations Conference on the Human Environment, states commit to adopting an integrated and coordinated approach to development planning to ensure that development is compatible with protection of the environment for the benefit of their population.²⁵⁵ Participation in development planning is implicit as states are urged to ensure benefits for all and leave out projects that are intended for 'colonialist and racist domination'.²⁵⁶

The 1982 World Charter for Nature, Rio Declaration and the Paris agreement provide for participation in decisions relating to the environment which includes development policies. The World Charter for Nature provides for the participation of persons in the formulation of decisions relating to the environment. In particular it provides that:

All persons, in accordance with their national legislation, shall have the opportunity to participate, individually or with others, in the formulation of decisions of direct concern to their environment, and shall have access to means of redress when their environment has suffered damage or degradation.²⁵⁷

2018 A/HRC/37/53 available at:
http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/37/53 (accessed 27 June 2018).

²⁵⁵ See Principles 13, 14 and 15.

²⁵⁶ Principle 15.

²⁵⁷ Article 23.

The Rio Declaration on Environment and Development states that environmental issues are best handled with the participation of all concerned citizens, at the relevant level.²⁵⁸ Furthermore, it provides that States shall facilitate and encourage public awareness and participation by making information widely available.²⁵⁹ The Paris Agreement recognises in its preamble that when acting to address climate change, States should respect, promote and consider their respective obligations on human rights, including the right to development. Furthermore, the Agreement affirms the importance of public participation, among other things and emphasises the participation of public and private sector in its implementation.

d) Participation of specific groups

Soft law just like treaty law also emphasises the participation of certain groups of people such as women, persons with disability, indigenous people, ethnic minorities, older persons and human rights defenders.

Women

The Working Group on the issue of discrimination against women in law and in practice, appointed by the UN Human Rights Council with the mandate to identify good practices to eliminate discrimination against women, has stated that:

...there can be *no true democracy without women's full and equal participation* in all its institutions and that women's substantive equality in political and public life can be fully realized only in conditions of democracy.²⁶⁰

The UN Special Rapporteur on Violence against Women, Dubravka Šimonović, has also highlighted that the participation of women is crucial and States need to address the fact that female members of parliament are negatively affected by sexism, harassment and violence which is often meted out against them.²⁶¹ She argues that violence against politically active women discourages them from political participation

²⁵⁸ Principle 10 of the Rio Declaration on Environment and Development.

²⁵⁹ As above.

²⁶⁰ Report of the Working Group on the issue of discrimination against women in law and in practice' 20.13 A/HRC/23/50 Para 30.

²⁶¹ See UN OHCHR News "*Stop violence against women in politics*" urges the Special Rapporteur on violence against women, its causes and consequences Geneva 21 June 2016 available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=21652&LangID=E> (accessed 28 June 2018.)

constituting a barrier that denies them their civil and political rights and undermines democracy and good governance.²⁶² She recommends the use of data on violence against women as a tool for its prevention.²⁶³

Persons with Disability

The Human Rights Council, in its resolution 26/20, established the mandate of the Special Rapporteur on the rights of persons with disabilities. The Human Rights Council was concerned that persons with disabilities face a lot of barriers in their participation as equal members of society and noted that there was need to address their challenges in order to improve the situation of persons with disabilities to enjoy their rights. The Special Rapporteur on the rights of persons with disabilities, Catalina Devandas-Aguilar who became the first mandate holder on 1 December 2014, affirms that the right of persons with disabilities to participate in political and public life on an equal basis with others, as provided by the CRPD, encompasses the right to participate in decision-making which is essential for a human rights-based approach to development and the realisation of the SDGs.²⁶⁴ She urges States to embrace their obligations under the CRPD noting that effective and meaningful participation of persons with disability is essential for: enhanced decisions and diverse perspectives leading to better outcomes; agency and empowerment; and good governance.²⁶⁵ She recommends that in order to enhance the participation of persons with disabilities in decision making States must: have adequate legislation; create an enabling environment favourable to the establishment and operation of representative organisations; guarantee the independence of these organisations; support capacity building; and secure their access to funding, among other things.²⁶⁶ She urges States to engage women and girls to secure their participation in a safe environment especially in processes regarding measures on violence and sexual abuse.²⁶⁷ She insists persons with disabilities and their representative organisations must be involved in: harmonization of laws with the CRPD; national implementation and

²⁶² UN OHCHR News above.

²⁶³ Report of the Special Rapporteur on violence against women, its causes and consequences (2016) A/HRC/32/42 Para 45.

²⁶⁴ Report of the Special Rapporteur on the rights of persons with disabilities (2016) A/HRC/31/62 Para 99.

²⁶⁵ Report of the Special Rapporteur on the rights of persons with disabilities above Paras 25-33.

²⁶⁶ Report of the Special Rapporteur on the rights of persons with disabilities above Para 100.

²⁶⁷ As above.

monitoring of the CRPD; budgeting; and international cooperation.²⁶⁸ She urges States to guarantee accessibility and reasonable accommodation to enhance the participation of persons with disabilities including age-appropriate assistance with special attention to disadvantaged groups.²⁶⁹ States are also implored to support the participation of persons with disabilities in international decision making processes.²⁷⁰

Older persons

As already mentioned earlier, the 1991 UN Principles of Independence, Dignity, Self-fulfilment, Participation and Care of Older Persons provides for participation of older persons.²⁷¹ The UN Independent Expert on the enjoyment of all human rights by older persons, Rosa Kornfeld-Matte, has also highlighted the importance of participation of elder persons.²⁷² In her report to the Human Rights Council she notes that participation of older persons is a good practice for promoting and protecting the rights of elder persons.²⁷³ She notes and commends the various countries that have established participatory mechanisms to ensure the participation of older persons and guarantee that States develop age-sensitive laws and policies.²⁷⁴

Indigenous people

The UN Declaration on the Rights of Indigenous Peoples provides that they have a right to participate in the political, economic, social and cultural life of the State and that they have the right to participate in decision making in matters that would affect their rights. Article 5 provides:

Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their *right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.*

Article 18 also asserts:

²⁶⁸ As above.

²⁶⁸ As above.

²⁶⁹ As above.

²⁷⁰ As above.

²⁷¹ See Articles 7, 8 and 9.

²⁷² Comprehensive Report of the Independent Expert on the enjoyment of all human rights by older persons, Rosa Kornfeld-Matte (2016) A/HRC/33/44.

²⁷³ Comprehensive Report of the Independent Expert on the enjoyment of all human rights by older persons above, Para 70.

²⁷⁴ As above.

Indigenous peoples have the *right to participate in decision-making in matters which would affect their rights*, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.

Racial and ethnic minorities

The Durban Declaration and Programme of Action recognises that the equal participation of all individuals and peoples in the formation of just, equitable, democratic and inclusive societies can contribute to a world free from racism, racial discrimination, xenophobia and related intolerance.²⁷⁵ Furthermore, it emphasises the importance of the equitable participation of all, without any discrimination, in domestic as well as global decision-making.²⁷⁶ It also provides:

We recognize the value and diversity of the cultural heritage of Africans and people of African descent and *affirm the importance and necessity of ensuring their full integration into social, economic and political life with a view to facilitating their full participation at all levels in the decision-making process;*²⁷⁷

Moreover, in relation to natural resources, the Durban Declaration also commits to enabling people of African descent to use, enjoy and conserve the natural renewable resources of their habitat and to their active participation in the design, implementation and development of educational systems and programmes, including those of a specific and characteristic nature; and where applicable to their ancestrally inhabited land.²⁷⁸

The 1992 UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities also recognises the right to participation. Article 2 (2) provides that:

Persons belonging to minorities have the *right to participate effectively in cultural, religious, social, economic and public life.*

²⁷⁵ Preamble of the Durban Declaration and Plan of Action.

²⁷⁶ As above.

²⁷⁷ Durban Declaration and Plan of Action, Para 32.

²⁷⁸ Durban Declaration and Plan of Action, Para 34.

Human Rights Defenders

The UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms (UN Declaration on the Rights of Human Rights Defenders) provides for their right to participate in the government of their country and in the conduct of public affairs which includes criticism and proposals for improving the human rights situation at the national and international levels. Article 8 provides that:

- 1) Everyone has the right, individually and in association with others, to have effective access, on a non-discriminatory basis, *to participation in the government of his or her country and in the conduct of public affairs.*

- 2) This includes, inter alia, the right, individually or in association with others, to submit to government bodies and agencies and organizations concerned with public affairs criticism and proposals for improving their functioning and to draw attention to any aspect of their work that may hinder or impede the promotion, protection and realization of human rights and fundamental freedoms.

e) Business and Human Rights

Business enterprises are required, under the UN Guiding Principles on Business and Human Rights, to respect human rights and to avoid infringing on the human rights of others. They have the duty to address adverse human rights impacts with which they are involved.²⁷⁹ Furthermore, in order to gauge human rights risks, business enterprises are required to identify and assess any actual or potential adverse human rights impacts with which they may be involved either through their own activities or as a result of their business relationships.²⁸⁰ Such a process should involve meaningful consultation with potentially affected groups and other relevant stakeholders, as appropriate to the size of the business enterprise and the nature and context of the operation.²⁸¹ Such meaningful consultation with potentially affected groups and other relevant stakeholders is, in essence, participation in decision making by people on issues that may have an impact on their human rights because of the operations of a business enterprise.

²⁷⁹ Article 11 of the UN Guiding Principles on Business and Human Rights.

²⁸⁰ Article 18 of the UN Guiding Principles on Business and Human Rights.

²⁸¹ Article 18 (b) of the UN Guiding Principles on Business and Human Rights.

2.4.2 Regional Legal Framework

Most regional legal frameworks affirm the right to participation. In the Americas, the Inter-American regional human rights instruments provide for the right to participation.²⁸² The League of Arab States have an Arab Charter on Human Rights which provides for participation.²⁸³ The Association of Southeast Asian Nations have a human rights declaration which recognises peoples' participation, inclusivity and accountability as the guiding principles for the realisation of human rights and freedoms.²⁸⁴ Under the European Convention on Human Rights, State Parties undertake to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.²⁸⁵ In order to ensure the free expression of the opinion of the people in the choice of legislature, participation is implicit.

2.4.2.1 Africa

Participation is provided for in various treaties and declarations of the AU ranging from the Constitutive Act,²⁸⁶ ACHPR,²⁸⁷ Protocol to the African Charter on the Rights of Women in Africa (Maputo Protocol),²⁸⁸ African Charter on the Rights and Welfare of the Child (ACRWC),²⁸⁹ the AU Convention on the Conservation of Nature,²⁹⁰ AU Convention on Preventing and Combating of Corruption;²⁹¹ the African Charter on Democracy, Elections and Governance²⁹² the Statutes of the Economic, Social and

²⁸² See Article XX of the American Declaration on the Rights and Duties of Man; Article 23 of the American Convention on Human Rights; Article 14 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights or the "Protocol of San Salvador"; Article 4 of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women or the "Convention of Belem do Para"; Article 5 of the Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities; Articles 2 and 6 of the Declaration of Principles on Freedom of Expression and the Inter-American Democratic Charter.

²⁸³ See Articles 6, 24, 40 (1), 42 (1) and 42 (3) of the 2004 Arab Charter on Human Rights.

²⁸⁴ See Articles 9, 25, 32 and 35 of the 2012 Association of Southeast Asian Nations Human Rights Declaration.

²⁸⁵ Article 3 of the Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

²⁸⁶ Articles 3 (g), 4 (c) and 17.

²⁸⁷ Articles 13 and 17 (2).

²⁸⁸ Articles 2 (1) (c), 9, 18, 19 and 23.

²⁸⁹ Articles 13 and 14.

²⁹⁰ Articles 16 (1) (c), 17 (3).

²⁹¹ Article 12.

²⁹² Articles 3 (7), 27, 29, 30, 31.

Cultural Council of the AU,²⁹³ the African Youth Charter,²⁹⁴ and the African Charter for Popular Participation, among others. Specific provisions of the key treaties and declarations will be discussed below.

a) Constitutive Act of the African Union

The 2000 Constitutive Act of the AU provides that the objectives of the Union, are among other things, to promote the democratic principles and institutions, popular participation and good governance.²⁹⁵ Furthermore, the Union functions in accordance with key principles including the participation of the African peoples in the activities of the Union.²⁹⁶ Moreover, the Constitutive Act provides for the establishment of the Pan-African Parliament in order to ensure the full participation of African People in the development and economic integration of the continent.²⁹⁷

b) African Charter on Human and Peoples' Rights

Article 13 of the 1981 ACHPR particularly provides that every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law. It also provides for the right to equal access to the public service and access to public property and services in strict equality of all persons before the law. The ACHPR also provides in Article 17 (2) that: 'every individual may freely, take part in the cultural life of his community'. The African Commission, which is responsible for overseeing the implementation of the ACHPR, has in the case of the *Ogoni* and in the case of the *Endorois* also emphasised the importance of participation.

The case of the *Ogoni*²⁹⁸ people dealt with quite a number of serious human rights violations by the military government of Nigeria which was involved in irresponsible oil development practices in the Ogoni region causing environmental degradation and health problems among the Ogoni people, resulting from the contamination of the

²⁹³ Articles 2 (3) and 5.

²⁹⁴ Article 16.

²⁹⁵ See Article 3 (g).

²⁹⁶ See Article 4 (c).

²⁹⁷ Article 17.

²⁹⁸ *The Social and Economic Rights Action Centre and the Centre for Economic and Social Rights v. Nigeria*, African Commission on Human and Peoples' Rights, Communication No. 155/96 (*Ogoni* case).

environment.²⁹⁹ There were allegations of violation of their rights to health, a healthy environment, housing and food, among others, contrary to the ACHPR.³⁰⁰ The African Commission asserted that government compliance with the spirit of Articles 16 and 24 of the ACHPR which provide for the right to health and the right to environment includes providing meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities.³⁰¹

In the case of the *Endorois* the African Commission decided that participation is a key right in development³⁰² which should be enjoyed without discrimination.³⁰³ The complaint which was against the government of Kenya was about violations resulting from the displacement of the Endorois community, an indigenous community, from their ancestral lands and the failure to adequately compensate them for the loss of their property, disruption of the community's pastoral enterprise and violations of the right to practice their religion and culture, as well as the overall process of development of the Endorois people.³⁰⁴ The African Commission held that where there is no effective participation and reasonable benefit enjoyed by the community in a development project, there is a violation of the right to development.³⁰⁵ In that case, the African Commission affirmed that "prior informed consent" which is key for participation especially in development is the minimum standard to be achieved by states before undertaking any development endeavours in indigenous peoples' communities.³⁰⁶

c) Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol)

Article 9 of the 2003 Maputo Protocol provides that States Parties shall take specific positive action to promote participative governance and the equal participation of women in the political life of their countries through affirmative action, enabling national

299 As above.

300 As above.

301 As above.

302 Article 22 of the ACHPR provides for the right to economic, social and cultural development.

303 *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) Vs. Kenya*, Communication No. 276/03 (*Endorois Case*).

304 As above.

305 As above.

306 As above.

legislation and other measures.³⁰⁷ The measures are meant to ensure that women: participate without any discrimination in all elections; are represented equally at all levels with men in all electoral processes; are equal partners with men at all levels of development and implementation of State policies and development programmes .³⁰⁸ Furthermore, the Maputo Protocol provides that States Parties shall ensure increased and effective representation and participation of women at all levels of decision-making.³⁰⁹

Article 18 of the Maputo Protocol provides that women have the right to live in a healthy and sustainable environment and that States should take all appropriate measures to ensure, among other things, greater participation of women in the planning, management and preservation of the environment and the sustainable use of natural resources at all levels. Furthermore, States should promote research and investment in new and renewable energy sources and appropriate technologies, including information technologies and facilitate women's access to, and participation in their control.

The Maputo Protocol also provides that women have the right to sustainable development and States have to ensure participation of women at all levels in the conceptualisation, decision-making, implementation and evaluation of development policies and programmes.³¹⁰With regard to women with disabilities, the Protocol provides that States have to ensure the protection of women with disabilities and take specific measures commensurate with their physical, economic and social needs to facilitate their access to employment, professional and vocational training as well as their participation in decision-making.

d) African Charter on the Rights and Welfare of the Child

The 1990 ACRWC provides that every child who is mentally or physically disabled has the right to special measures of protection in keeping with his physical and moral

³⁰⁷ Article 9 (1).
³⁰⁸ Article 9 (1), (a), (b) and (c).
³⁰⁹ Article 9 (2).
³¹⁰ Article 19 (b).

needs and under conditions which ensure his dignity, promote his self-reliance and active participation in the community.³¹¹

Furthermore, in order for every child to enjoy the right to the best attainable state of physical, mental and spiritual health, States have to ensure the meaningful participation of non-governmental organisations, local communities and the beneficiary population in the planning and management of a basic service programme for children.³¹²

e) African Convention on the Conservation of Nature and Natural Resources

The 2017 AU Convention on the Conservation of Nature and Natural Resources³¹³ provides that States must, among other things, adopt legislative and regulatory measures necessary to ensure timely and appropriate participation of the public in decision-making with a potentially significant environmental impact.³¹⁴

In addition, States must take measures necessary to enable active participation by the local communities in the process of planning and management of natural resources upon which such communities depend with a view to creating local incentives for the conservation and sustainable use of such resources.³¹⁵

f) African Union Convention on Preventing and Combating of Corruption

States undertake to be fully engaged in the fight against corruption and related offences and the popularisation of the 2003 AU Convention on Preventing and Combating of Corruption with the full participation of the media and civil society at large.³¹⁶ Furthermore, States commit to ensure and provide for the participation of civil society in the monitoring process and to consult them in the implementation of the Convention.³¹⁷

³¹¹ Article 13.

³¹² Article 14 (1), (2) (i).

³¹³ The Convention has not yet come into force.

³¹⁴ Article 16 (1) (c).

³¹⁵ Article 17 (3).

³¹⁶ Article 12 (1)

³¹⁷ Article 12 (3).

g) African Charter on Democracy, Elections and Governance

The 2007 African Charter on Democracy, Elections and Governance has to be implemented on the principle of effective participation of citizens in democratic and development processes and in governance of public affairs, among others.³¹⁸ In order to advance political, economic and social governance, States commit themselves to fostering popular participation and partnership with civil society organisations, among other things.³¹⁹

Furthermore, States recognize the crucial role of women in development and strengthening of democracy and commit themselves to: create the necessary conditions for full and active participation of women in the decision-making processes and structures at all levels; and to take all possible measures to encourage the full and active participation of women in the electoral process and ensure gender parity in representation at all levels, including legislatures.³²⁰

Moreover, States also commit themselves to: promote citizen participation in the development process through appropriate structures;³²¹ promote participation of social groups with special needs, including the youth and people with disabilities, in the governance process and to ensure systematic and comprehensive civic education in order to encourage full participation of social groups with special needs in democracy and development processes including monitoring of implementation.³²²

h) Statutes of the Economic, Social and Cultural Council of the African Union

The 2004 Statutes provide that the Economic, Social and Cultural Council of the AU shall promote the participation of African civil society in the implementation of the policies and programmes of the Union.³²³ This means that African civil society can and should participate in the implementation of all policies and programmes including

³¹⁸ Article 3 (7).

³¹⁹ Article 27 (2).

³²⁰ Article 29.

³²¹ Article 30.

³²² Article 31.

³²³ Article 2 (3).

those relating to development in the AU, which is an implicit recognition of the right to participation in development.

i) African Youth Charter

The 2006 African Youth Charter acknowledges the importance of youth participation in decision making and their involvement in the development of their continent.³²⁴ In the African Youth Charter States guarantee their right to participate in all spheres of society. States undertake to: guarantee their participation in parliament and other decision-making bodies;³²⁵ facilitate the creation or strengthening of platforms for youth participation in decision-making at all levels of governance;³²⁶ ensure their equal access to participate in decision-making and in fulfilling civic duties;³²⁷ give priority to youth policies and programmes;³²⁸ provide access to information to empower them to become aware of their rights and responsibilities;³²⁹ institute measures to professionalize their work and training;³³⁰ provide technical and financial support to build the institutional capacity of their organisations;³³¹ institute policy and programmes of their voluntarism at all levels as an important form of youth participation and as a means of peer-to-peer training;³³² and include youth representatives as part of delegations to ordinary sessions and other relevant meetings to broaden channels of communication and enhance the discussion of youth related issues.³³³

j) Protocol to The African Charter on Human and Peoples' Rights on The Rights of Older Persons in Africa

The 2016 Protocol, which commits State Parties to the fulfillment of the 1991 UN Principles of Independence, Dignity, Self-fulfilment, Participation and Care of Older

³²⁴ Preamble and Article 11 of the African Youth Charter.
³²⁵ Article 11 (2) (a).
³²⁶ Article 11 (2) (b).
³²⁷ Article 11 (2) (c).
³²⁸ Article 11 (2) (d).
³²⁹ Article 11 (2) (e) and (i).
³³⁰ Article 11 (2) (f).
³³¹ Article 11 (2) (g).
³³² Article 11 (2) (h).
³³³ Article 11 (2) (j).

Persons,³³⁴ provides for the right to participate in development of older persons. In particular the Protocol provides that:

States Parties shall develop policies that ensure the rights of Older Persons to enjoy all aspects of life, including active participation in socio – economic development, cultural programmes, leisure and sports.³³⁵

k) Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Persons with Disabilities in Africa

The Protocol which was adopted by the African Commission on Human and Peoples’ Rights in February 2016 and by the AU Assembly in January 2018.³³⁶ The protocol recognises the right to participation. In its preamble the Protocol acknowledges the importance of full and effective participation and inclusion of Persons with Disabilities in society. It also defines Persons with disabilities to include those who have physical, mental, intellectual, developmental or sensory impairments which in interaction with environmental, attitudinal or other barriers hinder their full and effective participation in society on an equal basis with others.³³⁷ The Protocol recognises the States’ general obligations including mainstreaming disability in policies, legislation, development plans, programmes and activities and in all other spheres of life.³³⁸

The Protocol provides for the right to live in the community and particularly that community-based rehabilitation services should be provided in ways that enhance the participation and inclusion of persons with disabilities in the community.³³⁹ Moreover, in order to enhance the right to education States are required to ensure that educating persons with disabilities is done in a manner that promotes their participation and inclusion in society and as members of the community.³⁴⁰ Furthermore, persons with disabilities are entitled to rehabilitation and habilitation to ensure their full inclusion and participation in all aspects of life.³⁴¹

334 Article 2 (2).

335 Article 17.

336 Adopted at the Assembly of the AU, Thirtieth Ordinary Session 28-29 January 2018, Decision on the legal instruments, Assembly/AU/Dec.678 (xxx) 1 Para 2 (g).

337 Article 1 (g).

338 Article 2 (b).

339 Article 10.

340 Article 12.

341 Article 10 (2) (c) and (d).

Persons with disabilities are also particularly entitled to the right to participate in a political and public life. Article 17 specifically provides:

1. Every person with a disability has the *right to participate in political and public life*.
2. States Parties shall take all appropriate policy, legislative and other measures to ensure this right, on the basis of equality, including through:
 - a) Undertaking or facilitating *systematic and comprehensive civic education to encourage full participation of persons with disabilities in democracy and development processes*, including by ensuring civic education materials are availed in accessible formats;
 - b) Ensuring that persons with disabilities, including persons with psychosocial disabilities and intellectual disabilities, can effectively participate in political and public life, including as members of political parties, electors and holders of political and public offices;
 - c) Putting in place reasonable accommodation and other support measures consistent with the secrecy of the ballot, including as appropriate, by ensuring accessibility to polling stations and facilitating assisted voting, for persons with disabilities to enable their effective participation in political and public life;
 - d) Realising increased and effective representation and participation of persons with disabilities on an equitable basis as members of national and local legislative bodies;
 - e) Repealing or amending laws that on the basis of disability restrict the right of persons with disabilities to vote, stand for or remain in public office.

Moreover, persons with disabilities are entitled to represent themselves in all spheres of life, including by promoting an environment that enables persons with disabilities to among other things being actively consulted and involved in the development and implementation of all legislation, policies and programmes that impact persons with disabilities which would include the national development plan.³⁴² Furthermore, persons with disabilities have right to participate in sports, recreation and culture³⁴³ and children with disabilities have right to enjoy a full and decent life in conditions

³⁴² Article 18.

³⁴³ Article 20.

which ensure dignity, promote self-reliance and facilitate the child's active participation in the community, among other things.³⁴⁴ Also youth with disabilities have the right to participate in political decision-making and activities, among other things.³⁴⁵ Moreover, State Parties have duty to ensure implementation of the protocol and ensure the full and effective participation of persons with disabilities in the implementation and monitoring of the Protocol.³⁴⁶

I) African Charter for Popular Participation in development and transformation

The 1990 African Charter for Popular Participation in development and transformation was adopted in Arusha (Arusha Charter) by a meeting that was attended by 23 African governments, 15 UN agencies and several non-governmental organisations. Although the Arusha Charter is not legally binding and may not qualify as soft law, it illustrates African expectations for participation in development. The Arusha Charter emphasises the importance of participation in the development process.³⁴⁷ The Arusha Charter thus clearly provides for people-centred development and for their participation in development specifically in terms of creating structures and designing policies and programmes that contribute to the development process.³⁴⁸ Moreover, it also emphasises women participation in development³⁴⁹ and also requires states to create a conducive environment for peoples' participation in development including democracy, among other things.³⁵⁰

2.4.2.2 Sub-regional mechanisms

Sub-regional mechanisms such as the East African Community (EAC), which is applicable in this study, also affirm the right to participation in development as discussed in detail below.

³⁴⁴ Article 2, 4, 12 (3) and 23.

³⁴⁵ Article 24.

³⁴⁶ Article 28.

³⁴⁷ The Arusha Charter, Para 11.

³⁴⁸ As above.

³⁴⁹ The Arusha Charter, Para 12.

³⁵⁰ The Arusha Charter, Para 11.

(i) Treaty establishing the East African Community

The 1999 Treaty establishing the EAC, which comprises of Burundi, Kenya, Rwanda, Tanzania, South Sudan and Uganda, pursues a policy of popular participation to achieve its objectives.³⁵¹ The EAC has the objective of developing policies and programmes aimed at widening and deepening co-operation among the East African States, in political, economic, social and cultural fields, research and technology, defence, security and legal and judicial affairs, for their mutual benefit.³⁵² The treaty provides for the participation of the private sector,³⁵³ women,³⁵⁴ and CSOs.³⁵⁵

In order for the EAC to realise a fast and balanced regional development, they commit to creating an enabling environment not only to attract investments but also allow the private sector and civil society to play a leading role in the socio-economic development activities including the development of sound macro-economic and sectoral policies, among other things.³⁵⁶ The EAC has the objective of widening and deepening cooperation of the partner states in political, economic, social and cultural fields, research and technology, defence, security and legal and judicial affairs, for their mutual benefit.³⁵⁷ The EAC thus aspires to have a Customs Union, a Common Market, a Monetary Union and a Political Federation to strengthen and regulate the industrial, commercial, infrastructural, cultural, social, political and other relations to ensure accelerated, harmonious and balanced development and sustained expansion of economic activities which would be equitably shared.³⁵⁸ As such the EAC commits to ensuring the reinforcement of partnerships with the private sector and civil society in order to attain sustainable socio-economic and political development and to guarantee an enabling environment.³⁵⁹

The EAC Treaty specifically recognises the role of women in socio-economic development and commits to: promoting their empowerment, integration and

³⁵¹ Article 65 of the Treaty Establishing the EAC.

³⁵² Article 5 (1) of the Treaty Establishing the EAC.

³⁵³ Article 102 (j) of the Treaty Establishing the EAC.

³⁵⁴ Article 121 (a) and 122 (a) of the Treaty Establishing the EAC.

³⁵⁵ Article 127 (3) of the Treaty Establishing the EAC.

³⁵⁶ See Preamble of the EAC Treaty.

³⁵⁷ Article 5 (1).

³⁵⁸ Article 5 (2).

³⁵⁹ See Articles 5 (3) (g), 127 and 128.

participation in decision making; abolishing legislation and discouraging customs that are discriminatory; promote education and awareness to change negative attitudes; creation and adoption of technology for stability of employment and professional progress of women and taking other measures to eliminate prejudice against women and promote their equality in all aspects.³⁶⁰ Moreover, the treaty also commits to increasing the participation of women in business at the policy formulation and implementation levels and promoting the effective participation of women in the trade and development activities of the community, among other things.³⁶¹

ii) Other EAC Treaties

The right to participation in development is also implicit in the Protocol on the Establishment of the East African Community Common Market. The Protocol provides for mechanisms to coordinate trade relations including the promotion of participation and joint representation in international trade negotiations.³⁶² Furthermore, partner states, in the areas of research and technological development, commit to encouraging the participation of private sector in intra-regional research and transfer of technology.³⁶³ Moreover, States also commit to ensuring private sector participation particularly in commercial agricultural activities and in the provision of support services in relation to co-operation in agriculture and food security.³⁶⁴

EAC States have also committed to promoting public participation in planning and decision-making in the management of the Lake Victoria Basin.³⁶⁵ Furthermore they commit themselves to the principle of public participation, among others, in the management of the resources of the Basin.³⁶⁶ States are required to create an environment conducive for public participation to influence project formulation and implementation.³⁶⁷ Public participation is encouraged for environmental impact

³⁶⁰ See Article 121.

³⁶¹ See Article 122.

³⁶² Article 37 (3).

³⁶³ Article 42 (c).

³⁶⁴ Article 45 (3) (n).

³⁶⁵ Article 3 (i) of the Protocol for Sustainable Development of Lake Victoria Basin.

³⁶⁶ Articles 4 (2) (h) and Article 6 of the Protocol for Sustainable Development of Lake Victoria Basin.

³⁶⁷ Article 22.

assessments³⁶⁸ and environmental audits.³⁶⁹ Moreover, the institutional framework for implementation of the Protocol for Sustainable Development of Lake Victoria Basin is also aimed at promoting stakeholder participation in sustainable development of natural resources.³⁷⁰ Participation in development is also embedded in the Protocol on Environment and Natural Resources Management. However, this Protocol was only signed by Uganda, Kenya and Tanzania in 2006. It has only been ratified by Uganda and Kenya who ratified in 2010 and 2011 respectively and has not been ratified by other EAC States. As such, the Protocol is not yet a legally binding document.³⁷¹

2.5 Concluding Remarks

Participation in development is a process through which members of the community take part or are involved and have an influence on decisions that affect them relating to development plans and projects. One can enjoy this right either directly or through a representative or representative organisation especially for persons with disabilities.

Participation in development is grounded in the principles of democracy, rule of law, social inclusion, development and respect for and protection of human rights. Participation is linked to other rights such as those relating to freedom of opinion and expression, right to peaceful assembly, freedom of association and access to information.

The issues requiring participation include: the conduct of public affairs; elections; access to public service; cultural life; scientific advancement; education; health; environment; natural resources management; formulation and implementation of government policy; development and development planning in all activities of the community including at the national, regional and global level.

³⁶⁸ Article 12 (2) of the Protocol for Sustainable Development of Lake Victoria Basin.

³⁶⁹ Article 14 (2) (d) of the Protocol for Sustainable Development of Lake Victoria Basin.

³⁷⁰ Article 33 (3) (b) of the Protocol for Sustainable Development of Lake Victoria Basin.

³⁷¹ See EAC 'Protocol on Environment and Natural Resource Management' available at: <https://www.eac.int/environment/natural-resources-management/protocol-on-environment-and-natural-resource-management> (accessed 28 October 2018.)

Participation in development is dependent on several factors such as: an enabling environment; awareness of rights and the opportunity to engage; and the existence of structures to enable participation including representatives and active civil society. There are special groups that need to be encouraged to participate in decision making and these include women, persons with disabilities, children, older persons, migrant workers, refugees, minorities, human rights defenders and indigenous people, among others. Both States and Non-State actors have obligations towards ensuring participation. Non-State Actors obligations are highlighted especially in the UN Guiding Principles on Business and Human Rights.

The conceptual and legal framework that participation in development is not only important for democracy, rule of law, social inclusion, development and human rights protection but is also a right. Participation in development is heavily embedded in the legal human rights framework at the UN and the regional levels. Participation in development is implicit as a right in the treaties and has been affirmed by the various treaty bodies and special procedures especially the Special Rapporteurs, Working Groups and Independent experts. It is important to note that the right to participation in development is mainly affirmed in soft law especially the UN Declaration on the right to development.

It is therefore still a developing right that has not been sufficiently interrogated in terms of case law especially through individual communications by the UN treaty bodies. There have been only a few cases by the Human Rights Committee and the CRPD Committee where participation has been considered, in general, with nothing really specific on participation in development in particular. There are no cases yet from various committees such as CERD, CESCR, CEDAW, CRC and CMW. The few cases so far decided by the Human Rights Committee and the general comments affirm the right to participation in development as part of the right of taking part in the conduct of public affairs. The Human Rights Committee in Communication No. 205/1986 against Canada made a key finding relating to the issue of taking part in the conduct of public affairs by individuals and/or their representatives. The Committee asserted that not every citizen can participate or directly take part in the conduct of public affairs on their own volition. The Human Rights Committee gave guidance that citizens cannot choose to directly participate or leave it to freely elected representatives as this is determined

by the law. The Committee stated that the conduct of public affairs in a democracy is the duty of the elected representatives, who are elected for that purpose, and of public officials who have been legally appointed. The few cases from the CRPD also affirm the right of persons with disabilities to participate especially in the conduct of public affairs including jury duty and in relation to voting in elections.

Notably, the African Commission on Human and Peoples' Rights has handled individual communications relating to the right to participate in development especially in the *Endorois* and the *SERAC* cases. However, the discussion is still insufficient. Participation, including the right to participate in development is also entrenched at the national level in Uganda as will be discussed in the following chapter.

Chapter Three

The right to participate in development in Uganda

3.1. Introduction

This chapter specifically discusses the right to participate in development in Uganda. It starts by giving a background of participation in development in Uganda right from the pre-colonial times to the present. It also discusses: the framework for participation in development through decentralization; the current national legal framework; operations of the national institutions; and participation by affected individuals, NGOs, vulnerable groups and development partners.

3.2 Historical Background

Participation is discussed in terms of three periods namely: pre-colonial; colonial and post-independence.

3.2.1 Pre-colonial era

In the pre-colonial period, the area that is now called Uganda, was comprised of a number of kingdoms and scattered communities with diverse cultures, social structures and practices.¹ The kingdoms included Bunyoro, Buganda, Ankole and Toro while the scattered communities were located in the Lango, Acholi, Madi, West Nile, Bukedi, Bugisi, Busoga, Teso, Karamoja, Sebei and Kigezi regions.² There were remarkable differences between the north and the south of the country.³ The southern part of the country had more advanced, developed and established centralised authorities in terms of kingdoms such as the ones mentioned above.⁴ Among the southern kingdoms, Bunyoro-Kitara, was the most powerful kingdom in the seventeenth and eighteenth centuries.⁵ However, by the nineteenth century, Buganda

¹ See J Moncrieffe, 'Uganda's Political Economy: A Synthesis of Major Thought', (2004) 5.

² As above.

³ As above.

⁴ As above.

⁵ As above.

had expanded greatly, and exceeded the kingdom of Bunyoro whose territories it took over.⁶ There is more literature available on the Buganda Kingdom than other kingdoms or communities.

In Buganda, generally kings or traditional leaders had all authority⁷ although decision making on some matters was to some extent participatory as the leaders ruled by consensus like most other African leaders and did not lock out people, especially adult males, of the decision making process.⁸ Consensus building was and still is a part of the culture.⁹ For example, the King of Buganda, the Kabaka had to consult his chiefs, who would provide information based on the views of the people, on questions of national importance such as war and peace and which religion to adopt, among other things.¹⁰ No doubt developmental issues were issues which involved consensus building although decision making was largely the preserve of mostly men who held posts such as chiefs, elders and clan heads.¹¹ Generally, women did not directly take part in the decision making processes.¹² Although women did not directly participate in public political debates, their opinions were respected and were often considered during the time of decision-making and indeed some women were indirectly involved in decision making for their communities as queen mothers, queen sisters, princesses or wives of chiefs, among others.¹³ Tamale asserts that pre-colonial women 'wielded social and political influence through indirect methods and that physical absence did not equal political passivity.'¹⁴

⁶ As above. Also see BBC, Uganda Profile-Timeline, available at: <http://www.bbc.com/news/world-africa-14112446> accessed 19 May 2016.

⁷ See JM Kauzya *Political Decentralization in Africa: experiences of Uganda, Rwanda, and South Africa* (2007) 3.

⁸ GCM Mutiso and SW Rohio (ed.) *Readings in African Political Thought* (1975) 476.

⁹ See L Sewanyana 'The Use of Traditional Communications in Conflict Management: The Case of Uganda,' (1997) Volume 11 No.3 *African Media Review* 65.

¹⁰ MSM Kiwanuka *A History of Buganda: From the Founding of the Kingdom to 1900* (1972) 125.

¹¹ A Richards 'Authority Patterns in Traditional Buganda and Traditional Values and Current Political Behaviour' in L Falter *The King's men: Leadership and Status in Buganda on the eve of independence* (1964) 257-258 and S Tamale *When Hens Begin To Crow: Gender And Parliamentary Politics In Uganda Gender and Parliamentary Politics in Contemporary Uganda* (1999) 5.

¹² Richards (n 11 above) and Tamale (n 11 above). Also see S Karugire, *A political History of Uganda* (1980).

¹³ A Labeuf *The Role of Women in Political Organizations of African Societies* (1963) cited in Tamale (n 11 above).

¹⁴ See Tamale (n 11 above).

With insufficient documentation, especially of the pre-colonial era, it is hard to establish whether children, persons with disabilities, minorities and other vulnerable groups directly or indirectly participated in decision making in the precolonial era but it is most likely that they did not directly participate or were completely left out.

3.2.2 Colonial period

The missionaries preceded the colonialists' arrival in Uganda. The first missionaries to arrive were Anglican and they came in 1876 followed by the Roman Catholics in 1879.¹⁵ The missionaries were followed by the Imperial British East Africa Company which was formed in 1888 to govern British territories in East Africa.¹⁶ In 1890, when Britain and Germany signed the Anglo-German treaty, Britain took over Uganda which eventually became a British Protectorate in 1894.¹⁷ As a British Protectorate, Uganda was subject to the British Crown and governed by indirect rule. Uganda was governed directly by the local rulers especially the Buganda Chiefs who reported to the British Crown. The protectorate control extended from Buganda to other kingdoms like Bunyoro, Ankole and Toro. The Uganda Agreement, which formalised the relationship between Britain and Uganda, was signed in 1900 by among others the Buganda's Katikiro, Sir Apolo Kagwa, on behalf of the Kabaka and Sir Harry Johnston on the behalf of the British colonial government.¹⁸ When the British took over Uganda, the leaders who opposed British rule like Kabaleega of Bunyoro and Mwanga of Buganda were deposed.¹⁹ Those rulers who collaborated were retained in their positions but their powers were essentially reduced.²⁰ Such rulers maintained their status and continued to have direct rule over the people but inevitably had to report to the British Authority who took the final decisions over the most crucial matters.

During the colonial era, despite the indirect rule, power was highly centralized and the governance system by and large excluded and did not have much regard for native

¹⁵ Moncrieffe (n 1 above) 12.

¹⁶ See History of Uganda, available at: <http://www.historyworld.net/wrldhis/PlainTextHistories.asp?historyid=ad22> (accessed 26 May 2016).

¹⁷ See BBC, Uganda Profile-Timeline n 6 above.

¹⁸ Moncrieffe (n 1 above) 13.

¹⁹ A Okoth *A History of Africa: African Societies and the Establishment of Colonial Rule* (2006) 190.

²⁰ As above.

institutions and practices and required the people to comply with the British directives as they had all power.²¹ This era of indirect rule by the British Crown has been eloquently described by Mamdani as a system of ‘decentralized despotism’.²² For example, before 1920 the British Commissioner had all executive and legislative powers.²³ Even though executive and legislative councils were promulgated in 1920 they only had European councillors until 1926 when one Indian man was appointed as an unofficial member.²⁴ Africans were regarded as ‘too backward to contribute much to the development of the country’ and were only involved in 1945.²⁵ Even when they were included, it was under strict conditions with representatives only from Buganda, eastern and western regions. As such during the colonial period, participation in decision making, including development, was the preserve of the British while a few non-significant decisions, related to maintenance of law and order, were left for the Buganda chiefs and who were used by the colony to rule.²⁶ This brought the Buganda chiefs in conflict with other communities as they performed their duties.²⁷ It is reported that although British economic policy resulted in the development of infrastructure it also brought on the ‘underdevelopment of the local industry and stifling of the private sector’ and also exacerbated regional inequalities.²⁸ Furthermore, that during this era, ‘production and wealth were largely concentrated in the South while the North was used as a reservoir for labour and soldiers.’²⁹

3.2.3 Post-independence era

The post-independence will be discussed in two segments: the period after independence up to 1985 and the period from 1986 when the National Resistance Movement (NRM) came to power through a *coup d’état* to present.

²¹ Moncrieffe (n 1 above) 14.

²² M Mamdani, *The politics of democratic reform? Critical reflections on the NRM*, (1995).

²³ Moncrieffe (n 1 above) 10.

²⁴ As above.

²⁵ As above. Also see GW Kanyeihamba, *Constitutional and political history of Uganda: from 1894 to the present* (2002).

²⁶ M Mamdani *Citizen and Subject: Contemporary Africa and the legacy of late colonialism* (1996) cited in Moncrieffe (n 1 above) 13. Also see Kanyeihamba *Kanyeihamba’s Commentaries on Law, Politics and Governance* (2006) 16.

²⁷ Moncrieffe (n 1 above) 15.

²⁸ As above.

²⁹ As above.

a) 1962-1985

This period was quite unstable without much opportunity for citizen participation in development. After Uganda attained independence Milton Obote, of the Uganda Peoples' Congress became the first Prime Minister. He strategically allied with Buganda's 'Kabaka Yekka' (KY) party to win the elections in 1962 where Kabaka Mutesa II of Buganda was elected President with Obote as Prime Minister.³⁰ The alliance was based on an agreement that Buganda would retain its privileged position, as it was during the colonial rule, with authority over the other kingdoms and also with representation in the National Assembly.³¹ However, shortly after independence in 1966 Obote overthrew the President and declared himself President and abolished the kingdoms under a new constitution which vested considerable power in the President and a one-party state.³² He crushed all opposition and forced the Kabaka to flee into exile.³³ During his reign, power was centralised and he took charge of all commercial enterprises³⁴ and it was 'bullets rather than ballots that dominated politics.'³⁵ The 1962, 1966 and 1967 Constitutions provided for some rights including: equality and non-discrimination;³⁶ life;³⁷ personal liberty;³⁸ freedom from slavery and forced labour;³⁹ freedom from torture and ill-treatment;⁴⁰ privacy;⁴¹ fair hearing;⁴² freedom of conscience,⁴³ expression,⁴⁴ assembly and association,⁴⁵ and movement,⁴⁶ among others. However, those Constitutions did not specifically provide for participation of the citizenry in development. Needless, to say that participation in

³⁰ See RM Byrnes *Uganda: A Country Study* (1990) 20 available at: <http://www.countrystudies.us> (accessed 19 May 2016).

³¹ As above.

³² Byrnes (n 30 above) 152.

³³ PM Mutibwa *Uganda since independence: A story of unfulfilled hopes* (1992) 60.

³⁴ Moncrieffe (n 1 above) 16.

³⁵ EA Brett 'Neutralising the Use of Force in Uganda: The Role of the Military in Politics' (1995) Vol.33/Issue 01/March *The Journal of Modern African Studies* 129.

³⁶ See Articles 17 and 29 in the 1962 and 1966 Constitutions and Articles 8 and 20 in the 1967 Constitution.

³⁷ Article 18 in the 1962 and 1966 Constitutions and Article 9 in the 1967 Constitution.

³⁸ Article 19 in the 1962 and 1966 Constitutions and Article 10 in the 1967 Constitution.

³⁹ Article 20 in the 1962 and 1966 Constitutions and Article 11 in the 1967 Constitution.

⁴⁰ Article 21 in the 1962 and 1966 Constitution and Article 12 in the 1967 Constitution.

⁴¹ Article 23 in the 1962 and 1966 Constitution and Article 14 in the 1967 Constitution.

⁴² Article 24 in the 1962 and 1966 Constitution and Article 15 in the 1967 Constitution.

⁴³ Article 25 in the 1962 and 1966 Constitutions and Article 15 in the 1967 Constitution.

⁴⁴ Article 26 in the 1962 and 1966 Constitutions and Article 16 in the 1967 Constitution.

⁴⁵ Article 27 in the 1962 and 1966 Constitutions and Article 17 in the 1967 Constitution.

⁴⁶ Article 28 in the 1962 and 1966 Constitutions and Article 18 in the 1967 Constitution.

development was limited during this period as decentralization significantly diminished with the 1967 republican constitution.

In 1971, Obote was toppled in a coup, led by Army chief Idi Amin, while he was out of the country on official duty. Amin took radical measures after coming into power, including: expelling all Asians and seizing their assets; assigning Muslims to significant positions in the army and discriminating against the Christians who were the majority; attacking the Langi and Acholi and isolating the northern part from the rest of the country; breaking up the Kingdom of Buganda into several districts; and dissolving the Cabinet.⁴⁷ Amin ruled by military decrees passed by the military council and suspended elections which were replaced by military appointments. His reign was described as one of 'terror' with 'unimaginable human suffering' including the killing of the Chief Justice, the Vice Chancellor of Makerere University and the Archbishop and members of his cabinet, among others.⁴⁸ Amin's government had border clashes as he was convinced that Uganda's boundaries extended to parts of Tanzania, Sudan, and Kenya.⁴⁹ Amin declared himself president for life and claimed parts of Kenya in 1976.⁵⁰ Amin invaded Tanzania in 1978 which retaliated and toppled his government in 1979.⁵¹ Amin's reign of terror did not allow much participation in development.

The rule of Yusufu Lule who was installed as president after Amin, did not last long as he was soon replaced by Godfrey Binaisa.⁵² Binaisa was replaced with Paulo Muwanga who was succeeded by Milton Obote after the 1980 elections.⁵³ However, the 1980 elections results were disputed⁵⁴ and sparked off resistance and opposition led by Yoweri Museveni.⁵⁵ Obote was eventually overthrown in 1985 and replaced by General Tito Okello Lutwa as president.⁵⁶ In January 1986, a rebel group led by Yoweri

⁴⁷ Moncrieffe (n 1 above) 16.

⁴⁸ See: DA Low 'The Dislocated Polity' in HB Hansen and M Twaddle (Eds.), *Uganda Now: Between Decay and Development* (1988) 47; T Gardner *African Democracy: Its origins and development in Uganda, Kenya and Tanzania* (2015) 180 and Moncrieffe (n 1 above) 16.

⁴⁹ Moncrieffe (n 1 above) 16.

⁵⁰ G Mwakikagile *Ethnicity and National Identity in Uganda: The Land and Its People* (2009) 26.

⁵¹ See BBC, Uganda Profile-Timeline n 6 above.

⁵² Mutibwa (n 33 above) 128.

⁵³ Mutibwa (n 33 above) 130-135.

⁵⁴ See M Sekaggya *Uganda: The Management of Elections*, (2010) 12 and C Mbazira 'Reform Overdue: Making the case for electoral restructuring in Uganda' (2009) *HURIPPEC Working Paper No. 26*, 10.

⁵⁵ YK Museveni *Sowing the mustard seed* (1997) 121-126.

⁵⁶ G Mwakigale *Uganda: A nation in transition: Post-colonial analysis* (2013) 196.

Museveni's National Resistance Army (NRA) toppled the Okello regime over alleged human rights violations by the Military Council despite their negotiations and agreements with the NRA.⁵⁷ This period was also too unstable for the citizenry to participate in development.

b) 1986- Present

In 1986 the National Resistance Army rebels took over Kampala and Yoweri Museveni became president. The government immediately embarked on building a perception of legitimacy and unity in the country. Museveni, propounded the ideals of democracy, good governance and accountability, rule of law, security, unity and broad public participation.⁵⁸ The NRM in 1987 established Resistance Councils (RCs) currently Local Councils (LCs) whose operating principle was to enable citizens to participate in decision making including formulation of policies and they could influence their governance at the local level, promote accountability from their leaders which would improve the quality of services.⁵⁹ In 1993, Museveni restored the traditional kingdoms but without political power.⁶⁰ The NRM raised expectations of a break from the past and an increase in citizen participation to enhance the democratization process of Uganda. However, the NRM in a move inconsistent with the ideals of democracy and broad public participation, insisted on establishing a 'no-party system' or rather a disguised 'one party system' referred to as the 'movement' system which was to comprise all citizens without any political party activities.⁶¹

⁵⁷ See S Finnström 'Living with bad surroundings: War, history and every day moments in Northern Uganda (2008) 68 and S Chu Ilo *The face of Africa: Looking beyond the shadows* (2012) 197.

⁵⁸ See National Resistance Movement 'Ten-Point Programme of NRM' (1986) available at <http://www.austria-uganda.at/dokumente/Ten-Point%20Programme.pdf> (accessed 28 June 2018)

⁵⁹ Also see World Bank/A Shah and T Thompson *Implementing Decentralized Local Governance: A Treacherous Road with Potholes, Detours and Road Closures*, Policy Research Working Paper, June 2004.

⁶⁰ See BBC, Uganda Profile-Timeline n 6 above. Also see Article 246 of the 1995 Constitution of the Republic of Uganda, as amended.

⁶¹ Legal Notice No.1 of 1986. Also see: J Okuku *Ethnicity, State Power and the Democratization Process in Uganda* (2002) 31-33; HRW *Hostile to democracy: The Movement System and political repression in Uganda* (1999) and HB Hansen and M Twaddle 'Uganda: The Advent of No-Party Democracy' in Wiseman, John A. (ed.) *Democracy and Political Change in Sub-Saharan Africa*, (1995) 137-151. Also see J Oloka-Onyango 'From whence have we come, and where exactly are we going? The Politics of electoral struggle and Constitutional (Non) Transition in Uganda (2005) 3 available at: http://www.huripec.mak.ac.ug/pdfs/Publication_series_1.pdf (accessed 28 June 2018).

The 1995 Constitution, which is the fourth and current Constitution of Uganda, was passed in a slightly more participatory process than the previous constitutions. The constitutional-making process for the 1995 Constitution started in 1988 shortly after the NRM took over power. The National Resistance Council (NRC), the parliament which the NRM had created during the war, passed a Statute which established the 21 Member Constitutional Commission with a mandate to review the 1967 Constitution and make proposals for enactment of a new national Constitution. The NRC was composed of thirty-eight cadres from the NRA and the NRM who were members by virtue of service and not elections. In 1993, the Constitutional Commission presented a draft Constitution to the President. However, the Constitutional Commission also recommended that a Constituent Assembly directly elected by the people would have greater legitimacy to enact the new Constitution. In March 1994 members were elected to the Constituent Assembly. The new Constitution that was promulgated by the Constituent Assembly was lauded especially for its human rights provisions. However, there remained some sticky issues such as the political system, land and federalism and it has been alleged that the 1995 Constitutional-making process was initiated by the NRM to legitimise its own rule while delegitimising its political opponents especially from the UPC.⁶² The composition of the Constituent Assembly was strongly dominated by the NRM which used the opportunity to firmly entrench itself.⁶³

The 1995 Constitution legalised political parties but maintained a ban on political activity.⁶⁴ Museveni blamed political parties for the instability of the country in the past and maintained the 'movement' system as the best system for Uganda.⁶⁵ This 'movement' system enabled Museveni have monopoly on political power and he effectively neutralised political opposition.⁶⁶ Given the relative peace, stability, general improvement in the situation of human rights as compared to the past leaders, his commitment to poverty reduction and with support from development partners, the economy grew.⁶⁷

⁶² Centre for Basic Research 'Lessons of Constitution-Making in Uganda' (1996) 2. Also see: JJ Barya in his paper 'The Making of Uganda's 1995 Constitution: Achieving Consensus by Law' (1996).

⁶³ As above.

⁶⁴ Article 269 of the 1995 Constitution.

⁶⁵ Museveni (n 55 above) 187.

⁶⁶ Generally, see HRW (n 61 above).

⁶⁷ Moncrieffe (n 1 above) 6.

In 1996 when elections were held under the new Constitution, Museveni returned to office as president. The elections were generally satisfactory as there were no substantial cases of irregularities, voter intimidation and harassment in the electoral process except for monetization.⁶⁸ There was however, a lot of pressure both from within and without the country to restore political activities.⁶⁹ However, the results of a 2000 referendum with a low voter turnout apparently rejected multi-party politics in favour of continuing with the 'movement' or 'no-party' system.⁷⁰ The 2001 elections were thus held under the 'movement system' as was the case in 1996. Museveni won another term in office, beating his rival Kizza Besigye. These elections, however, had allegations of malpractice and were challenged in the Supreme Court, which also established various irregularities such as: multiple voting, pre-ticked ballot papers and harassment of voters.⁷¹ However, the Supreme Court did not nullify the process.⁷²

In 2005, the Constitutional Review Commission recommended a restoration of the multi-party system which was also affirmed by the referendum in July. The 2006 election came after amendments to the constitution in 2005 including provisions for multi-party-political activity and the removal of presidential term limits. Museveni won the elections of 2006 with a lower margin than before.⁷³ The 2006 elections were particularly characterised with harassment and arrest of the major opposition candidate on alleged charges of rape and treason and other electoral breaches. Although, the Supreme Court acknowledged, as it did in 2001 election, widespread electoral malpractices and vote rigging, it still decided that this 'did not substantially affect the result of the elections.'⁷⁴

⁶⁸ See generally W Muhumuza 'Money and Power in Uganda's 1996 Elections' (1997) Vol. 2 No. 1 *African Journal of Political Science* 168-179.

⁶⁹ See Y Kiranda and M Kamp (Eds.) *Reality Check: The State of Multi-Party Democracy in Uganda* (2010) 21.

⁷⁰ As above.

⁷¹ *Col. Dr. Besigye Kiiza v Museveni Yoweri Kaguta, Electoral Commission (Election Petition No.1 of 2001)*.

⁷² As above

⁷³ The President Yoweri Kaguta Museveni won the election with 59.26% which was 10% less than the 2001 election win.

⁷⁴ *Rtd. Col. Dr. Kizza Besigye v Electoral Commission, Yoweri Kaguta Museveni* (Election Petition No.1 of 2006).

Museveni also won the 2011 elections which were less violent than previous elections. Some of the issues of concern with the 2011 elections related to the negative perception of the Electoral Commission, commercialisation of elections, disenfranchisement of voters due to various flaws in the National Voters Register, voter intimidation and harassment and several other administrative malfunctions, among others.⁷⁵ Notably, the opposition presidential candidates did not concede defeat but, probably disappointed by the decisions of the Supreme Court in 2001 and 2005 which did not nullify the elections although there were malpractices, did not contest the results in court. The leading opposition candidate Kiiza Besigye of the Forum for Democratic Change led the 'walk to work' protests against the political and socio-economic situation and the government responded by quashing the protests.⁷⁶ The last election which was in 2016 was also won by President Museveni against Kizza Besigye amid heavy opposition and concerns about the fairness and transparency of the process by the Commonwealth, United States, European Union and AU observer missions.⁷⁷ The 2016 elections were also upheld by the Supreme Court which also gave several recommendations to improve future electoral processes. The human rights situation in general is fragile and characterised by: high levels of poverty; challenges in access to health services, water, shelter, education and other social amenities.⁷⁸ There are violations of: the right to equality and non-discrimination; violations of the right to liberty; freedom from torture and ill treatment; freedom of assembly and association; freedom of the media and the right to privacy, among others.⁷⁹

⁷⁵ See the *Uganda Human Rights Commission Report on the 2011 Uganda Elections* (2011).

⁷⁶ See US Department of State *2011 Human Rights Report Uganda* available at: <http://www.state.gov> (accessed 19 May 2018).

⁷⁷ See: Commonwealth 'Interim Statement on the 2016 Uganda General Elections' available at <http://thecommonwealth.org> (accessed 20 May 2018); US State Department 'Press Statement on the results of Uganda's Presidential Elections' available at <http://www.state.gov> (accessed 20 May 2018).

⁷⁸ See *UHRC Annual Reports* (2006-2017), Human Rights Watch (2017), Amnesty International *World Report 2018: Uganda, Events of 2017* and US State Department Report *Uganda 2017 Human Rights Report*.

⁷⁹ As above.

3.3 Legal and Institutional framework for participation in development

The NRM started off by pursuing decentralization from when they took over power. Their aim was to change the centralized state into a decentralized one by transferring the powers, functions and the provision of services from the central government to local government. Later on, in 1995 and the latter years, the NRM enhanced participation in development by: providing a legal framework including a new constitution and other subsidiary laws; enhancing awareness of rights through the establishment and operations of the Uganda Human Rights Commission (UHRC) and Equal Opportunities Commission (EOC) which enhances special measures for vulnerable groups; and the establishment and the work of the National Planning Authority (NPA), among other things. The legal and institutional framework for participation is discussed in detail below.

3.3.1 National legal framework specific to participation in development

The legal framework in Uganda is embedded in the 1995 Constitution of the Republic of Uganda (the Constitution) and subsidiary legislation which provide for participation including for participation in development as discussed below.

a) Constitution

The Bill of Rights in the Constitution provides for the right to participate: in the affairs of government, individually or through representatives;⁸⁰ in peaceful activities to influence the policies of government through civic organisations;⁸¹ by minorities in decision-making processes and for their views and interests to be taken into account;⁸² and for their representation in Parliament.⁸³ The Constitution in its National Objectives and Directive Principles of State Policy further provides: for the involvement of the people in the formulation and implementation of development plans and programmes;⁸⁴ for the encouraging of the active participation of all citizens at all levels in their own governance;⁸⁵ broad representation which reflects the national character

⁸⁰ Article 38 (1).

⁸¹ Article 38 (2).

⁸² Article 36.

⁸³ Article 78 (1).

⁸⁴ Article X of the National Objectives and Directive Principles of State Policy.

⁸⁵ Article II (i) of the National Objectives and Directive Principles of State Policy.

and diversity;⁸⁶ and that the State shall be guided by the principle of decentralisation and devolution of governmental functions and powers to the people at appropriate levels where they can best manage and direct their own affairs.⁸⁷ Moreover the State also recognises the role of CSOs and NGOs in managing and directing public affairs and in the promotion and protection of human rights.⁸⁸ The provisions are specifically highlighted below.

Article 38 of the Constitution provides that:

- 1) Every Uganda citizen has the right to participate in the affairs of government, individually or through his or her representatives in accordance with law.
- 2) Every Ugandan has a right to participate in peaceful activities to influence the policies of government through civic organisations.

Article 36 provides for the right to participate in decision-making processes for minorities. It specifically provides:

Minorities have a right to participate in decision-making processes, and their views and interests shall be taken into account in the making of national plans and programmes.

Article 78 provides for composition of Parliament and particularly provides for women representative and representatives of other groups including the youth and persons with disabilities among others.⁸⁹ It further provides for the review of the groups represented.⁹⁰

The National Objectives and Directive Principles of State Policy in the Constitution provide for the role of the people in development and particularly provide that:

The State shall take all necessary steps to involve the people in the formulation and implementation of development plans and programmes which affect them.⁹¹

The democratic principles in the National Objectives and Directive Principles of State Policy of the Constitution provide that:

⁸⁶ Article II (iv) of the National Objectives and Directive Principles of State Policy.

⁸⁷ Article II (iii) of the National Objectives and Directive Principles of State Policy.

⁸⁸ Article II (v) and (vi) and Article V of the National Objectives and Directive Principles of State Policy.

⁸⁹ Article 78 (1) (b) and (c).

⁹⁰ Article 78 (1) (2).

⁹¹ Article X of the National Objectives and Directive Principles of State Policy.

- (i) The State shall be based on democratic principles which empower and encourage the active participation of all citizens at all levels in their own governance.
- (ii) All the people of Uganda shall have access to leadership positions at all levels, subject to the Constitution.
- (iii) The State shall be guided by the principle of decentralisation and devolution of governmental functions and powers to the people at appropriate levels where they can best manage and direct their own affairs.
- (iv) The composition of Government shall be broadly representative of the national character and social diversity of the country.
- (v) All political and civic associations aspiring to manage and direct public affairs shall conform to democratic principles in their internal organisations and practice.
- (vi) Civic organisations shall retain their autonomy in pursuit of their declared objectives.⁹²

Furthermore, the Constitution provides that:

- (i) The State shall guarantee and respect institutions which are charged by the State with responsibility for protecting and promoting human rights by providing them with adequate resources to function effectively.
- (ii) The State shall guarantee and respect the independence of non-governmental organisations which protect and promote human rights.⁹³

The Constitution further provides for electoral rights: the right to vote and stand for elective office⁹⁴ and also involves taking part in the conduct of public affairs including aspects of public administration,⁹⁵ and the formulation and implementation of policy.⁹⁶ Citizens may participate directly or through representation and can exert influence through public debate and dialogue with their representatives⁹⁷ or through their capacity to organise themselves⁹⁸ and exercising the freedom of expression,⁹⁹

⁹² See Article II of the National Objectives and Directive Principles of State Policy.

⁹³ Article V of the National Objectives and Directive Principles of State Policy.

⁹⁴ See Articles 59, 38, 78 (1), (a), (b) and (c) of the Constitution.

⁹⁵ Article 38.

⁹⁶ Article X of the National Objectives and Directive Principles of State Policy.

⁹⁷ Article 38.

⁹⁸ Article 38 (2).

⁹⁹ Article 29 (1) (a).

assembly and association¹⁰⁰ on various issues relating to the conduct of public affairs. Moreover, the Constitution also provides for the right to hold opinions,¹⁰¹ freedom of expression,¹⁰² access to information¹⁰³ and freedom of association¹⁰⁴ which enhance participation.

b) Subsidiary legislation and policies on participation

The Ugandan policy and legal framework is composed of policies and laws that promote participation of citizens in public affairs especially elections;¹⁰⁵ education;¹⁰⁶ health;¹⁰⁷ environment;¹⁰⁸ natural resources management;¹⁰⁹ formulation and implementation of government policy including development and development planning¹¹⁰ and in all activities of the community at various levels.¹¹¹ Furthermore there are laws to enhance the participation of women,¹¹² persons with disabilities,¹¹³ children,¹¹⁴ older persons,¹¹⁵ youth,¹¹⁶ CSOs,¹¹⁷ refugees,¹¹⁸ minorities,¹¹⁹ among others.

3.3.2 Decentralization

Decentralization by the NRM was phased. It started off in the late 1980s with the establishment of Resistance Councils.¹²⁰ Although the Resistance Councils did not

¹⁰⁰ Article 29 (1) (d) and (e).

¹⁰¹ Article 21 (1) and (2).

¹⁰² Article 29 (1) (a).

¹⁰³ Article 41 (1).

¹⁰⁴ Article 29 (e).

¹⁰⁵ Presidential Elections Act, Parliamentary Elections Act, Electoral Commission Act, Political Parties and Organisations Act, National Women's Council Act and the National Youth Council Act.

¹⁰⁶ Education Act.

¹⁰⁷ Public Health Act.

¹⁰⁸ National Environment Act

¹⁰⁹ These include: The National Land Use Policy and the Land Act, Forestry Policy and National Forestry and Tree Planting Act, National Environment Management Policy and National Environment Act, Uganda Mineral Policy and Minerals Development Act, National Water Policy and National Water Act, among others.

¹¹⁰ National Planning Authority Act

¹¹¹ Local Government Act.

¹¹² Equal Opportunities Act and National Women's Council Act.

¹¹³ Persons with Disabilities Act.

¹¹⁴ Children's Act.

¹¹⁵ National Policy for Older Persons.

¹¹⁶ National Youth Policy and National Youth Council Act.

¹¹⁷ Non-Governmental Organisations Act.

¹¹⁸ Refugee Act.

¹¹⁹ Equal Opportunities Act,

¹²⁰ Resistance Councils and Committees Statute 1987 and the Resistance Committees Judicial

have control of financial and human resources, they had policy-making and limited judicial and oversight functions. This evolved into the local council system after public consultations.¹²¹ In order to enhance decentralization and empower locally elected leaders to take decisions affecting their communities and to budget, plan and monitor their own programs the Local Government (Resistance Councils) Act 1993 was passed repealing the Resistance Councils and Committees Statute 1987. This was followed by the passing of the 1995 Constitution and the Local Government Act 1997 which provided for districts to be a unit of decentralization with Local Government Councils.¹²² As of July 2017, Uganda had 121 districts with populations ranging from approximately 70,000 to 2,000,000 people per district.¹²³

Currently, the Local Government Councils, have been granted wide-ranging powers as the highest political authority in their areas of jurisdiction,¹²⁴ with both executive and legislative powers to make local laws that are not inconsistent with the constitution or any other law.¹²⁵ The Councils also have powers to make development plans based on locally determined priorities that are consistent with the national development plan;¹²⁶ raise revenue with support (technical and financial) from the central government,¹²⁷ including determining and implementing the revenue raising mechanism;¹²⁸ make, approve and execute their own budgets;¹²⁹ alter or create new boundaries within their areas of jurisdiction;¹³⁰ appoint District Service Commissions,¹³¹ District Land Boards,¹³² District and Urban Tender Boards and Local Government Public Accounts Committees;¹³³ and establish or abolish offices in the

Powers Statute 1988.

¹²¹ See World Bank, Participants Manual, Case Study Uganda, 2003 3.

¹²² Chapter 11 of the 1995 Constitution of the Republic of Uganda and the Local Government Act 1997.

¹²³ See Ministry of Local Government Fact Sheet, available at: <http://molg.go.ug/sites/default/files/MoLG%20-%20%20Fact%20Sheet.pdf> accessed 29 May 2018. Also see UBOS, *National Population and Housing Census* (2014) available at: https://www.ubos.org/wpcontent/uploads/publications/03_20182014_National_Census_Main_Report.pdf (accessed 29 May 2018)

¹²⁴ The area of jurisdiction is the district. See Section 9 (1) of the Local Government Act 1997.

¹²⁵ Section 9 (1) of the Local Government Act 1997.

¹²⁶ Section 35 (3) of the Local Government Act 1997

¹²⁷ Article 193 and the Seventh Schedule of the 1995 Constitution of the Republic of Uganda.

¹²⁸ See Sections 65, 76, 78, 80, 82 and 85.

¹²⁹ Sections 77 and 82 of the Local Government Act 1997.

¹³⁰ Section 7 of the Local Government Act 1997.

¹³¹ Section 54, 55 and 57 of the Local Government Act 1997.

¹³² Section 17 (4) of the Local Government Act 1997

¹³³ Sections 88 and 91 of the Local Government Act 1997.

public service of a district or urban council,¹³⁴ among other things. The powers are assigned to the councils,¹³⁵ and not to individual offices like that of the Chairperson or the Chief Administrative Officer presumably to ensure democratic participation in decision-making in line with the objectives of the Act.¹³⁶

The central government is directly responsible for specific functions and services which the local government cannot handle on its own such as: defence, law and order, banks, land, mines, mineral and water resources, citizenship, foreign relations, taxation, national parks, national elections and national plans, among others.¹³⁷ Generally, local governments are now responsible for the delivery of services while sector or line ministries focus on setting national policy standards, ensuring their compliance through inspection (including monitoring and evaluation), training, providing technical guidance and mentoring.

The aim of the Local Government Act was to legalise the policy of decentralization so as to enhance national development by empowering the people and institutions at every level of society including public, private and civic institutions; improving access to basic services; increasing people's participation in decision-making; assisting in developing people's capacities; and enhancing government's responsiveness, transparency, accountability and improving service delivery.¹³⁸ NRM regarded decentralization as a 'necessary condition for democratization' and fundamental to the fulfilment of their goal of bringing about a 'popular democracy' in Uganda given its history.¹³⁹ Although decentralization has been lauded for opening up opportunities for empowerment of the people and improving service delivery the benefits have been limited and not met peoples' expectations.¹⁴⁰ Local governments are often over-loaded

¹³⁴ Sections 52 of the Local Government Act 1997.

¹³⁵ See Section 9 of the Local Government Act 1997.

¹³⁶ See Section 2 of the Local Government Act 1997.

¹³⁷ See Sixth Schedule relating to Article 189 of the Constitution.

¹³⁸ See Section 2 of the Local Government Act 1997 as amended.

¹³⁹ See J Kisakye, 'Political Background to Decentralization' (1996) 36-46 in S Villadsen & F Lubanga, *Democratic Decentralization in Uganda*, 36.

¹⁴⁰ See: World Bank/A Shah and T Thompson (n 59 above); E Green, 'Decentralization and Development in Contemporary Uganda' (2015) Volume 25, 2015-Issue 5 *Regional and Federal Studies* 491-508; B Bashasha, MN Mangheni and E Nkonya 'Decentralization and Rural Service Delivery in Uganda (2011); World Bank 'Service Delivery with More Districts in Uganda: Fiscal Challenges and Opportunities for Reforms' (2013) available at:

with responsibilities which are not matched with the requisite capacities and the resources to fulfil them.¹⁴¹ In the recent past, the process of decentralization has become politicised and new districts are created on the basis of tribe without adequate planning and resources, both human and financial, to run them leading to constraints in service delivery.¹⁴² The creation of new districts have apparently led to only empowering the elites at the expense of excluding local people from policy making and a downturn in the delivery of social services.¹⁴³

3.3.3 Uganda Human Rights Commission and Equal Opportunities Commission

The UHRC was established as a result of a recommendation made by the Constitutional Review Commission which advocated for a permanent body to promote and protect human rights in light of Uganda's unstable history where arbitrary arrests, detention without trial, torture and ill-treatment of the citizens with impunity by security organs, was the order of the day, especially during the turbulent post-independence era. The UHRC was thus established under the 1995 Constitution to improve the situation of human rights in Uganda with functions such as complaints handling, conducting human rights education and monitoring compliance with international, regional and national human rights obligations and documenting the human rights situation, among other things.¹⁴⁴ Since its establishment, the UHRC has executed its functions diligently. The UHRC has played an important role in promoting human rights in the national development process especially by conducting human rights education for government officials and encouraging the government to adopt the 'human rights-based approach to development' which was adopted in the National Development Plan II 2015-2020 (NDP II).¹⁴⁵ Furthermore, the UHRC also provided guidance to the

<https://www.openknowledge.worldbank.org/handle/10986/16012> (accessed 9 July 2018). Also see generally: Ministry of Local Government et al 'Decentralization and local development in Uganda' (2014).

¹⁴¹ See J Kiyaga Nsubuga and Y Olum 'Local Governance and Local Democracy in Uganda' (2009) Issue 2 *Commonwealth Journal of Local Governance* 26-41.

<http://epress.lib.uts.edu.au/ojs/index.php/cjlg> (accessed 17 May 2016).

¹⁴² See DK Singiza and J De Visser 'Chewing more than one can swallow: the creation of new districts in Uganda' (2011) Vol 15 *Law, Democracy & Development* 8-17. <https://www.ajol.info/index.php/Idd/article/view/68296/56378> (accessed 30 May 2018).

¹⁴³ See J Ayeko-Kümmeth 'Districts creation and its impact on local government in Uganda' (2014) Vol. 8 (3) *African Journal of Political Science and International Relations* 81.

¹⁴⁴ Articles 48 and 51 of the Constitution.

¹⁴⁵ National Development Plan II 2015-2020 (2015) 214.

government on how to make the national development process more participatory by developing guidelines.¹⁴⁶ The UHRC also working in close collaboration with the NPA, German Technical Cooperation (GIZ) and the UN Office of the High Commissioner for Human Rights (UN OHCHR) built the capacity of local government planners in integrating the human rights-based approach in the national development process which was included in the NDP II.¹⁴⁷ The UHRC has continuously monitored the various development plans including the Poverty Eradication Action Plans and the current National Development Plans and made recommendations for improvement including advising on how issues such as inequality and discrimination of vulnerable groups can be addressed in the development process.¹⁴⁸

Nevertheless, the UHRC is yet to provide redress for victims of violations arising from the development process including the right to participate in development. In executing its mandate, the UHRC has faced several challenges including: inadequate funding, the non-payment of compensations of awards made by the tribunal, delays in resolution of cases, among other things.¹⁴⁹ In spite of its challenges, the UHRC has generally been effective and done well in terms of fulfilling the Paris Principles. The UHRC for the last 10 years has been accredited with accredited with 'A' status by the International Coordinating Committee of National Human Rights Institutions.¹⁵⁰ UHRC's commendable work has also been recognised by the African Commission on Human and Peoples' Rights as the best National Human Rights Institution in Africa in 2012.¹⁵¹

The NRM has been advancing equality and non-discrimination by implementing a policy of affirmative action with special measures to empower those who have been previously left out because of their vulnerabilities such as women, persons with

¹⁴⁶ See UHRC *Guidelines on the Human Rights Based Approach to Development to National Development Planning* (2015).

¹⁴⁷ See UHRC *Annual Report 2015* 68.

¹⁴⁸ See UHRC *Annual Reports 1997-2017*, available at www.uhrc.ug accessed 30 July 2018. Also see UNDP *Study on the State of National Human Rights Institutions in Africa* (2016) 78.

¹⁴⁹ See UHRC *Annual Report 2012* 19.

¹⁵⁰ See Global Alliance of National Human Rights Institutions 'Chart of the Status of National Institutions, Accreditation status as of 26 May 2017' available at: https://www.ohchr.org/Documents/Countries/NHRI/Chart_Status_NIs.pdf (accessed 6 August 2018)

¹⁵¹ African Commission 'The 52nd Ordinary Session: Final Communique' available at: <http://www.achpr.org/sessions/52nd/info/communique52/> (accessed 17 May 2016).

disability and ethnic minorities, among others.¹⁵² The NRM government also passed the Equal Opportunities Commission Act 2007 and finally established the EOC in 2010.¹⁵³ The EOC is mandated to eliminate discrimination and inequalities against any individual or group of persons on the ground of sex, age, race, colour, ethnic origin, tribe, birth, creed or religion, health status, social or economic standing, political opinion or disability, and take affirmative action in favour of groups marginalised on the basis of gender, age, disability or any other reason created by history, tradition or custom for the purpose of redressing imbalances which exist against them, and to provide for other related matters.¹⁵⁴ The EOC has: conducted a baseline report on the state of equal opportunities;¹⁵⁵ issued two annual reports on the state of equal opportunities;¹⁵⁶ assessed the compliance of budget framework papers with gender and equity;¹⁵⁷ and equity compliance in the plans and budgets of government institutions,¹⁵⁸ among others. The reports and assessments provide guidance and recommendations on how government institutions can enhance gender and equity in opportunities. Although the EOC had a slow start it has picked up in the recent past and has a lot of potential to contribute to the protective human rights framework in Uganda.

As noted above, both the UHRC and EOC have enhanced the participation of citizens including vulnerable groups by enhancing awareness and protection of rights.¹⁵⁹ The EOC has made effort to ensure that special measures are made by government institutions to enhance the enjoyment of rights and the participation of vulnerable groups. However, both institutions need strengthening in terms of capacity both human and financial to reach the grass roots.

¹⁵² National Equal Opportunities Policy 2006.

¹⁵³ Article 32 of the Constitution.

¹⁵⁴ Articles 32(3) and 32(4) of the Constitution.

¹⁵⁵ EOC *The Baseline Report on the State of Equal Opportunities in Uganda* (2013) available at: <http://www.eoc.go.ug/publications-downloads> (accessed 17 May 2016).

¹⁵⁶ Annual Reports on the State of Equal Opportunities 2014 and 2015 available at: <http://www.eoc.go.ug/publications-downloads> (accessed 17 May 2016).

¹⁵⁷ EOC *Assessment Report Compliance of Budget Framework Papers with Gender and Equity Financial Year 2016/2017* (2016) available at: <http://www.eoc.go.ug/publications-downloads> (accessed 17 May 2016).

¹⁵⁸ EOC *Gender and Equity Compliance in the Plans and Budgets of Government Institutions for Financial Year 2016/17* (2016) available at: <http://www.eoc.go.ug/publications-downloads> (accessed 17 May 2016).

¹⁵⁹ See UHRC *Annual Reports*, www.uhrc.ug (accessed 30 May 2018) and EOC *Annual Reports* <http://www.eoc.go.ug> (accessed 30 May 2018).

3.3.4 National Planning Authority

The NRM government established the National Planning Authority (NPA) under the NPA Act (15 of 2002) in line with Article 125 of the Constitution. The NPA works towards: building the national capacity for visionary and long-term planning. The NPA has established a framework to identify strategies to implement national priorities including national development goals to ensure sustainable and equitable national development. The primary function of the NPA is not only to produce comprehensive and integrated development plans for the country but also to study and publish independent assessments of key economic and social policy issues and options so as to increase public understanding and participation in the economic and social policy debate.¹⁶⁰ In the formulation and implementation of national plans, special attention has to be paid to ensure that: all citizens are involved including women, persons with disabilities, children and youth, older persons and CSOs, among others.¹⁶¹

The NPA adopted the Comprehensive National Development Planning Framework (CNDPF) in 2007 as the country's strategic planning framework which is a coordinated and all-inclusive approach to development planning aimed at enabling the country to realise its long-term development aspirations as a nation.¹⁶² CNDPF is based on the principles of: equity and gender equality; competitiveness; Public Private Partnership (PPP); sustainable development; economic diversification; participation and ownership; evidence-based planning and accountability for development results.¹⁶³ The CNDPF entails five principle elements which includes: the 30 year National Vision; 10 year National Development Plan, the 5 year National Development Plans, Sector Policies and Master Plans and the Annual Plans and Budgets.¹⁶⁴ Before the CNPF, development planning had different approaches and frameworks. According to the National Development Plan I 2010-2015 (NDP I), the mixed economy approach to development was key in the period between 1962 and 1971.¹⁶⁵ However, this was

¹⁶⁰ See Section 7 (1) and (2) of the National Planning Authority Act, 2002.

¹⁶¹ See Article II (i) and X of the National Objectives and Directive Principles of State Policy.

¹⁶² NPA, Planning Framework available at:
<http://npa.ug/development-plans/planning-frameworks/cndpf/> (accessed 17 May 2016).

¹⁶³ As above.

¹⁶⁴ As above.

¹⁶⁵ See National Development Plan 2010/2011 – 2015/2016 3
<https://www.imf.org/external/pubs/ft/scr/2010/cr10141.pdf> (accessed 30 May 2018).

interrupted by the *ad hoc* economic war plan of Idi Amin in the 1970s.¹⁶⁶ This was then followed by the Structural Adjustment Program of the early 1990s.¹⁶⁷ From 1997 to 2008, the Poverty Eradication Action Plan (PEAP) was the central planning framework for Uganda.¹⁶⁸

So far the NPA has developed the Vision 2040 whose vision is ‘A Transformed Ugandan Society from a Peasant to a Modern and Prosperous Country within 30 years.’¹⁶⁹ Furthermore, the NPA has developed two National Development Plans from this vision with the themes of ‘Growth, employment and socio-economic transformation for prosperity’ (2010-2015) and ‘Strengthening Uganda’s Competitiveness for Sustainable Wealth Creation, Employment and Inclusive Growth’ (2015-2020).¹⁷⁰ The sector policies, master plans, annual plans and budgets of Ministries, Departments and Agencies of Government including those of the districts are supposed to feed into the development plans and the vision. These informed the Vision 2040 and the two national development plans (NDP I and NDP II) which were earlier mentioned above. However, like most government institutions, the NPA is affected and limited by resource constraints.

3.4 Participation by affected individuals

Those who are affected by a development project, plan or policy are entitled to participate in its formulation or implementation.¹⁷¹ Under the Constitution, the State is required to take all the necessary steps to involve the people in the formulation and implementation of development plans and programmes which affect them.¹⁷² On the face of it, this would mean that everyone would ideally have to be involved in the formulation and implementation of the National Development Plans as they affect everybody which is not practical. Moreover, as was already highlighted in Chapter 2

¹⁶⁶ As above.

¹⁶⁷ As above.

¹⁶⁸ As above.

¹⁶⁹ Available at <http://npa.ug/wp-content/themes/npatheme/documents/NDP2.pdf> (accessed 17 May 2016).

¹⁷⁰ Available at <http://npa.ug/wp-content/uploads/NDPII-Final.pdf> (accessed 17 May 2016).

¹⁷¹ Article X of the National Objectives and Directive Principles of State Policy.

¹⁷² As above.

the UN Human Rights Committee has given guidance to the effect that it is only elected representatives who are entitled to participate in the conduct of public affairs.

There is no specific definition of who is affected by a development project in the Constitution, National Planning Authority Act or even Local Government Act even though they all directly and indirectly refer to the participation and involvement of the people or those concerned and affected in development planning. The definition in the National Environment Act could provide some guidance. The National Environment Act, which is in line with the Constitution, encourages participation as one of its key principles and specifically provides for: 'the maximum participation by the people of Uganda in the development of policies, plans and processes for the management of the environment.' The National Environment Act refers to an interested and affected party as including: any person, group of persons, or organisation interested in or affected by an activity; and any organ of state that may have jurisdiction over any aspect of the activity.¹⁷³ This means that any person, groups of persons or organisation which is interested in or affected by a plan or project should participate in decision making. Moreover, any organ of state that has jurisdiction over any aspect of the plan or project should also be involved.

Individuals can generally participate in decision making including development planning by voting in elections and choosing their representatives; participating in party politics; public demonstrations and campaigns; lobbying and petitioning the leaders and representatives; attending, participating and making verbal or written submissions in public hearings and consultations; referring complaints to appropriate institutions such as the UHRC, EOC and Courts of Law, among others.

Participation can be direct or representative e.g. through Members of Parliament and Local Council leaders.¹⁷⁴ It can also be through CSOs.¹⁷⁵ Nevertheless, there are numerous challenges in terms of ensuring that the representatives and CSOs actually represent the interests of those that they purport to represent. On whether people are consulted in decision making including the formulation of development plans, the

¹⁷³ CAP 153, Section 24.

¹⁷⁴ Article 38 (1) of the Constitution.

¹⁷⁵ Article 38 (2) of the Constitution.

Uganda National Governance Baseline Survey of 2014 which is the most recent report, indicated that more than half of the respondents were not consulted.¹⁷⁶ Nevertheless, a high number of the respondents indicated that the government takes into consideration views presented by NGOs and CSOs and local authorities including local council leaders and members of parliament.¹⁷⁷ Below is a discussion of participation by various groups.

3.4.1 Participation through representatives

As mentioned earlier, the Constitution and the law allows for participation in decision making including development through representatives such as members of parliament and local council leaders. In line with its constitutional role, parliament is responsible for various functions under national development planning. Members of Parliament are expected, on behalf of the people they represent, to: provide input and guidance on the national development plan; approve the plan; pass relevant legislation; appropriate resources; and have general oversight to ensure the implementation of the plan. The Local Council leaders on behalf of the people are also expected to: be involved in the preparation of local development plans and their implementation, among other things. However, Members of Parliament and Local Council leaders who serve as the peoples' representatives have been reported to not adequately respond to peoples' needs and concerns.¹⁷⁸ Furthermore, in terms of performance the Local Council Leaders were deemed more favourably than the Members of Parliament in terms of representation and addressing matters that concern the people.¹⁷⁹ There are thus concerns relating to the quality of representation by the political leaders in terms of input to the national development plans. Despite the fact that the government takes into consideration the political leaders' views, their quality of representation of the citizenry's needs and concerns remain wanting.¹⁸⁰

¹⁷⁶ Uganda Bureau of Statistics *Uganda National Governance Baseline Survey Report (2014)* 50 available at: <http://www.ug.undp.org/content/dam/uganda/docs/Uganda%20National%20Governance%20Baseline%20Survey%202014.pdf> (accessed 12 July 2018).

¹⁷⁷ Uganda Bureau of Statistics (n 176 above) 51.

¹⁷⁸ Uganda Bureau of Statistics (n 176 above) 53.

¹⁷⁹ Uganda Bureau of Statistics (n 176 above) 54.

¹⁸⁰ Uganda Bureau of Statistics (n 176 above) 52 and 53.

3.4.2 Civil Society Organisations

There are numerous definitions of CSOs. In this study, CSOs are defined as independent non-governmental and not-for-profit organisations that perform the functions of: articulating citizen's interests and demands; defending citizen's rights and providing goods and services.¹⁸¹ CSOs degree of participation depends on the country context, political space and their organisational capacity to get and stay engaged in the process of development. CSOs in Uganda have positively influenced the situation of human rights for the citizenry by not only advocating for and defending citizen's rights but also providing goods and services. In terms of national development, they participate in the formulation of plans and also monitor their implementation. They also enhance the democratization process and promote the rule of law as they demand accountability from government.

Uganda has a good history of CSO participation in development. CSOs, because of their practical knowledge and experience obtained due to the nature of their work, are often invited to participate in development and poverty eradication policies and plans.¹⁸² Most times CSOs have more information on the situation on the ground and are more aware of the problems, needs and development concerns of the people.¹⁸³ The government often relies on such CSOs, especially if they are credible, to design strategies to address development issues. CSOs in Uganda, over the years, have formed networks to increase their capacity for influencing policy. There are various networks of CSOs that have been established over the years such as: the NGO Forum, Human Rights Network-Uganda (HURINET-U), Uganda Water and Sanitation Network (UWASNET) and the Civil Society Coalition for Oil, among others. It has been asserted that such networks stimulate civil society to: act proactively and effectively participate and engage with Government and other development partners with well researched propositions.¹⁸⁴

¹⁸¹ Adapted from A Krishna et al *Changing Policy and Practice from Below: Community Experiences in Poverty Reduction* (2000) 6.

¹⁸² See J Gaventa 'Legal and Policy Frameworks for Citizen Participation in Local Governance in East Africa: a regional report' (2002) 31.

¹⁸³ As above.

¹⁸⁴ W Nyamugasira/World Vision International *The poor can't wait: Poverty and Debt Relief*, (2000)1.

During the development of the PEAP 2000, CSO involvement in the process was formal.¹⁸⁵ The principal features of the framework were: the use of a multi-stakeholder national task force or national working group on poverty eradication formed to prioritise public actions across various sectors and ensure the widest possible participation.¹⁸⁶ A resource team of five local and international experts was hired to draft the plan and organise the participatory process on behalf of the national task force.¹⁸⁷ Seven thematic working groups were formed to assess the situation on sectoral concerns and each group used existing data, collected additional information and consulted with experts.¹⁸⁸ The resource team facilitated thematic seminars and retreats organised as required by the thematic teams.¹⁸⁹ The work was done with continuous engagement of parliamentarians who provided the validation needed to revise the plan which was also verified through CSO consultations.¹⁹⁰ CSO participation was so entrenched that some politicians began to resent and refer to CSOs as ‘the unelected politicians’, who influence development policies much more than the legally elected local government officials and Members of Parliament.¹⁹¹

The role of CSOs is acknowledged in the NDP II. CSOs are recognised as partners in development and that their role according to NDP includes: ‘advocacy, particularly for the interests of groups who might otherwise be neglected; voluntarily financed service delivery in sectors not covered by Government programmes; delivery of publicly financed services as subcontracted by Government; support to conflict resolutions; and independent research on key policy issues.’¹⁹² In order to enhance the role of civil society to national development, the NDP II provides for the following: partnership with government; survey to establish the value of NGO work to Uganda’s development; finding more sustainable sources of financing for NGOs and to ensure improved

¹⁸⁵ See *Ministry of Local Government Planning Guidelines* (2001) 13. Also see UNDP *The role of CSOs: Training Modules, MDG-Based National Development Strategies* (2007) 47.

<http://www.undp.org/content/dam/aplaws/publication/en/publications/poverty-reduction/poverty-website/mdg-based-national-development-strategies-the-role-of-csos/mdg-based%20national%20development%20strategies.pdf> (accessed 25 May 2018).

¹⁸⁶ See UNDP (n 185 above).

¹⁸⁷ As above.

¹⁸⁸ As above.

¹⁸⁹ As above.

¹⁹⁰ As above.

¹⁹¹ K Brock, R McGee and R Ssewakiryanga ‘Poverty knowledge and policy processes: A case study of Ugandan national poverty reduction policy’ (2002) Research Report 53/2002 *Institute for Development Studies* 19.

¹⁹² See NDP I 2010-2015 Para 204.

harmonisation of NGO work so as to avoid duplication and wastage of resources.¹⁹³ The NDP II which was developed using a similar approach also acknowledges the role of CSOs and the need to align their work plans with the national development plans.¹⁹⁴ The Plan commits to strengthening civil society and civic participation in public sector management and sector review including the monitoring and implementation of the plan.¹⁹⁵

However, participation by CSOs has been largely restricted to the ‘invited spaces’ where the government wants to consult them.¹⁹⁶ Furthermore, this is complicated by the fact that CSOs especially working on the promotion and protection of human rights including the right to development and supporting participation of the citizenry in development are sometimes adversely perceived by the government. Some authorities have denounced human rights defenders and their organisations as those serving a ‘foreign agenda’, ‘saboteurs’ and ‘anti-government’.¹⁹⁷ CSOs engaged in human rights defense face a lot of challenges in the course of their work including: arbitrary arrests; torture and ill treatment; threats and intimidation; attacks from communities; restrictive legislative framework; office break-ins; low capacity and the negative perception from the authorities and communities.¹⁹⁸ Such challenges inevitably negatively affect their work and participation in development. The relationship between Civil Society Organisations and the government has an impact on the success of the advocacy and lobbying efforts of the civil society for better national development plans.

3.4.3 Vulnerable groups

Vulnerable groups are specific groups of people who, for diverse reasons, are weak and susceptible or have traditionally been victims of human rights violations and thus

¹⁹³ See NDP I 2010-2015, Para 205.

¹⁹⁴ See NDP II 2015-2020 10.

¹⁹⁵ See NDP II above 45, 243 and 244.

¹⁹⁶ Gaventa (n 182 above). Also see K Brock, R McGee and R Ssewakiryanga (n 191 above) vii.

¹⁹⁷ See M Nassali ‘Civil Society in Africa: Politics, Power and Accountability addressing the elephant in the room in the quest for civil society organisations right to freedom of association’ (2014) Vol. 16, No. 2, December *International Journal of Not-for-Profit Law* 34; HRW *Curtailling Criticism Intimidation and Obstruction of Civil Society in Uganda* (2012) available at: <https://www.hrw.org/report/2012/08/21/curtailling-criticism/intimidation-and-obstruction-civil-society-uganda> (accessed 17 May 2018).

¹⁹⁸ See generally, Human Rights Centre Uganda *Baseline Survey and Situational Analysis of the Working Environment for Human Rights Defenders* (2014).

require special protection as part of the human rights based approach to development.¹⁹⁹ Such vulnerable groups experience a higher risk of poverty, social exclusion and marginalisation than the general population and may include: women and girls; children; refugees; internally displaced persons (IDPs); stateless persons; national minorities; indigenous peoples; migrant workers; persons with disability; elderly persons; human rights defenders; and persons living with HIV and AIDS, among others.²⁰⁰ Such groups of people are usually marginalised politically and discriminated against socially which affects their participation in development. Vulnerable groups in the context of participation in development in Uganda would include: women; children; IDPs; minorities; indigenous peoples; persons with disability; elderly persons and persons living with HIV and AIDS, among others.

The NDP 2010-2015 recognises the need for the participation of vulnerable groups as highlighted above. The NDP provides for interventions such as strengthening the EOC to ensure affirmative action is implemented by the various government sectors to empower the vulnerable and marginalised groups to effectively participate in the development process and development initiatives.²⁰¹ The NDP 2015-2020 specifically adopts a human rights based approach to development and specifically provides for all policies, legislation, programmes and plans to have express linkage to human rights instruments; equality and equity; accountability; empowerment; participation; non-discrimination and attention to vulnerable groups.²⁰² Furthermore, it provides for support for vulnerable groups including the expansion of direct income support schemes.²⁰³

Participation in development in Uganda has been affected by cultural norms including patriarchal traditional and religious beliefs which do not support the individual, direct

¹⁹⁹ See UN OHCHR 'The Human Rights-Based Approach to Development Cooperation Towards a Common Understanding among the UN Agencies' (2003).

²⁰⁰ Adapted from UNDP-OHCHR 'Toolkit: For Collaboration with National Human Rights Institutions' (2010) 60.

²⁰¹ NDP I.

²⁰² NDP II 2015-2020 Para 615.

²⁰³ NDP II 2015-2020 Para 254.

and public participation of certain vulnerable groups such as women,²⁰⁴ children,²⁰⁵ persons with disability²⁰⁶ and minorities.²⁰⁷ Although some vulnerable groups such as women may be more knowledgeable than men regarding the needs of the population, especially the poor, their participation and contribution to the formulation of development plans is hindered.²⁰⁸ The situation of the recognised vulnerable groups under the constitution, including their participation in development, is highlighted below.

a) Women

Women constitute 51% of the Ugandan population.²⁰⁹ Women's participation in the political space, including Parliament and Local Government, has improved because of the implementation of affirmative action.²¹⁰ However, despite the progress made in empowering women and reducing their marginalisation in Uganda they are still vulnerable to human rights violations and exclusion in the development process. The women's movement, which advances their rights, remains fragmented and is characterised by tensions based on political, ideological, religious and tribal differences.²¹¹ In spite of various steps to promote women's rights through the legal framework, implementation of the laws is still a challenge and discrimination remains rampant.²¹² Reform of discriminatory laws has stalled since 2013 and women's rights

²⁰⁴ Also see: RS Esuruku 'Gender, Governance and Participatory Development in Uganda: Lessons for the Local Government' in M Prah (Ed.) *Insights into Gender Equity, Equality and Power Relations in Sub-Saharan Africa* (2013) 38; A Cornwall, Making a difference? Gender and participatory development (2000) *IDS Discussion Paper 378* 11-27.

²⁰⁵ See UNICEF *Situation Analysis of Children in Uganda* (2015) available at: [http://www.unicef.org/uganda/UNICEF_SitAn_7_2015_\(Full_report\).pdf](http://www.unicef.org/uganda/UNICEF_SitAn_7_2015_(Full_report).pdf) (accessed 18 May 2016).

²⁰⁶ See D Alamillo and L Diaz 'Disability is Not Inability: Grassroots Participatory Development and Collective Action in the Iganga District of Uganda' (2012) Vol.7, Issue 1 *The Journal of Sustainable Development* 87-96.

²⁰⁷ BG Wairama/Minority Rights Group International *Uganda: The Marginalization of Minorities* (2001).

²⁰⁸ See C Randzio-Plath 'Gender and Decentralisation: An Introduction, Local Power and Women's Rights – Gender Perspectives on Decentralisation Processes' Workshop of African and European Civil Society Organisations (2010) 4.

²⁰⁹ Uganda Bureau of Statistics *Women and men in Uganda: Facts and Figures* (2017) 1.

²¹⁰ See UWONET 'A Civil Society Gender Issues' Paper towards the Second National Development Plan 2015–2020: Proposed Priorities and Interventions' (undated) 2. Also see UNDP *Gender Equality and Women's Empowerment in Public Administration: Uganda Case Study* (2012).

²¹¹ See UWONET *United We Can: Celebrating 50 Years of Women's Contribution to Uganda's Development* (October 2012).

²¹² See FIDH, FIDA-U and FHRI *Women's Rights in Uganda: Gaps between Policy and Practice*, (2012).

violations such as polygamy, sexual and gender-based violence and poverty, among other things remain rife.²¹³

Leadership in Uganda has remained the preserve of men: women are not yet fully socialised to participate in political and governance roles as they have limited skills and are not highly valued on the political scene.²¹⁴ Women participation in public service is particularly hindered by their care responsibility and ‘double burden’ which requires balancing career and domestic responsibilities and the absence of flexible working arrangements.²¹⁵ Furthermore, although recruitment, promotion and allowances in the public service are based on merit and gender-neutral criteria, there are underlying implications of policies on women and men which inadvertently put women at the disadvantage of men.²¹⁶ Sexual harassment is rampant in public service.²¹⁷ The national gender machinery, Ministry of Gender, Labour and Social Development, has a wide mandate but with limited capacity and resources to deliver its mandate.²¹⁸

The National Development Plans acknowledge that women participation in decision making, political leadership and development is still generally affected by their low literacy levels; poverty and lack of resources; limited skills; oppressive cultural and traditional beliefs; and violence against them and efforts are targeted at improving the situation for women.²¹⁹ Although, women participate in development, their participation is still limited.

²¹³ See FIDH, FIDA-U and FHRI above. Also see UN Women *Progress of the World's Women 2015-2016* available at: http://progress.unwomen.org/en/2015/pdf/UNW_progressreport.pdf (accessed 30 May 2015).

²¹⁴ A Ellis, C Manuel, and CM Blackden, World Bank *Directions in Development: Gender and Economic Growth in Uganda: Unleashing the power of women* (2006) 23.

²¹⁵ See UNDP ‘Gender Equality and Women’s Empowerment in Public Administration: Uganda Case Study’ (2012) 28.

²¹⁶ As above.

²¹⁷ As above.

²¹⁸ See UNDP (n 215 above) 29.

²¹⁹ Generally, see NDP I (2010-2015) and NDP II (2015-2020).

b) Children

Children, persons below 18 years, constitute 55% of the Ugandan population.²²⁰ Reports indicate that children's rights are violated as they have been neglected,²²¹ sacrificed as part of a ritual,²²² trafficked,²²³ used as domestic workers,²²⁴ married off early,²²⁵ sexually abused²²⁶ or involved in prostitution²²⁷ and armed conflict.²²⁸ Many of the children are orphaned and vulnerable lacking sufficient care and basic needs such as food, shelter, clothing and access to social services like health care and education.²²⁹

The situation of children in Uganda is not conducive for their participation in development. Participation of children in decision making, including in development, is also hindered by the inadequate provision of a coherent national strategy and guidelines for child participation and the limited systematic interventions outside CSO or development partner programmes.²³⁰ Although there is a National Child Participation Guide 2008 which provides guidelines for the participation of children it does not define actions or goals and child participation is often limited to programmes funded and run by international and local CSOs.²³¹ Child participation is limited more especially for the vulnerable children such as girls, children with disabilities, children living with HIV and AIDS, street children, children in conflict with the law and children from ethnic minority families and those in refugee camps because there are no real institutional mechanisms for child participation to ensure that their views are considered in decision-making at the national and local government levels.²³²

²²⁰ Uganda Bureau of Statistics *Evidence for planning and improved service delivery* (2017) xxv.

²²¹ See generally UHRC *Annual Reports 2007-2017*.

²²² See UHRC *Annual Report* (2008) 94. Also see UHRC *Annual Report* (2009) 181.

²²³ See UHRC *Annual Report* (2008) 95.

²²⁴ See UHRC *Annual Report* (2009) 119. United States Department of Labour, *2012 Findings on the Worst Forms of Child Labour - Uganda*, 30 September 2013, available at: <http://www.refworld.org/docid/5268e5f314.html> [accessed 13 February 2014]

²²⁵ See UHRC *Annual Report* (2009) 101-103.

²²⁶ See US State Department Report *Uganda* (2012). Also See Annual Police Crime Reports 2011 & 2012.

²²⁷ See UHRC *Annual Report 2009* 101.

²²⁸ See UHRC (n 227 above) 91-95.

²²⁹ Generally, see UNICEF *Situation Analysis of Children in Uganda* (2015). Also see P Perezniето, D Walker et al/Overseas Development Institute *Situation analysis of children and poverty in Uganda: Voices of children* (2011).

²³⁰ UNICEF (n 229 above) 26.

²³¹ As above.

²³² As above.

Furthermore, the environment, cultural values and attitudes are not conducive for child participation although the benefits of their participation have been affirmed by the practice of local CSOs and international NGOs.²³³

Nevertheless some children, especially those aged 15-18, participated in the formulation of the national development plan of 2010-2015 and contributed on issues of education, employment, health and population, and gender and social development.²³⁴ The Department for International Development (DFID)-Uganda commissioned a civil society organisation Students Partnership Worldwide (SPW), at the request of the National Planning Authority, to organise a youth consultation meeting where their views were heard and documented in the plan.²³⁵ The consultation especially provided input on key issues affecting young people, such as unemployment, education, health and poverty. Fifty-two young people who came from various districts across the country discussed the key thematic areas of the plan and formulated recommendations for the government.

c) Persons with Disability

The Persons with Disabilities Act 2006 defines disability as ‘a substantial functional limitation of daily life activities caused by physical, mental or sensory impairment and environmental barriers resulting in limited participation.’²³⁶ The population of persons with disability above the age of 2 is about 12%.²³⁷ Furthermore, the report indicates that disability is higher among females compared to males and that the prevalence rate was higher among those living in the rural areas compared to those in the urban areas.²³⁸ The Constitution promotes affirmative action in favour of marginalised groups including persons with disability and such persons have representation in Parliament and at the Local Government Levels.²³⁹ The Persons with Disabilities Act has provisions for the participation of persons with disabilities in all aspects of life as equal

²³³ As above.

²³⁴ See DFID-CSO/Youth Working Group *Youth Participation in Development: A Guide for Development Agencies and Policy Makers* (2010) 50 available at: <http://restlessdevelopment.org/file/youth-participation-in-development-pdf> (accessed 30 May 2016).

²³⁵ DFID-CSO/Youth Working Group (n 234 above) 49-50.

²³⁶ Section 2, Persons with Disabilities Act.

²³⁷ Uganda Bureau of Statistics (n 220 above) 156.

²³⁸ Uganda Bureau of Statistics (n 220 above) 155.

²³⁹ Articles 32, 35 and 75.

citizens.²⁴⁰ Despite progressive legislation that is favourable to persons with disability, there are inadequate implementation mechanisms affecting the enjoyment of rights. There are challenges in terms of statistical data on disability issues and inadequate coordination between different line ministries.²⁴¹ Persons with disability face several challenges such as: high levels of poverty due to unemployment, accessibility to social services such as education, health care and infrastructure among others.²⁴²

Persons with Disability are also hindered by: limited access to information; insufficient social assistance; and inadequate attention to special needs especially in school as children with learning disabilities are most often not assisted.²⁴³ It has been reported that the National Council on Disability has found that '55 percent of persons with disabilities lacked functional literacy skills, and only 33 percent studied to primary grade seven.'²⁴⁴ Furthermore, it was alleged that children with mental disabilities were subjected to ill treatment as they were sometimes denied food and tied to trees and beds with ropes in order to control their movements.²⁴⁵ The challenges of persons with disabilities are further exacerbated by insufficient funding to the Ministry of Gender, Labour and Social Development which is responsible for addressing their concerns.²⁴⁶

Persons with disabilities were initially not involved in the formulation of the National Development Plan of 2010-2015.²⁴⁷ However, they were later consulted under the NGO Forum and subsequently the National Development Plans and Vision 2040 included disability targets in the area of trade, education, health and social security and gender and equity budgeting which also focuses on disability, among other things.²⁴⁸ The National Union of Disabled Persons in Uganda (NUDIPU) has stated that:

²⁴⁰ Sections 3 (b), 10 (a), 37 and 38.

²⁴¹ See DFID Uganda *Disability Scoping Study* (2009) 10 available at www.ucl.ac.uk (accessed 26 February 2014).

²⁴² See UHRC Report on Persons with Disability (2010).

²⁴³ See United States Department of State, *Human Rights Report: Uganda* (2012) 31-32 available at: www.state.gov/documents/organization/204390.pdf. (accessed 30 May 2016).

²⁴⁴ As above.

²⁴⁵ As above.

²⁴⁶ As above.

²⁴⁷ SIDA *Disability Rights in Uganda* (2014) available at: <http://www.sida.se/globalassets/sida/eng/partners/human-rights-based-approach/disability/rights-of-persons-with-disabilities-uganda.pdf> (accessed 30 May 2016).

²⁴⁸ As above.

The process of consultation on national planning and development is uncoordinated and is not fully inclusive. Generally, persons with disabilities have been excluded.²⁴⁹

NUDIPU asserts that several persons with disability including women, youth and children are left out in the formulation of laws, policies and development processes and that subsequently their special needs and interests are neglected.²⁵⁰ Moreover, NUDIPU further asserts that when persons with disability are consulted by government, their input is often not considered.²⁵¹

d) Internally displaced persons

The Guiding Principles on Internal Displacement define ‘internally displaced persons’, as:

...persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human made disasters, and who have not crossed an internationally recognized State border.²⁵²

The International Displacement Monitoring Centre (IDMC) estimated that there were 29,776 internally displaced people by the conflict in Northern Uganda as of May 2015.²⁵³ As of 31 December 2017, there was only a slight improvement in terms of reduction of numbers, it was estimated that there are now 24,000.²⁵⁴ Many IDPs returned home after the conflict although they have not found durable solutions to their displacement. The numbers of those who have remained displaced by the LRA conflict had reduced and they were living in four camps in Ngomoromo in Lamwo district, Mucwini in Kitgum district, Corner Agula in Gulu district and Arum in Agago district.²⁵⁵

²⁴⁹ See NUDIPU ‘Alternative Report to the UN Committee on the Implementation of the Convention on the Rights of Persons with Disabilities’ (2013) 13.

²⁵⁰ As above.

²⁵¹ As above.

²⁵² Article 2 of the *Guiding Principles on Internal Displacement* (1998) E/CN.4/1998/53/Add.2.

²⁵³ IDMC *Uganda IDP Figures Analysis*, available at: <http://www.internal-displacement.org/sub-saharan-africa/uganda/figures-analysis> (accessed 30 May 2016).

²⁵⁴ IDMC *Uganda IDP Figures Analysis*, available at: <http://www.internal-displacement.org/countries/uganda> (accessed 10 July 2018).

²⁵⁵ Norwegian Refugee Council/Internal Displacement Monitoring Centre (NRC/IDMC) *Internal displacement in Uganda* (2014) 5.

Those internally displaced persons who remained in camps did so either because they lack land or are old, sick, or have a disability and needed assistance to go back home.²⁵⁶ The number of those who are internally displaced continues to grow as people flee from disasters including floods, landslides, internal conflicts or as a result of evictions from land being cleared for development projects.²⁵⁷ For those who have returned, they have faced numerous challenges due to poverty and lack of access to basic services such as health care, education, livelihood, finances and credit schemes.²⁵⁸

It is important for IDPs to participate in decisions that affect their lives.²⁵⁹ Decisions affecting IDPs should not be centralized and IDPs need to have a say on the plans and lay out of the camps, the distribution of food and other items and in others matters that affect their lives. The lack of participation in key decisions which affect their lives can increase the IDPs' vulnerability and expose them, especially women, to violence and insecurity which reduces the quality of humanitarian assistance.²⁶⁰ International Alert found that the political participation of women emerging from conflict in local government is very limited. Such women only stand for the mandatory positions slated for them. This is because these women: have limited resources; are engaged in heavy domestic workloads; lack support from their political parties and groups; live in a patriarchy; and suffer and are vulnerable to sexual and gender-based violence.²⁶¹

The IDP Policy emphasises the importance of consultations with and participation of IDPs in finding durable solutions. Under the policy, IDPs have to be represented on the District Disaster Management Committees (DDMCs), which were established for their protection and assistance at the district level. DDMCs are involved in the planning and management of return and resettlement to ensure that it is voluntary and that the

²⁵⁶ As above.

²⁵⁷ NRC/IDMC above and NRC/IDMC 'Africa Report on Internal Displacement' (2017) 44.

²⁵⁸ NRC/IDMC (n 255 above).

²⁵⁹ Report of the Representative of the Secretary-General on the human rights of internally displaced persons, Walter Kälin, 2006, E/CN.4/2006/71 5 available at: <http://www.refworld.org/pdfid/441182000.pdf> (accessed 30 May 2016).

²⁶⁰ Protection of Internally Displaced Persons in Situations of Natural Disaster: A Working Visit to Asia by the Representative of the UN Secretary-General on the Human Rights of Internally Displaced Persons, Walter Kälin, 27 February to 5 March 2005, 20 and 21 available at <http://www.ohchr.org/english/issues/idp/Tsunami.pdf> (accessed 31 May 2016).

²⁶¹ Generally, see International Alert 'Post-war economic opportunities in northern Uganda: Implications for women's empowerment and political participation' (2012).

IDPs are consulted on the design of the resettlement assistance kits.²⁶² However IDP participation in the formulation of the national development plans was not effective as evidenced by the scanty interventions highlighted in both plans.²⁶³

e) Minorities

There is no clear definition of ethnic minorities and indigenous groups in Uganda. Indeed the African Commission has urged the government to clarify the criteria for identifying indigenous peoples in Uganda.²⁶⁴ The 1995 Constitution provides for a long list of 65 'indigenous communities' which are just ethnic groups that are not necessarily marginalized.²⁶⁵ Ethnic minorities in Uganda are often classified on the basis of their numbers in relation to the population and the extent to which they enjoy their rights in community with others.²⁶⁶ They are thus regarded as groups within the population that are fewer and have different cultures and traditions such as the Karamojong pastoralists, hunter gatherers such as the Batwa and Benet who are vulnerable to discrimination and marginalisation from the dominant neighbouring tribes and face challenges in access to services and representation.²⁶⁷

Ethnic minorities, such as the Batwa and Benet, are faced with the threat of extinction of their culture, language and dispossession of land and often do not have: equal participation in the decision making processes, access to education, food, health and water facilities.²⁶⁸ These concerns are echoed in the reports of several organisations working on issues concerning ethnic minorities.²⁶⁹ According to Minority Rights Group

²⁶² Also see Brookings-LSE *From responsibility to response: Assessing national approaches to internal displacement* (2011) available at: <http://www.brookings.edu> (accessed 31 May 2016).

²⁶³ See NDP I (2010-2015) and NDP II (2015-2020).

²⁶⁴ See Report on the African Commission's Working Group on Indigenous populations/communities 'Research and Information visit to the Republic of Uganda (14-17 and 24-29 July 2006)' adopted at the 43rd Ordinary Session, 7-22 May 2008.

²⁶⁵ Third Schedule of the 1995 Constitution of the Republic of Uganda, as amended.

²⁶⁶ A Asimwe and Others, *Ethnicity and Human Rights in Uganda: A Desk Study of Human Rights issues faced by Ethnic Minorities and Indigenous Groups* (2012) 13 available at: http://www.globalrights.org/site/PageServer?pagename=www_africa_uganda (accessed 30 May 2018).

²⁶⁷ As above.

²⁶⁸ See UHRC *Annual Report 2008* 83-90.

²⁶⁹ See Asimwe n 266 above. Also see Minority Rights Group International, *State of the World's Minorities and Indigenous Peoples – Uganda* (2013) available at: <http://www.refworld.org/docid/526fb72710.html> accessed 26 February 2014. Also see HURIP/K Kabanukye and D Kwagala 'Culture, Minorities and Linguistic Rights in Uganda: The case of the Batwa, and the Ik' (2007).

International, the government has not done much to enable the ethnic minorities to participate in the conduct of public affairs, including their participation in the development and formulation of development policies and plans.²⁷⁰ They argue that there is no legal and institutional framework to support their specific participation especially in terms of providing for their right to participate in development processes which affect them or provision of remedies when these rights are violated as provided by the international treaties.²⁷¹ The ethnic minorities have the general right like everyone else to participate in the conduct of public affairs including the right to participate in the formulation and implementation of development plans that affect them. The National Development Plans especially the NDP I includes ethnic minorities as vulnerable groups with interventions to support their community programmes.²⁷²

f) Older persons

In Uganda, an 'older person' is defined as a person aged sixty years and above.²⁷³ Older persons constitute 4.1% of the population.²⁷⁴ Older persons should participate in the decisions affecting their lives and their community.²⁷⁵ Traditionally, elderly persons are respected for their wisdom and experience and their guidance and counsel was sought in times of crises.²⁷⁶ Older persons were regarded as the fountain of knowledge on cultural values and customs which they passed on to the next generation.²⁷⁷

However, for those who have become disabled as they have aged, their frailty has now become a liability and they are perceived by some as a burden to the family and society leading to a decline in their status and loss of most of the authority they had in

²⁷⁰ http://www.chr.up.ac.za/chr_old/indigenous/documents/Uganda/Themes/General/Culture%20Minorities%20and%20Linguistic%20Rights%20in%20Uganda.pdf (accessed 31 May 2016).

²⁷¹ See Minority and Indigenous Groups in Uganda 'Universal Periodic Review Report: Joint Submissions for Uganda' (2016) available at: <http://lib.ohchr.org/HRBodies/UPR/Documents/session12/UG/JS6-JointSubmission6-eng.pdf> (accessed 31 May 2016.).

²⁷² As above.

²⁷³ See NDP I 2010-2015, 22, 276 & 284 and NDP II 2015-2020 305.

²⁷⁴ See Section 2 of the National Council for Older Persons Act, 2013.

²⁷⁵ See Uganda Bureau of Statistics 'The National Population and Housing Census 2014 – National Analytical Report' (2017) 26.

²⁷⁶ Section 10 of the Local Governments Act.

²⁷⁷ See Uganda Reach the Aged Association 'Situation of Older Persons in Uganda' (2009) available at: <https://www.globalgiving.org/pfil/114/projdoc.doc> accessed 31 May 2016.

²⁷⁷ As above.

the past.²⁷⁸ The current situation of older persons in Uganda is such that they live in poverty and lack the basics such as food, water, clothing, housing and health care including HIV and AIDS treatment.²⁷⁹ Furthermore, many have physical disabilities and suffer from discrimination, neglect, abuse and violence from relatives and the communities in which they live.²⁸⁰ Older women especially are accused of being witches and chased away from their homes and villages.²⁸¹

Although older persons play a vital role in society because they contribute by caring for orphaned grandchildren and providing household income, they are often excluded from development programmes.²⁸² Despite a progressive National Policy for older persons and a national planning framework which empowers older persons to participate in the development process, their participation in decision making is limited.²⁸³

g) Persons living with HIV and AIDS

There are about 1.3 Million Ugandans living with HIV and AIDS.²⁸⁴ Common human rights challenges faced by people living with HIV and AIDS include: discrimination in employment or education and access to medical care and housing; violations of the right to medical privacy; and mandatory HIV testing.²⁸⁵ The UHRC has raised concerns relating to provisions in the HIV and AIDS Act that have the potential to violate human

²⁷⁸ As above. Also see: B Cohen and J Menken/ National Research Council Committee on Population *Aging in Sub-Saharan Africa: Recommendation for Furthering Research*, (2006) and Ministry of Gender, Labour and Social Development, *Role of Social Protection in Uganda's national development efforts and initiatives* (undated) 4-5 available at: <http://www.socialprotection.go.ug/publications.php> last (accessed 31 May 2016).

²⁷⁹ Uganda Reach the Aged Association (n 276 above). Also see generally: SO Wandera et al, 'Determinants of access to healthcare by older persons in Uganda: a cross-sectional study' (2015) *International Journal of Equity in Health* 26; UN, Economic and Social Affairs *Current status of the social situation, wellbeing, participation in development and rights of older persons worldwide* (2011) and WHO *Uganda Wellbeing of Older People: A study on global ageing and adult health* (2011) available at: <http://www.who.int/healthinfo/systems/sage/en/index.html> (accessed 31 May 2016).

²⁸⁰ Uganda Reach the Aged Association (n 276 above). Also see SO Wandera et al, 'Prevalence and correlates of disability among older Ugandans: evidence from the Uganda National Household Survey' *Global Health Action* (2014) 7 and 10.

²⁸¹ Uganda Reach the Aged Association (n 276 above).

²⁸² See Help Age International *Older people in Africa: a forgotten generation* (2008) available at: <http://eng.zivot90.cz/uploads/document/205.pdf> (accessed 31 May 2016).

²⁸³ Also see J Oloka-Onyango 'Equal opportunity, age-based discrimination and the rights of elderly persons in Uganda' (2008) 19.

²⁸⁴ See UNAIDS 'Country Fact Sheets: Uganda' (2017) available at: <http://www.unaids.org/en/regionscountries/countries/uganda> (accessed 9 August 2018).

²⁸⁵ See OSIEA 'HIV/AIDS, Human Rights, and Legal Services in Uganda' (2008).

rights including: mandatory testing, disclosure of results without consent, criminalization of attempted and intentional transmission which is already covered under the Penal Code, lack of gender sensitive counselling and inadequate protection of vulnerable groups, among others.²⁸⁶

Although HIV and AIDS is regarded as a cross-cutting issue, in the NDP 2010-2015 combating HIV and AIDS was specifically targeted only in the education sector in terms of capacity building; advocacy and education; and provision of treatment and care.²⁸⁷ Combating of HIV and AIDS should not only be limited to the education sector because it is a national matter. The NDP 2015-2020 presents it in a more national manner. The provisions of the two national development plans indicated limited participation of persons living with HIV and AIDS.

3.4.4 Development partners

States have obligations on the right to development at three levels: internally for the formulation of national development policies and programmes affecting persons within their jurisdictions; internationally, for the adoption and implementation of policies extending beyond their jurisdictions; and collectively, through global and regional partnerships.²⁸⁸ It is with regard to the obligation relating to global and regional partnerships that development partners are involved in national development plans. Development partners are particularly involved in the development of plans not necessarily to influence them but rather for their own information to guide them in choosing specific aspects of the development plans that they would want to support.²⁸⁹ Development partners are particularly recognised as key stakeholders in terms of providing financial and technical support.

Development partners have played an important role in the development of Uganda. Although, they do not directly participate in the formulation of the national development plan, they may be consulted and also provide support to increase the participation of

²⁸⁶ UHRC *Annual Report 2010* 124-129.

²⁸⁷ See NDP I 2010-2015 257.

²⁸⁸ See UN OHCHR 'Frequently asked Questions on the Right to Development' (2016) 9, available at: http://www.ohchr.org/Documents/Publications/FSheet37_RtD_EN.pdf (accessed on 31 May 2016).

²⁸⁹ See NDP II 2015-2020 229

citizens in its formulation.²⁹⁰ Development partners have provided support especially for CSOs to make their input on national development issues including the PEAP.²⁹¹ Due to donor aid influence, participation of CSOs has become central.²⁹² However, unlike the PEAP the donors did not participate as much in the recent National Development Plans.²⁹³ However, they have played another equally important role of supporting the implementation of the National Development Plans.²⁹⁴

It has been suggested that the Development Partners play a very important role in the promotion and protection of human rights in Uganda because they fund over 80% of the development budget of key justice institutions including the Uganda Human Rights Commission and the Justice, Law and Order Sector.²⁹⁵ Furthermore, that because of development partner funding to the justice institutions, they are more likely to be accountable to them than to the citizens creating a situation where the human rights programmes lack national ownership.²⁹⁶

3.5 Concluding remarks

Participation has evolved and grown in Uganda over the years. During the pre-colonial period, kings or traditional leaders had all authority but decision making on some matters was participatory. In the colonial period participation in decision making was the preserve of the British while a few non-significant decisions were left for the Baganda chiefs who were used by the colony to rule. The post-independence era was largely unstable without much opportunity to participate.

The legal framework in Uganda provides for the right to participate in development and it can be implied that the right to participate in development is part of the right to participate in the affairs of government²⁹⁷ comprising the formulation and

²⁹⁰ See DFID-CSO/Youth Working Group (n 234 above).

²⁹¹ See Brock, McGee and Ssewakiryanga (n 191 above).

²⁹² See M Isooba 'Civil society participation in Uganda's PRS process: opportunities and dilemmas' (2005) 44.

²⁹³ National Planning Authority *Mid-Term Review of the National Development Plan, Thematic Report on Development Partnerships* (2013) 3-4.

²⁹⁴ As above.

²⁹⁵ D Rukare *The role of development assistance in the promotion and protection of human rights in Uganda*, Unpublished LLD Thesis, University of Pretoria (2011) 277-278.

²⁹⁶ As above.

²⁹⁷ Article 38.

implementation of policies, plans and programmes including those relating to development.²⁹⁸ Indeed, the primary function of the National Planning Authority is not only to produce ‘comprehensive and integrated development plans’ for the country but also to ‘study and publish independent assessments of key economic and social policy issues and options so as to increase public understanding and participation in the economic and social policy debate.’²⁹⁹ In the formulation and implementation of national plans, special attention has to be paid to ensure that: all citizens are involved including women, persons with disabilities, children and youth, older persons and CSOs, among others.³⁰⁰ However, the law does not adequately prescribe how citizens can directly participate or how their representatives can ensure that they represent their views.

Although there have been more opportunities for citizens to participate in development under the NRM government because of its legal, policy and institutional framework, there are numerous challenges. Over the years, during the NRM reign, there has been discontent by citizens not only about the democratisation process but also about the quality, levels and equity of development in Uganda especially: the inequalities between the north and the south; regional imbalances; youth unemployment; high levels of corruption and access to social services such as education, health, food and housing, among others despite an intense decentralization process.

Notably, there has been an increase in the participation of women, CSOs and development partners in development. However, there are still limitations in participation especially for individuals, children, persons with disability, IDPs, minorities, elderly persons and persons living with HIV and AIDS. It is necessary to have an in-depth investigation of the barriers and obstacles to participation in development so as to effectively promote citizen participation in development and this will be discussed in the next chapter.

²⁹⁸ Article X of the National Objectives and Directive Principles of State Policy.

²⁹⁹ S.7 (1) and (2) of the National Planning Authority Act.

³⁰⁰ Article II (i) and X of the National Objectives and Directive Principles of State Policy.

Chapter Four

Barriers and Obstacles to participation in development

4.1 Introduction

As was noted in the previous chapter, participation in development in Uganda has evolved and improved over the years. However, participation is far from perfect as there are still various barriers and obstacles that prevent effective participation in development. This chapter discusses some of the barriers and obstacles to participation in development in Uganda.

4.2 Challenges of participation in development in Uganda

In order to have ‘active, free and meaningful participation’ it is necessary for individuals to: have access to information and be aware of the development project, plan or policy process; have resources to participate; have a good relationship with the authorities; and have adequate time to engage and meaningfully contribute to the process, among other things.¹ Participation of persons in development in Uganda is affected by several factors including legal and non-legal issues. The legal barriers and obstacles include: inadequacy of the law; weak implementation of the law and ignorance about rights and lack of awareness of the development processes. Other barriers and obstacles include: poverty, limited space for the participation of civil society organisations, limited timelines for participation, negative cultural and traditional values, lack of special measures to enhance the participation of vulnerable groups, perception that there is disregard of input given and violations of human rights. These are discussed in more detail below.

4.2.1 Inadequacy of the law

As mentioned earlier in chapter two,² participation is dependent on several factors including an enabling environment which entails a legal and policy framework, among

¹ U Spliid/Danish Institute for Human Rights ‘NHRIS and Public Participation’ (2013) 9.

² See Section 2.4 above.

other things. A conducive legal and policy framework is necessary to entrench human rights principles and also encourage the participation of the citizenry in development. Indeed, the UN Declaration on the Right to Development provides that:

Steps should be taken to ensure the full exercise and progressive enhancement of the right to development, including the formulation, adoption and implementation of policy, legislative and other measures at the national and international levels.³

The legal and policy framework provides opportunities for participation in development in Uganda. Uganda is subject to all the various rights provided in the international and regional human rights treaties that it has ratified which include the right to participate in the conduct of public affairs.⁴ The right to participate in development in Uganda is a right on its own and is also part of the right to participate in the affairs of government, which includes participation in the formulation and implementation of policies, plans and programmes including those relating to development.⁵ The law requires that efforts are made to ensure peoples' participation in the formulation and implementation of national plans, including women, persons with disabilities, children and youth, older persons and civil society organisations, among others.⁶ However, there are inadequacies in the law that affect the right to participation in development: the right is specifically provided only in the National Objectives and Directive Principles of State Policy and not in the bill of rights; and the lack of clarity on the right to participate in development in terms of how it should be exercised.

a) Right is provided in the National Objectives and Directive Principles of State Policy

The requirement for public participation and for people to participate in the formulation and implementation of national development plans is only specifically highlighted in

³ See Article 10 of the UN Declaration on the Rights to Development.

⁴ Uganda is party to various international and regional human rights treaties such as ICERD, ICCPR, ICESCR, CEDAW, CRC, CMW, CRPD, ACHPR, ACRWC and Maputo Protocol, among others. Information on Uganda's ratifications UN and AU is available at: https://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?CountryID=182&Lang=EN and <http://www.achpr.org/states/uganda/ratifications/> (accessed 8 August 2018).

⁵ See Article X of the National Objectives and Directive Principles of State Policy and Article 38 of the Constitution.

⁶ Equal Opportunities Act and National Women's Council Act, Persons with Disabilities Act; Children's Act; National Policy for Older Persons; National Youth Policy and National Youth Act; Non-Governmental Organisations Act; Refugee Act; and the Equal Opportunities Act, among others.

the National Objectives and Directive Principles of State Policy.⁷ While this may not be a problem *per se*, interpretation can be a challenge. Being placed in the National Objectives and Directive Principles of State Policy and not in the main bill of rights, creates uncertainty of whether it is an actual right or not and this may require constitutional interpretation. Rukare articulately argues that the provisions of rights in the National Objectives and Directive Principles of State Policy in the Ugandan Constitution are ‘no more than just mere decorations.’⁸ However, Oloka has asserted that the rights in the National Objectives and Directive Principles of State Policy are rights just like any other rights in the Constitution.⁹ The Ghanaian Courts have persuasively affirmed the justiciability of the Directive Principles of State Policy in their Constitution in the cases of *New Patriotic Party v Attorney-General*¹⁰ and *Ghana Lotto Operators Association (and 6 others) v National Lottery Authority*.¹¹

Nevertheless, the lack of clarity in the Ugandan Constitution and jurisprudence creates inadequacies in the law because of the ambiguity on the justiciability of rights enumerated only in the National Objectives and Directive Principles of State Policy and not in the main bill of rights in Chapter four of the Constitution.¹² It would have been better if the right had been specifically and clearly articulated and provided in the main text of the Constitution. This would have left no chance of any doubt as to its existence. During the constitutional amendment process in 2005, the UHRC and other human rights organisations recommended that the rights highlighted in the National Objectives and Directive Principles of State Policy should be included in the main text of the bill of rights. Otherwise, mention of the rights in only the National Objectives and Directive Principles seems like a token or superficial right just like the other socio-economic rights listed there such as the right to food, health care, shelter, water and development, among others.¹³ However, the advocacy efforts for the rights in the National Objectives and Directive Principles of State Policy to be moved to the main bill of rights only resulted into a Constitutional Amendment in the form of Article 8 A.

⁷ National Objectives and Directive Principles of State Policy X and II (i) & (ii).

⁸ See D Rukare ‘The role of development assistance in the promotion and protection of human rights in Uganda’ Unpublished LLD Thesis, University of Pretoria (2011) 113.

⁹ See J Oloka-Onyango ‘Interrogating NGO Struggles for Economic, Social and Cultural Rights in Contemporary Uganda: A perspective from Uganda’ (2006) 24-25.

¹⁰ *New Patriotic Party v Attorney-General* (1993-94) 2 Ghana Law Reports 35.

¹¹ [2009] 3 LRC 235.

¹² National Objectives and Directive Principles of State Policy II & X

¹³ Generally, see Oloka-Onyango (n 9 above).

That Article provides that the country shall be governed on the basis of the national objectives and directive principles of state policy and furthermore, that parliament shall enact appropriate laws to this effect. However, since that constitutional amendment was made, Parliament has never enacted any law to this effect.

The provisions in the National Objectives and Directive Principles may not be enough to guarantee the rights therein or provide good guidance. This issue has been discussed by the Constitutional Court with regard to public participation in governance which is also provided in the National Objectives and Directive Principles of State Policy.¹⁴ Justice Remmy Kasule of the Constitutional Court has stated:

All that there is in the Constitution on public participation is in the National Objectives and Directive Principles of State Policy... In the absence of a law that lays down a structural modus operandi for public consultation and participation...no meaningful consultation can be done. *The provision in the National Objectives and Directive Principles of State Policy is couched in general terms bordering on the abstract. It cannot guide anyone with any specificity on the mode of consultation and public participation.*¹⁵

Justice Kasule held that the National Objectives and Directive Principles of State Policy are not enough to guide public consultation and participation and therefore recommended that Parliament makes rules and guidelines to provide for and facilitate public participation of the people, specifically on the amendment of the Constitution, where such participation is necessary. However, general guidelines and rules on participation may be necessary.

Courts have struggled with interpretation of the National Objectives and Directive Principles of State Policy in Uganda. Usually, the interpretation has been narrowed and not progressive. When the Centre for Health, Human Rights and Development first filed a case with the Constitutional Court in 2011, the Court backed away from examining the matter and providing redress.¹⁶ In *Centre for Human Rights, Health and Development and Others v Attorney General*, the petitioners pursued a court declaration to state that the non-provision of basic maternal health care commodities

¹⁴ National Objectives and Directive Principles of State Policy II (I).

¹⁵ *Male Mbirizi Vs. Attorney General*, Constitutional Petition No. 49/ 2017; *Uganda Law Society Vs. Attorney General*, Constitutional Petition No. 03/ 2018; *Hon Gerald Kafureeka Karuhanga & Others Vs. Attorney General*, Constitutional Petition No. 05/2018; *Prosper Businge & Others Vs. Attorney General*, Constitutional Petition No. 10/ 2018; *Abaine Jonathan Buregyeya Vs. Attorney General*, Constitutional Petition No. 13/ 2018 p 188.

¹⁶ *Centre for Human Rights, Health and Development and Others Vs. Attorney General*, Constitutional Petition No. 16 of 2011.

in government health facilities and the irresponsible and unethical behaviour of the health workers towards expectant mothers were unconstitutional and a violation of the right to health. The right to health is provided for in the National Objectives and Directive Principles of State Policy and is not in the main bill of rights in Chapter Four of the Constitution.¹⁷ The Centre for Human Rights, Health and Development argued that the high maternal mortality rate was the fault of the government which did not provide the basic minimum maternal health care packages and that the insufficient human resources for maternal health especially midwives and doctors, frequent lack of essential drugs for maternal health and the inadequate emergency obstetric care services at health centres all over the country. However, the Attorney General raised a preliminary objection on grounds that the petition was political and that by hearing the matter, the constitutional court would be interfering with the political discretion which is the role of the executive and legislature. Furthermore, the Attorney General argued that for the Court to determine the issues or political questions raised in the petition would be a call for a review of all the policies of the health sector as a whole and the sub-sector of the maternal health care services. The Attorney General argued that Court could not make findings on such policies because implementation of these policies is constitutionally mandated to the legislature and executive. The Attorney General thus urged the Court to dismiss the petition. The Constitutional Court in dismissing the petition held that even though the government had not provided enough resources to the health sector especially the maternal health care services, the Court could not hear the matter because the political and legal responsibility to determine, formulate and implement policies of government for the good governance of Uganda belongs to the executive.

Fortunately, on appeal by the Centre for Human Rights, Health and Development, the Supreme Court in May 2016 ruled that the Constitutional Court misunderstood what was required of them and confirmed that the Court was required to determine whether the government had provided or taken all practical measures to ensure the basic medical services to the population, particularly the maternal services.¹⁸ Furthermore,

¹⁷ National Objectives and Directive Principles of State Policy XIV and XX.

¹⁸ *Centre for Human Rights, Health and Development and Others Vs. Attorney General*, Constitutional Appeal No.1 of 2013.

the Court referred the application for redress to the High Court. Clearly, due to the uncertainty of health care in the Constitution, it has taken five years for the victims to get redress which probably could not have happened without the strong advocacy from the Centre for Human Rights, Health and Development and other activists.

Perhaps, if access to health care had been clearly stipulated in the bill of rights and not just in the National Objectives and Directive Principles of State Policy, it would have been considered much more favourably. The specific right to participate in development is in the same category as the right to access health care as they are both provided in the National Objectives and Directive Principles of State Policy. However, since the right to participate in development is also part of the general right to participate in the conduct of public affairs, its status could be more favourable. Nevertheless, there is still a risk of misinterpretation.

b) Lack of clarity on scope on the right to participate in the affairs of government

The Constitution provides for the right of every Ugandan citizen to participate in the affairs of government, individually or through his or her representatives.¹⁹ Such a right would, presumably, also include the right to participate in development. Furthermore, every Ugandan has the right to participate in peaceful activities to influence the policies of government, which should also include development policies, through civic organisations.²⁰ The Constitution particularly provides that minorities have a right to participate in decision-making processes, and that their views and interests shall be taken into account in the making of national plans and programmes which should also national development plans and programmes.²¹ Finally, the Constitution also provides for other rights, duties, declarations and guarantees relating to the fundamental and other human rights which are not specifically mentioned which would also include the right to participate in development as provided in the various international instruments which Uganda has ratified.

¹⁹ Article 38 (1).

²⁰ Article 38 (2).

²¹ Article 36.

However, the height, depth, breadth and scope of this right has not been well prescribed. This has also been complicated by the dearth of cases on the matter. Even the recent constitutional case of *Male Mabirizi Vs. Attorney General* that touched on the matter of participation and consultation of the people acknowledged and pointed out that there is no specific legal guidance in terms of rules or regulations on how members of parliament can consult or ensure the participation of the people to ensure public participation.²² In line with the spirit of the Constitution, it may be necessary to confirm the right to participate in development by enacting a policy and law that specifically provides for it, to avoid ambiguity and to clearly set criteria and parameters for participation.

4.2.2 Weak implementation of the law

The existing constitutional, legal and policy framework for citizen participation in development, has not been well implemented.²³ It is not enough just to have the law, it is also very important to implement it. The law is not of much use if it cannot be effectively implemented. Implementation of the law can best be achieved in a secure environment that is: free of corruption; respectful to human rights; has adequate mechanisms for access to justice; with a government that is accountable to its citizenry, upholds the rule of law and commits adequate resources for this purpose. Reasons for weak implementation of the law relating to participation, apart from the lack of clarity discussed above, includes inadequate resources, low capacity for implementation, corruption and political constraints which are discussed in detail below.

a) Inadequate resources

For a long time, Uganda's decentralization program has faced challenges of funding.²⁴ Over 90% of the local government funding is from the central government as the

²² See *Male Mabirizi Vs. Attorney General*, Constitutional Petition No. 49/ 2017; *Uganda Law Society Vs. Attorney General*, Constitutional Petition No. 03/ 2018; *Hon Gerald Kafureeka Karuhanga & Others Vs. Attorney General*, Constitutional Petition No. 05/2018; *Prosper Businge & Others Vs. Attorney General*, Constitutional Petition No. 10/ 2018; *Abaine Jonathan Buregyeya Vs. Attorney General*, Constitutional Petition No. 13/ 2018, Decision of Justice Remmy Kasule p 259.

²³ See World Bank, 'Republic of Uganda Service Delivery with More Districts in Uganda: Fiscal Challenges and Opportunities for Reforms' (2013) 7.

²⁴ See P Francis and R James 'Balancing Rural Poverty Reduction and Citizen Participation:

districts have very minimal own-sourced revenues.²⁵ The allocation of funds to local governments is based on: 'historical practices, needs based formulas, and availability of funds.'²⁶ The funding from the central government is categorized in terms of: conditional grants, unconditional grants and equalization grants.²⁷ The conditional grant which is the majority of the total fund is specifically allocated for certain things which are decided with the minimal participation of the district.²⁸ Although there is provision for local bottom-up planning there are limitations in resources which are mainly used for administrative costs such as: payment of salaries, allowances, and procurement costs, among others.²⁹ These conditions only encourage and strengthen political ties and loyalty at the local level but cannot achieve the objectives of decentralization which is meant to improve service delivery and enhance the involvement of the citizenry in governance including their participation in development planning.³⁰ Furthermore, without an efficient system or mechanism to ensure transparency and civic engagement for accountability to the people and to prevent corruption, it is highly unlikely that decentralization will enhance efficient service delivery and local empowerment or achieve any of its desired objectives.³¹

The legal and policy framework providing for public participation in development is very ambitious raising high legitimate expectations of citizen to participation in development. Both the Constitution and Local Government Act are meant to guarantee democratic participation, control, and decision making by the people concerned. Furthermore, the laws are meant to 'establish a democratic, political and gender-sensitive administrative setup in local government,' among other things.³² However, the imposing legal and policy framework has not been adequately reinforced or

²⁵ The Contradictions of Uganda's Decentralization Program' (2003) Vol. 31, No.2 *World Development* 325–337.

²⁶ See World Bank, 'Republic of Uganda, Service Delivery with More Districts in Uganda: Fiscal Challenges and Opportunities for Reforms' (2013) 20.

²⁷ As above.

²⁸ As above.

²⁹ See World Bank (n 25 above) 8.

³⁰ As above.

³¹ See Francis and James (n 24 above).

³² As above. Also see DKW Ssonko, 'Decentralisation and Development: Can Uganda Now Pass the Test of Being a Role Model?' (2013) Issue 13/14 *Commonwealth Journal of Local Governance*; S Steiner, 'Decentralisation in Uganda: Exploring the Constraints for Poverty Reduction,' (2007).

³² See Section 2 of the Local Government Act.

buoyed with the appropriate and requisite capacity for its enforcement including resources.

Particularly, with regard to decentralization, which is meant to increase citizen participation, the creation of numerous new districts has not followed the requisite procedures but has been driven by selfish interests and manipulative political tactics and does not necessarily serve the purpose of enhancing national development by improving service delivery because of the unavailability of resources.³³ Thus implementation of the law, with regard to participation in development, is particularly hindered by inadequate capacity including: human, technical, financial and infrastructural resources. This kind of situation is not conducive for effective citizen participation.

b) Low capacity for implementation

The inadequacy of resources is compounded by the low capacity for implementation resulting from weaknesses in the rule of law. Uganda ranks very low in the rule of law index particularly in terms of: deficiencies in the accountability of the government and private sector; uneven application of laws to protect fundamental rights; inadequacies in the process by which laws are enacted; challenges of access to justice and its delivery in a timely manner by a competent and independent judiciary.³⁴ In an environment where there is inadequate accountability of the government and private sector, weak enactment and enforcement of laws with challenges of access to justice, participation in development cannot thrive. In Uganda, the human rights situation is also fragile³⁵ with challenges in access to justice³⁶ and the rule of law and accountability of the government to the citizenry is questioned.³⁷

³³ See DK Singiza and JD Visser 'Chewing more than one can swallow: the creation of new districts in Uganda' *Law*, (2011) Vol.15 *Democracy and Development* 8-10.

³⁴ See World Justice Project 'Rule of Law Index: 2017-2018' available at: https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2018-June-Online-Edition_0.pdf (accessed 31 July 2018).

³⁵ Generally, see UHRC *Annual Reports* (2011-2017), Human Rights Watch, *World Reports 2015, 2016 and 2017: Uganda*, and US State Department, *Uganda Human Rights Reports, 2015-2017*.

³⁶ See Justice Law and Order Sector, *Annual Performance Report 2014/2015*.

³⁷ See Human Rights Watch, *World Report 2013: Uganda* (2013) and Amnesty International, *Rule by law: Discriminatory legislation and legitimised abuses in Uganda* (2014).

c) Corruption and political constraints

The weak implementation of the law is also caused by political constraints and corruption. The political structures are not yet sufficiently developed to support credible consultations which enhance efficient citizen participation. Uganda has very high levels of corruption³⁸ which mars the processes that enable citizen participation.³⁹ Corruption inevitably affects people's participation in development because they are not certain that their contribution counts.⁴⁰

Generally, there have been challenges in ensuring that Members of Parliament actually represent the interests of the people they supposedly represent. Perhaps, it should also be noted that the public usually has higher expectations and demands on Members of Parliament, usually exceeding their legislative and oversight role.⁴¹ What is of major concern though is that the people being represented and the Members of Parliament who represent them, more often than not, do not know their roles. This is usually illustrated during campaigns where the politicians promise to do different things from those required of their legislative mandate such as improving social services, building roads, dams and wells, among many other things.⁴² Ugandan voters often demand and usually vote for those Members of Parliament who attend burials of their dead loved ones, pay school fees for their needy children, attend and contribute to wedding celebrations and solve various personal and community problems.⁴³

Although the Members of Parliament often receive large sums of money to consult their constituencies on bills to be passed, they do not necessarily take the views expressed by the people.⁴⁴ Decisions on several bills are usually taken based on

³⁸ See World Justice Project (n 34 above). Also see Inspectorate of Government *Report to Parliament: January to June 2017* (2017) 5-6.

³⁹ See UNDP 'Uganda Human Development Report, Unlocking the Development Potential of Northern Uganda' (2015) 108.

⁴⁰ See BC Basheka 'Public procurement corruption and its implications on effective service delivery in Uganda: an empirical study' (2009) Vol. 2, No. 4 *International Journal of Procurement Management* 418.

⁴¹ See Parliament of Uganda 'Strategic Plan 2016/2017 - 2019/2020, Legislating for the People, Sustainable Development and Democracy' (2016) 7.

⁴² Also see: DENIVA 'Role of Parliament in Governance and Democracy' (2010) 29.

⁴³ Also see generally S Kaduuli 'Operational Roles of Ugandan Members of Parliament' (2008).

⁴⁴ See F Golooba-Mutebi 'Informal Governance and Corruption – Transcending the Principal Agent and Collective Action Paradigms: Uganda Country Report' (2018) 10.

political party positions.⁴⁵ Some bills are even passed expeditiously without much consultation or even where there is consultation their political party position on the bill is what prevails despite the numerous consultative meetings held to discuss issues relating to the bill as was the case with bill removing the age limit. Moreover, priority for passing bills is also based on what the majority political party wants rather than what the people need. For example, there are various laws which have not been enacted despite their urgency such as those relating to economic, social and cultural rights and the establishment of the disaster management commission. These laws have been pending for the last 13 and 23 years respectively since the 2005 Constitutional Amendment and the promulgation of the 1995 Constitution but have not yet even been drafted, despite their need, urgency and recommendations from the Uganda Human Rights Commission.⁴⁶

However, Members of Parliament were very quick to enact a constitutional amendment act to remove the age limit for the presidency and extend the period of their own term of service.⁴⁷ The age limit was the only blockade against the President standing for another election as the presidential term limits had been already removed earlier. The speed with which the Parliament moved to pass this bill without sufficient consultation and participation and the ensuing dramatic events, where members of parliament physically fought each other, in parliament was incomprehensible.⁴⁸ The issue of removal of the age limit for the president and the extension of term limits for the members of parliament was heard by the Constitutional Court.⁴⁹ Although the Court upheld the removal of the age limit for the President, the extension of the members term of service from five to seven was held to be unconstitutional.⁵⁰ Clearly, representation by the Members of Parliament is not enough to guarantee peoples' right to participate in development as they usually only cater for their own interests.

⁴⁵ See Golooba-Mutebi (n 44 above) 11.

⁴⁶ See *UHRC Annual Reports 2008-2017* available at: www.uhrc.ug (accessed 30 July 2018)

⁴⁷ See *Male Mabirizi Vs. Attorney General*, Constitutional Petition No. 49/ 2017; *Uganda Law Society Vs. Attorney General*, Constitutional Petition No. 03/ 2018; *Hon Gerald Kafureeka Karuhanga & Others Vs. Attorney General*, Constitutional Petition No. 05/2018; *Prosper Businge & Others Vs. Attorney General*, Constitutional Petition No. 10/ 2018; *Abaine Jonathan Buregyeya Vs. Attorney General*, Constitutional Petition No. 13/ 2018.

⁴⁸ As above.

⁴⁹ As above.

⁵⁰ As above.

4.2.3 Ignorance about rights and lack of awareness on the processes

People are generally not aware of their rights especially their participatory rights.⁵¹ Although human rights education and awareness is increasing thanks to the work of the CSOs and the UHRC, it is still done in a sporadic manner depending on the interest and priority of the organisation conducting it.⁵²

Human rights education can be defined as:

training, dissemination and information efforts aimed at the building of a universal culture of human rights through the imparting of knowledge and skills and the moulding of attitudes which are directed to: the strengthening of respect for human rights and fundamental freedoms; the full development of the human personality and the sense of its dignity; the promotion of understanding, tolerance, gender equality, and friendship among all nations, indigenous peoples and racial, national, ethnic, religious and linguistic groups; the enabling of all persons to participate effectively in a free society; and the furtherance of the activities of the United Nations for the maintenance of peace.⁵³

To achieve the goals of human rights education, including to enable all persons to participate effectively in society, requires a systematic and comprehensive programme which is lacking in Uganda. The UHRC has continually decried the lack of funding to implement civic education campaigns, which has made it hard for it to discharge its constitutional mandate to formulate, oversee and implement civic education programmes for citizens.⁵⁴ UHRC advocated that the government should develop a National Civic Education Policy to guide civic education interventions in a more holistic, sustainable and continuous manner.⁵⁵ Currently the National Civic Education Policy is being developed. Furthermore, there are efforts to integrate Human Rights Education in primary, secondary school, vocational and Business, Technical, Vocational Education and Training activities and systems. There is a National Action Plan for formal Human Rights Education in Uganda by the Ministry of Education and

⁵¹ Also see C Schwarte 'Public Participation and Oil Exploitation in Uganda' (2008) 9-11.

⁵² M Sekaggya/AfriMAP and The Open Society Initiative for Eastern Africa 'Uganda: Management of Elections' (2010) 43.

⁵³ Plan of Action of the UN Decade for Human Rights Education (1995-2004), Para 2.

⁵⁴ See *UHRC Annual Report 2014* 79 and *UHRC Annual Report 2017* 232.

⁵⁵ *UHRC Annual Report 2012* 72.

Sports for 2016-2021. The Plan of Action strategically addresses the five key components relating to human rights education including: educational policies, policy implementation, the learning environment, teaching and learning, education and professional development. Although the Plan has great potential it is yet to be implemented. The previous absence of a systematic and comprehensive systematic programme for human rights education continues to affect citizen participation not just in democratic elections but also participation in development. Ignorance and lack of awareness of rights prevents the citizenry from effective participation in development because the citizens are not aware of their rights including their rights to participate in the conduct of public affairs including the formulation of national development plans.

People often have no knowledge or information on the processes of developing the national development plans or the importance of their participation. Usually affected individuals or beneficiaries of development programmes lack understanding and access to information of the processes including: the key players, timeframe for formulation and implementation and the steps they can take to influence the programmes.⁵⁶ The lack of understanding prevents individuals from becoming involved in trying to formulate or implement a project, plan or policy and, if so, how to best go about it. Information on the themes for consultation and participation is often disclosed late or is inaccessible. Access to information is an important factor for participation. If the citizenry has no information they cannot participate. Article 41 of the Constitution provides that:

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

This right is further expounded in the 2005 Access to Information Act and the 2011 Access to Information Regulations. Apart from promoting the right to access to information, the Act is also aimed at promoting an efficient, transparent and accountable government and to enable the public to effectively access and participate in decisions that affect them as citizens of the country. In order to implement the Act, the government has: established the Ministry of Information and Communication

⁵⁶ Also see J Bagenda, 'The Challenges of Community Participation in Decentralization Processes in Uganda: A Case Study of Kibaale District' (2007) 7-9.

Technology and National Guidance; developed a Communication Strategy; provided public education through radio stations all over the country and in every district and has also established the Government Citizens Interaction Centre which provides an opportunity and feedback from citizens on service delivery and how it can be improved.

However, there are serious challenges in implementation of the act including: non-compliance by Ministers, wide exemptions to accessible information, ignorance of the law and its relevance, bureaucracy, tedious complaints mechanism and the limited scope of bodies obligated to give information.⁵⁷ Access to information in Uganda is also affected by the general lack of resources, infrastructure and capacity.⁵⁸ For example, there are often not enough resources, infrastructure and capacity to: mobilize the citizenry and their organisations to participate in development processes; print all relevant materials and documentation; keep websites updated with the latest information; and translate all relevant materials and documentation into local languages and in accessible formats for persons with disability.

Where resources, infrastructure and capacity are available as was the case for the youth during the formulation of the NDP I, participation was enhanced.⁵⁹ As was discussed earlier, some children participated in the formulation of the plan.⁶⁰ They were able to do so with support from DFID and SPW and the process was successful because the youth were able to use national newspaper advertisements inviting contributions via the short message service.⁶¹ As a result, of their participation and contribution, the NDP I specifically provides for: 'youth entrepreneurship; vocational skills for out-of-school youth with attention to quality and moral aspects and youth-friendly sexual and reproductive health education.'⁶² Moreover, the NDP I also emphasises the vulnerable youth in the sections on gender and social protection, among other things.⁶³

⁵⁷ See Collaboration on International ICT Policy for East and Southern Africa 'Position Paper: The State of Access to Information in Uganda' (2017) available at: https://cipesa.org/?wpfb_dl=241 (accessed 30 May 2018).

⁵⁸ See Schwarte (n 51 above).

⁵⁹ DFID-CSO/Youth Working Group *Youth Participation in Development: A Guide for Development Agencies and Policy Makers* (2010) 50.

⁶⁰ See Chapter Three.

⁶¹ DFID-CSO/Youth Working Group (n 59 above) 49-50.

⁶² See NDP I 2010-2015 46, 201 & 207, among others.

⁶³ See NDP I 2010-2015 183 & 219.

Participation by citizens in development programs is therefore affected by ignorance and lack of awareness of the available development programs due to inadequate mobilization of communities and limited access to development information which hinders their access and benefit from development plans and programs.⁶⁴ Often times, after overcoming the hurdle of mobilization of citizens and/or their organisations to participate in consultative meetings, participants are obstructed by the lack of information and knowledge on the issues being consulted on due to the unavailability of relevant materials for discussion. Furthermore, the illiteracy levels also affect the quality of discussion as it slows and diverts the process of consultations, whose time is often constrained, which limits the intended benefits that should be derived from a participatory development process.

4.2.4 Poverty

There are several definitions of and distinctions between poverty. Absolute poverty is defined as:

...a condition characterised by severe deprivation of basic human needs, including food, safe drinking water, sanitation facilities, health, shelter, education and information. It depends not only on income but also on access to services.⁶⁵

Poverty has a variety of forms but relates to lack of basics such as food, access to health care, food, housing, and education. As was stated in the Human Development Report 2000:

Human poverty is defined by impoverishment in multiple dimensions—deprivations in a long and healthy life, in knowledge, in a decent standard of living, in participation.

Poverty is thus a deprivation of basics in life which also includes participation. The UN has also said:

Fundamentally, poverty is a denial of choices and opportunities, a violation of human dignity. It means lack of basic capacity to participate effectively in society. It means not having enough to feed and clothe a family, not having a school or clinic to go to, not

⁶⁴ See NDP II 2015-2020 45.

⁶⁵ Report of the UN World Summit on Social Development in Copenhagen in 1995, A/CONF.166/9, Para 19 available at: <http://www.un.org/documents/ga/conf166/aconf166-9.htm> (accessed 30 July 2018.)

having the land on which to grow one's food or a job to earn one's living, not having access to credit. It means insecurity, powerlessness and exclusion of individuals, households and communities. It means susceptibility to violence, and it often implies living on marginal or fragile environments, without access to clean water or sanitation.

Each definition reflects poverty as a deprivation of basic needs such as food, water, clothing, health, shelter, education, information and also includes the lack of participation in decision-making. It is vital for the poor to participate in decision making, not only as the beneficiaries of the development plans or programmes but also, because it is their right as citizens. However, poverty presents a very formidable obstacle and barrier to participation in any decision making. Poverty increases vulnerability and exclusion in the development process.⁶⁶

Participation in development in Uganda has been largely affected by the high levels of poverty in Uganda.⁶⁷ Most of the population in Uganda is comprised of the poor who lack the capacity to participate in development including: lack of empowerment due to limited access to information, inadequate literacy and education, and inadequate resources such as money to cover the costs, which are all necessary to enable them to effectively participate in development processes.⁶⁸ The lack of capacity interferes with their ability to effectively contribute to the process. As such the poor, who are the majority, in the communities often remain excluded from participating in development processes.

When the poor engage in discussions for development, without empowerment including economic security, human rights education and free association or organisation, their participation will not be active, free, informed, meaningful or effective.⁶⁹ The poor often have less access to channels of participation or through which to exercise their rights and often meet greater barriers and obstacles to

⁶⁶ See NDP II 2015-2020 45.

⁶⁷ See Ministry of Finance, Planning and Economic Development, 'Poverty Status Report 2014: Structural Change and Poverty Reduction in Uganda' (2014).

⁶⁸ See Bagenda (n 56 above).

⁶⁹ See UN OHCHR 'Principles and guidelines for a human rights approach to poverty reduction Strategies' (2002) 15 available at: <https://www.ohchr.org/Documents/Publications/PovertyStrategiesen.pdf> accessed 30 July 2018

participation in development than other citizens.⁷⁰ The poor often face obstacles of power, social exclusion, minimal individual and collective organisation capacity to participate in development and make gains for themselves.⁷¹ Poverty has a web of disadvantages including: placing the person in a vulnerable situation; insecurity; physical ill-being; lacking basic needs; poor social relations; ascribed and legal inferiority; lack of political clout; lack of information; lack of education and capabilities; lack of access to institutions and also being unable to form institutions; and having limited time, among other things.⁷² Development is meant to bring the poor from: lack of basics to having enough for a good life; physical weakness to physical well-being; insecurity to security; powerlessness to freedom of choice and action; and bad social relations to good social relations. This makes it vital for the poor to participate in development processes. However, as long as they remain in poverty, their participation is ineffective.

Most poor people have a sense of powerlessness and are most likely more worried about their own needs.⁷³ The poor people in Uganda most likely have no time or the resources to participate in politics or in decisions affecting them including participation in development, specifically the formulation of development plans. Participation in the formulation of development plans, often involves challenging the status quo which may involve 'swimming against the tide' which needs a lot of focus, strength and resilience which they may lack. Moreover, the poor often cannot read or write or speak English, which is the official language, because they are uneducated. Indeed, a study by the World Bank on a project of adult literacy in Uganda found that the beneficiaries gained from their education in terms of enhanced participation in the governance of their communities, adoption of better health practices and income generation, among other things.⁷⁴ The participation of the poor or their representatives, like any other

⁷⁰ See N Devas and U Grant 'Local government decision-making—citizen participation and local accountability: some evidence from Kenya and Uganda' (2003) Vol.23, Issue 4 *Public Administration and Development* 307–316.

⁷¹ J Gaventa 'Towards participatory governance: assessing the transformative possibilities' in S Hickey and G Mogan, *Participation from tyranny to transformation: Exploring New Approaches to Participation in Development* (2004) 32.

⁷² See UNDP 'Poverty in focus' (2006) 3.

⁷³ Also see M Mugisha, D Ojok, Y Kiranda and BB Kabasa 'Youth Participation in Political Processes in Uganda: Exploring Opportunities and Constraint' (2016) Volume 1, Issue 1 *Journal on Perspectives of African Democracy and Development* 60.

⁷⁴ World Bank 'Adult Literacy Programs in Uganda' (2001) 20.

stakeholders, requires resources including financial, at least a minimum of the transport fare from where they live to the venue of the consultative meeting. The government provided a transport refund and meals for those who had been invited to attend the consultation meetings. Nevertheless, at the meetings, the poor people's participation was affected not only by the language spoken as mentioned earlier, but also other barriers including personal, financial, economic, social and cultural and the unequal power relations among all the participants and the facilitators of the meetings.

During the 2010 national development plan consultations at the national and regional level, the poor were not well-represented in terms of input into the national development plan. These meetings, which I personally attended, were often facilitated and dominated by the economists and other technocrats, who had drafted the sectoral development plans, with little or no appreciation for human rights or the human rights-based approach to development which provides for effective participation of the poor in development planning. Although there was mention of human rights and the human rights-based approach to development, the environment was not very conducive especially for the poor and their representatives to voice their views. There was thus no guarantee that even though the poor and/or their representatives attended the meetings relating to the formulation of the development plans, that they effectively participated leading to any pro-poor outcomes in the plan. Even though the national development plan makes a lot of reference to improving the lives of the poor, it was not necessarily as a result of the advocacy of the poor people or their organisations but because those who drafted the plan considered it necessary. The mid-term review revealed that the plan was not human rights compliant and did not effectively address the issues of the poor people.⁷⁵ Efforts were made to address these anomalies in the 2015 national development plan where human rights experts were hired to make input during the process of formulation of the development plan. However, the input from the experts did not directly address or resolve the issue of effective participation of the poor in the formulation of the national development plan. Participation in policy making processes such as the formulation of national development plans by those living in

⁷⁵ Also see generally JM Aliro Omara, C Birabwa, and R Kirenga, 'Mid-Term Review Assessment of the integration of fundamental human rights and freedoms in planning, budgeting, implementation, monitoring and evaluation in Uganda's National Development Plan 2010/2011-2014/2015' (2013).

poverty is important because it contributes towards the prevention of violent conflict and helps to identify priorities when resources are limited.⁷⁶

4.2.5 Limited space for the participation of civil society organisations

Although CSOs, as mentioned in the previous chapter, have played an important role in terms of contribution to poverty reduction strategies and the national development plans with the support from development partners and have government recognition as key partners, their participation has been limited and restricted to the 'invited spaces' created by government for their participation and consultation.⁷⁷ Although there are currently advancements that spaces have been created for CSOs and citizens by media especially social media where self-initiated recommendations can be made to influence government, these were not adequately used during the formulation of the recent national development plans. The failure to use the social media could be attributed to the limited timelines and awareness of the issues as mentioned earlier and as such some were not able to make much input. In any exercise of power, including decision making on development matters, space is fundamental.⁷⁸ It is necessary to have space available, claimed or taken up so to effectively participate⁷⁹ in the conduct of affairs including those relating to national development. Space can be defined as opportunities in which citizens can engage and affect governance processes.⁸⁰ Space is not always available and has to be deliberately created.⁸¹ There are different kinds of spaces available including: invited, claimed and closed.⁸²

Invited spaces are opportunities for participation including consultations which are provided by invitation from government or other policy makers.⁸³ Such invited spaces

⁷⁶ See CAFOD 'Participation of people living in poverty in policy making' (2014)12.

⁷⁷ J Gaventa 'Legal and Policy Frameworks for Citizen Participation in Local Governance in East Africa: a regional report' (2002) 31.

⁷⁸ See M Foucault 'Space, Knowledge and Power' in P Rabinow (ed.) *The Foucault Reader* (1984) 252.

⁷⁹ See A Cornwall 'Spaces for transformation? Reflections on issues of power and difference in participation in development' in S Hickey and G Mohan (Eds.) *Participation from Tyranny to Transformation* (2004) 80.

⁸⁰ See generally H Lefebvre 'The Production of Space' (1991).

⁸¹ Lefebvre (n 80 above) 24.

⁸² J Gaventa 'Finding the spaces for change: A Power analysis' (2006) 25-27.

⁸³ See F Miraftab 'Invited and Invented Spaces of Participation: Neoliberal Citizenship and Feminists' (2004) Vol.1 *Wagadu* 3.

are usually regular, institutionalised and legal in response to popular demand, donor pressure or shifts in policy.⁸⁴ Claimed spaces refer to those spaces for participation which powerless or excluded groups create from themselves which arise out of common problems or as a result of popular mobilization⁸⁵ for example space for participation of minorities and other vulnerable groups. Closed spaces refer to those where decisions are made with little broad consultation or involvement of other stakeholders.⁸⁶

Whether spaces are invited or created they are never neutral and are often infused with existing power relations with the potential to either reproduce or challenge the hierarchies and inequalities.⁸⁷ However, such governmental practices can become sites of resistance with possibilities for 'subversion, appropriation and reconstitution'.⁸⁸ This is because where government is not impartial their actions are likely to be contested and resisted. In such circumstances it may be possible to have the plans altered and adjusted according to the interventions of certain CSOs. In other words, it may be difficult to predict or control outcomes with the spaces provided. However, this all depends on how strong the CSOs are in terms of their ability and capacity to challenge the status quo.

It has been argued that in contexts where there is a high level of social conflict or risk of violence, inclusive processes and participation in policy-making may bring together actors and diffuse conflict.⁸⁹ Furthermore that, where space is provided for people to air their demands and people can see that their voices are being heard and can channel their demands through such spaces helps to prevent conflict.⁹⁰ Where space for participation does not exist and people feel that their priorities and aspirations are

⁸⁴ CAFOD (n 76 above) 6.

⁸⁵ A Cornwall 'Making Spaces Changing Places: situating participation in development' (2002) 24.

⁸⁶ J Gaventa 'Towards participatory governance: assessing the transformative possibilities' in S Hickey and G Mohan (Eds.) *Participation from Tyranny to Transformation* (2004) 35. Also see CAFOD (n 76 above) 7.

⁸⁷ See A Cornwall, *Spaces for transformation? Reflections on issues of power and difference in participation in development*, in S Hickey and G Mohan (Eds.) *Participation from Tyranny to Transformation* (2004) 81.

⁸⁸ See M Foucault 'Governmentality' in G. Burchell et al (Eds.) *The Foucault effect: Studies in Governmentality* (1991) 5.

⁸⁹ CAFOD (n 76 above).

⁹⁰ As above.

not being heard or are being actively ignored this leads to increased tension and risk of conflict.⁹¹ Moreover, spaces for participation can provide a platform for mediation and negotiation in which CSOs have the potential to play an important role in bringing together communities and government.⁹² Moreover, participation also enables the formulation of more people centred plans.

As mentioned earlier, strategies for mobilization and action by CSOs therefore should connect across all the spaces as it is important for civil society actors to build alliances in order to enhance their participation in development. It is important for CSOs participating in all spaces to have knowledge and expertise on the key issues being discussed and other skills such as public speaking, negotiation, conciliation and compromise so as to effectively participate. As discussed earlier, Ugandan CSOs have been limited mainly to the 'invited spaces' and they need to be empowered to participate beyond such spaces. It is important for civil society to be creative and innovative and use all within their power to open up the closed spaces and claim more spaces. They should not be content with just the invited spaces. In order to claim more space, it is important that they have the capacity to participate, feel safe and confident free of stigmatization and defamation in an environment with conducive legislation that enhances freedom of assembly, association and expression. It is only through strong representative CSOs that effective citizen participation in national development can be realised. CSOs are crucial as they play an important role of raising awareness of the citizens on the relevant issues, challenging inequalities and unfair processes and thus promote development in the country.

However, the ability of Ugandan CSOs to hold the government accountable has been questioned in terms of their representation, diversity, credibility and efficiency. The capacity of CSOs is affected by: their own internal organisation deficiencies including democracy, accountability and transparency; the strict legal and regulatory regime governing their operations; elite-urban capture; relations with donors; and the desire to complement rather than question government.⁹³ More disturbing is the fact that

⁹¹ As above.

⁹² As above.

⁹³ Also see DJ Fourie and U Kakumba 'Assessing the Role and Capacity of Civil Society Organisations in holding Local Government Accountable in Uganda' (2011) Volume 4 No.2 *African Journal of Public Affairs* 55.

several NGOs in Uganda, were established simply because of the availability of donor funds and are not necessarily born out of the need to ensure the welfare of their communities. As was pointed out by Fourie and Kakumba:

...a large number of NGOs have developed due to the available donor funds – in a bid to have a *bite* on a typical *donor bonanza* – more than the need to pursue the socio-economic wellbeing of their constituencies⁹⁴

It has also been indicated that although the NGOs have access to participate in all the processes of formulation, planning and implementation of various policies including development planning they are not as actively involved in monitoring of service delivery and that they are not as responsive to the needs and rights especially of the poor in their communities.⁹⁵

4.2.6 Limited timelines

Usually there are time limits set for participation in decision making. The consultation processes should not take too long so as to frustrate those who want to see the policies in action. Neither should the consultation process be too short and prevent effective participation. Limited timelines can have adverse effects on the decision-making process. Although there are some people who may be able, even with the limited time, to act, think quickly and make a clever input to the formulation of a development plan, most cannot. For most people, time limitations may make them less objective and more subjective and they may not be able to follow a logical decision-making process. Studies indeed indicate that perceived time pressure reduces efficiency in negotiation by weakening people's motivation to process information.⁹⁶ If the stakeholders have enough time, they are likely to come to more logically formed and higher quality decisions and make better input to the formulation of the development plan than where there is limited time.

Participation in and consultation on the national and district development plans follows a particular cycle or pattern in Uganda. The NPA works according to the CNDPF which

⁹⁴ Fourie and Kakumba (n 93 above) 57.

⁹⁵ Fourie and Kakumba (n 93 above) 59.

⁹⁶ CKW De Dreu 'Time Pressure and closing of the mind in negotiation, Organisational behaviour and human decision processes' (2003) 91/2 *Organizational Behavior and Human Decision Processes* 280-295.

comprises five key components: the 30 year national vision; 10 year national development plan; the 5 year national development plans; and the annual plans and budgets. All these components follow a particular cycle and timeline for participation in the formulation and development of the plans. The public consultation processes are usually short and do not allow the citizenry much time to study and understand the drafts so as to prepare so that they can effectively participate. Although the government considers development plans for long periods of time, the public consultation process is usually very short, and individuals often do not have enough time to prepare to effectively participate to engage and meaningfully contribute to the process. People usually have one or two days to participate in the consultations to develop the national development plan as was the case for the first and second national development plans.⁹⁷ The participants usually receive the draft documents on which their views are sought only a few days to the meeting or on the same day as the meeting. Therefore participants often come to the meeting with little or no information on the issues for discussion. The limited time lines for consultations and formulation of development plans coupled with ignorance or limited awareness of the issues for discussion, and the lack of resources to mobilize the citizenry and to provide all the relevant materials and documentation translated into local languages and in accessible formats especially for persons with disability, prevents the citizenry from enjoying their right to participate in development.

4.2.7 Cultural and traditional values

Traditional, religious and cultural beliefs can be a hindrance to participation in the conduct of public affairs including development.⁹⁸ Although women may have information on the needs of their communities and what needs to be done to improve the situation in terms of development, their participation and contribution to the formulation of development plans are often hindered.⁹⁹ Participation in development in Uganda is affected by cultural norms including patriarchal, traditional and religious

⁹⁷ Ministry of Finance, Planning and Economic Development 'Concept Note on the Revision of the National Development Plan for Uganda 2007/8' (2007) 13.

⁹⁸ See UN OHCHR 'Factors that impede equal political participation and steps to overcome those challenges' (2014) 12 A/HRC/27/29. Also see generally Lutheran World Federation 'Religion: Help or hindrance to development' (2013).

⁹⁹ See C Randzio-Plath 'Gender and Decentralisation: An Introduction, Local Power and Women's Rights – Gender Perspectives on Decentralisation Processes, Workshop of African and European Civil Society Organisations' (2010) 4.

beliefs that do not support the individual, direct and public participation of certain vulnerable groups such as women,¹⁰⁰ youth, children,¹⁰¹ persons with disability¹⁰² and minorities.¹⁰³

For example, African traditions perceive women's primary roles as caregivers, wives, cooks and cleaners in the home and women who move beyond that role can be ostracised by their family and community. The involvement and participation of women and girls in decision making is often constrained by the negative traditional, cultural and social norms that limit their public participation in decision making. Thus, women do not actively participate in decision making because when they do: they are opposed, scorned and mocked by their friends, family and community.¹⁰⁴ The cultures in Uganda have a strong patriarchal system and in the absence of social services, most working women have a double burden as men do not equally share household tasks which limits their participation in the conduct of public affairs, including participation in development.¹⁰⁵ Women participation in the conduct of public affairs, including their participation in development, is also affected by gender stereotyping; domestic violence; and the lack of financial independence, among other factors.¹⁰⁶ Women often lack: public support, confidence, financial means, skills, and access to information, technology and education to participate in the conduct of public affairs.¹⁰⁷ Indeed during the development of the previous national development plans, the lack of women participation was acknowledged in the plan.¹⁰⁸ Furthermore, their lack of

¹⁰⁰ Also see: RS Esuruku 'Gender, Governance and Participatory Development in Uganda: Lessons for the Local Government' in M Prah (Ed.) *Insights into Gender Equity, Equality and Power Relations in Sub-Saharan Africa* (2013) 23 at 38; A Cornwall, 'Making a difference: Gender and participatory development' (2000) 11-13.

¹⁰¹ See UNICEF *Situation Analysis of Children in Uganda* (2015) available at: [http://www.unicef.org/uganda/UNICEF_SitAn_7_2015_\(Full_report\).pdf](http://www.unicef.org/uganda/UNICEF_SitAn_7_2015_(Full_report).pdf) (accessed 18 May 2016).

¹⁰² See D Alamillo and L Diaz 'Disability is Not Inability: Grassroots Participatory Development and Collective Action in the Iganga District of Uganda' (2012) Vol. 7, Issue 1 *The Journal of Sustainable Development* (2012), 87-96.

¹⁰³ See Minority Rights Group International 'Uganda: The Marginalization of Minorities Uganda' (2001).

¹⁰⁴ See Uganda Women's Network 'Making women politically relevant in Uganda's politics and electoral process: Practical guide to address gender barriers that hinder women from actively participating in leadership and decision making' (2011) 5.

¹⁰⁵ See UNDP 'Gender Equality and Women's Empowerment in Public Administration: Uganda Case Study' (2012) 28.

¹⁰⁶ See UNDP above 10, 11 and 20.

¹⁰⁷ See NDP I 2010-2015 and NDP II 2015-2020.

¹⁰⁸ NDP I 2010-2015 and NDP II 2015-2020.

participation was a matter of concern in the Universal Periodic Review (UPR) and a recommendation was made to increase participation of women in developing and implementing development plans.¹⁰⁹ The UPR is one of latest UN mechanisms, introduced by the Human Rights Council in 2006, where the UN Member States periodically review each other's human right situation and make recommendations for improvement.¹¹⁰ During the first cycle of Uganda's UPR Azerbaijan made the recommendation below which was accepted:

Take further necessary measures to increase and strengthen the participation of women in designing and implementing local development plans and pay special attention to the needs of rural women.

Furthermore, child participation is also hindered by adults who due to cultural and traditional beliefs think that children have neither the right nor the capability to influence decisions that affect their lives.¹¹¹ There is also a lack of skills and willingness among politicians, officials and other adults involved with children to work with them as partners and collaborators.¹¹² Moreover, there are no formal structures and infrastructure aimed at facilitating children's participation.¹¹³ Traditional, religious and cultural attitudes have also affected persons with disability and minorities such as ethnic minorities in the sense that some people believe that they are not capable of taking decisions that affect their lives including development.¹¹⁴ This often results into their marginalisation, discrimination and exclusion despite the progressive laws protecting the rights of persons with disability and ethnic minorities to participate in development.

¹⁰⁹ See UPR Info 'Database of UPR Recommendations Uganda' available at: <http://www.upr-info.org/database/> (accessed 11 June 2016).

¹¹⁰ See UN OHCHR 'Basic facts about the UPR' available at: <https://www.ohchr.org/en/HRBodies/UPR/pages/BasicFacts.aspx> (accessed 31 July 2018).

¹¹¹ See UNICEF (n 101 above) 83-85.

¹¹² As above.

¹¹³ As above.

¹¹⁴ See J Abimanyi-Ochom and H Manan 'Uganda's disability journey: Progress and Challenges' (2014) Vol.3 No.1 *African Journal of Disability* 5. Also see Minority Rights Group International above 18.

4.2.8 No special measures for vulnerable groups

Closely related to cultural and traditional values is the fact that there are no adequate special measures to enhance the participation of vulnerable groups. Vulnerable groups can be defined as:

Those groups of people who, for various reasons, are weak and vulnerable or have traditionally been victims of violations and consequently require special protection for the equal and effective enjoyment of their human rights.¹¹⁵

Participation, including in development, has been hindered by the lack of special measures to enhance the contribution of vulnerable groups. As mentioned earlier in chapter three and in this chapter, several vulnerable groups were left out of the process of formulating the national development plan and this was the case especially for women and persons with disabilities. Such special measures can include legislative, policy and administrative measures which must be well implemented. Furthermore, special measures can include Human Rights Education and raising awareness and sensitisation on the rights of vulnerable groups so as to modify the traditional, social and cultural practices of people against vulnerable groups. Moreover, some special measures could include providing quotas for the inclusion of vulnerable groups into political offices, education and employment which enables them to be in position to contribute to key decision making including on development policies. In order to enhance the participation in development for vulnerable groups there must be: respect for human rights of all especially the most vulnerable; motivation of all people including vulnerable groups to participate, strong civil society, universal access to public infrastructure and facilities; access to information; equity in the distribution of wealth and resources; education; effective representative leadership and an adequate and strong legislative and policy framework.¹¹⁶

¹¹⁵ Adapted from definition by the Icelandic Human Rights Centre, 'The human rights protection of vulnerable groups' available at: <http://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-ideas-and-fora/the-human-rights-protection-of-vulnerable-groups> and R Iskandarli 'Human Rights of Vulnerable Groups in Azerbaijan' (2012) (accessed 8 August 2018).

¹¹⁶ See United Nations Department of Economic and Social Affairs, Final Report of the Expert Group Meeting on 'Creating an Inclusive Society: Practical Strategies to Promote Social Integration' (2009) available at: <http://www.un.org/esa/socdev/egms/docs/2008/Paris-report.pdf> (accessed 8 August 2018).

There are institutional barriers to participation such as: the dominance of participation processes by male government officials, councillors and development experts especially economists; discomfort in the space provided as people may not understand issues relating to the rights of the vulnerable groups; problems with inadequate representation through representatives; and situations where the culture of participation is not central but rather peripheral and participation is only done to fulfil the legal requirements or because of the insistence of development partners. It is important that these barriers are overcome and voices of the vulnerable groups: are heard, considered, strengthened, respected, and that resources are provided to enable them to fully participate. There must be enough resources, infrastructure and capacity to: mobilize the vulnerable groups and their organisations to participate in development processes; provide relevant materials and documentation; access to information; and translate all documentation into local languages and accessible formats for persons with disability. Participation can be hindered by: challenges of reaching and accessing certain vulnerable groups; lack of resources to conduct the consultations including human, financial and infrastructural resources including the absence of accessible formats for persons with disability to enable them to effectively participate in the formulation of development plans.

Prisoners are among the most vulnerable groups that are usually left out and do not take part in the conduct of public affairs including participation in development. Prisoners in Uganda are often detained in overcrowded facilities, which are dilapidated without adequate lighting and ventilation, and they do not have adequate food, water, clothing, bedding and sanitation.¹¹⁷ In October 2017 the prison population was estimated at 54,059 which is three times more than the capacity of the prison system.¹¹⁸ More than half of these prisoners are pre-trial detainees.¹¹⁹ The majority of the prisoners are men with only 4.4% women.¹²⁰ Prisoners just like the rest of the population have the right to take part in the conduct of public affairs as is provided in the Constitution without distinction on the basis of status including that of being

¹¹⁷ UHRC, *Annual Report*, (2017) 212-220

¹¹⁸ World Prison Brief *Uganda* available at <http://www.prisonstudies.org/country/uganda> (accessed 31 July 2018).

¹¹⁹ As above.

¹²⁰ As above.

incarcerated in prison.¹²¹ Moreover, the Uganda Prisons Act affirms that prisoners' rights are subject to the Constitution. However, prisoners are often left out of decision-making processes relating to the conduct of public affairs. The UHRC noted with concern, a few years ago, that no efforts were made to register the prisoners and as such they were not able to vote in the 2016 General elections.¹²² There is no record showing that prisoners had any say in the formulation of the previous national development plans or poverty reduction strategies. Usually the majority of prisoners are poor people who are also meant to benefit and take part in the national development processes at least through elected representatives. However, when they are denied the chance to vote, they lose out on this opportunity. They are few and it could be argued that it would not make any substantial difference even if they voted, but it is their right to do so. Failure for them to vote inevitably affects their inherent right to participate in the conduct of public affairs in general including the right to vote and to participate in development. The Human Rights Committee has indicated that the denial of prisoners' rights to vote is a violation of their right to participate in the conduct of public affairs.¹²³ The NDP I noted that the Uganda Prison Service had more prisoners than they had capacity to cater, which should have been addressed, but since then the numbers have tripled.¹²⁴ NDP II provides for improving access to justice for vulnerable persons, which includes detainees, by the Justice, Law and Order Sector.¹²⁵ However, the prison population has continued to escalate, and the prisoners predicaments are far from over. As a matter of fact, participation in development, could be the least of their problems.

4.2.9 Perception that there is disregard of input given

During consultations on matters of national development, many issues are raised. However, most of these issues are not addressed and there is often no feedback mechanism or support for communities to work towards resolving the problems that were raised. There have obviously been challenges in facilitating participation where: there are prevailing conflicts; there is a lack of trust among the people and their

¹²¹ Article 38 and Article 21 of the 1995 Constitution of the Republic of Uganda, as amended.

¹²² UHRC, Protection and Promotion of Human Rights in Electoral Processes for the 2016 General Elections (2016) 81.

¹²³ Human Rights Committee 'Concluding observations on the second periodic report of Turkmenistan' (2017) CCPR/C/TKM/CO/2 Para 51.

¹²⁴ NDP I 2010-2015 291.

¹²⁵ NDP II 2015-2020 236.

leaders; people have pending issues from previous consultations and they have not yet seen any visible outcomes of their input; there is a lack of independent voices, organisation and infrastructure; and where there is lack of common understanding between the technocrats and the people participating in the formulation of the development plan.

There is a perception that the input given during some of the consultative meetings where the citizenry is invited to make recommendations for national development is often disregarded and that sometimes those consulting come with predetermined development agendas and that what is said during the consultative meetings does not necessarily influence the development plans. This perception is especially brought about by the inadequate implementation of the plans, which discourages those who participated in the formulation of previous plans, giving them the impression that there was total disregard of their input.¹²⁶ Moreover, sometimes the scope for participation to influence national development policy especially poverty reduction is often limited because some key areas of national policy making cannot be negotiated.¹²⁷ Furthermore, usually the big development picture is completely drawn before voices are heard on the table and the participation of the citizenry may be of no consequence.¹²⁸ For example, in relation to the recent national development plans, the pillars for achieving national development were already decided before the consultative meetings and although they were discussed they could not really be changed dramatically. In 2015, during consultations on the National Action Plan on Human Rights which is linked to the National Development Plan, which I attended and facilitated, some participants expressed pessimism on whether their participation had any impact on the development plans which they were convinced were already preset and predetermined by either the World Bank and the development partners and that neither the government nor the citizenry had much control over the process.¹²⁹ Participants at that meeting thus demanded that they should be given feedback on the

¹²⁶ See NDP II 2015-2020 8-9.

¹²⁷ Also see D Brown 'Participation in poverty reduction strategies: democracy strengthened or democracy undermined' in S Hickey and G Mohan S Hickey and G Mohan (Eds.) *Participation from Tyranny to Transformation* (2004) 237.

¹²⁸ See generally A Wilkes and F Lefrançois 'Blinding with Science or Encouraging Debate? How World Bank Analysis determines PRSP Policies' (2002).

¹²⁹ See R Karugonjo-Segawa, C Mbazira, F Okumu & GMB Baitera 'Regional Workshops Report: Consultative meetings for the development of the Uganda National Action Plan on Human Rights' (2015).

final plan to check that their views had been incorporated and should be actively involved in monitoring its implementation.¹³⁰

Similarly, in the past it has been suggested that the Poverty Reduction Strategy Papers (PRSPs) despite the extensive participatory processes did not promote national ownership of programmes.¹³¹ This was because civil Society could not make much change to the programme design.¹³² The content of the PRSPs was pre-determined and there were no major adjustments as a result of the various 'participatory' processes. Since there was no significant impact from the extensive participation by civil society, this affected the PRSPs ownership at the national level.¹³³

The lack of opportunity to influence development policies by affected communities could in some instances be regarded as a violation of the right to participation in development. The Endorois case, earlier discussed in Chapter two, emphasised that consultations with the affected communities must be adequate and appropriate in order to facilitate the right to effective participation in development.¹³⁴ The African Commission on Human and People's Rights noted that community members, in that case, were only informed of the impending project as 'a fait accompli' without being given a platform to shape the policies or their role in the Game reserve.¹³⁵ This was held to be a violation of the right to participate in development.¹³⁶

4.2.10 Violations of human rights

Every member of society regardless of their socio-economic status or political opinion must be treated equally under the law. There must be equity, justice and equal opportunity for all and rights must be respected, promoted and protected. Violators of human rights must be brought to book and the judiciary and national human rights

¹³⁰ As above.

¹³¹ See generally F Stewart and M Wang 'Do PRSPs empower poor countries and disempower the World Bank, or is it the other way round?' (2003) 2 available at: https://www.qeh.ox.ac.uk/sites/www.odid.ox.ac.uk/files/www3_docs/qehwps108.pdf (accessed 8 August 2018).

¹³² As above.

¹³³ As above.

¹³⁴ *Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) Vs. Kenya*, Communication No. 276/03 (*Endorois Case*).

¹³⁵ *Endorois Case* above Para 281.

¹³⁶ *Endorois Case* above.

institutions must be impartial and speedily provide remedies for those whose rights have been violated. It is important that people live in a secure environment that is respectful to human rights and encourages participation. Citizens have to be motivated to participate in development.

Participation in development cannot be free, meaningful, active and empowering in an environment where there are widespread violations of human.¹³⁷ Violations of human rights have been rampant especially during the electoral process where opposition candidates have been denied their freedom of expression, association and assembly thereby denying citizens access to information on what the opposition candidates have to offer.¹³⁸ Indeed the elections were said to have fallen ‘short of international standards’ as they were marred by, among other things, allegations of disenfranchisement and voter intimidation, harassment of the opposition, closure of social media websites, and lack of transparency and independence in the Electoral Commission.¹³⁹

Common human rights violations according to various reports in the recent past include: unlawful killings, torture and ill-treatment, arbitrary detention, violations of the rights of detainees including including pre-trial detention; restrictions on freedoms of press, expression, assembly, association, and political participation; discrimination against marginalised groups, such as women, children, persons with disabilities, and the lesbian, gay, bisexual, transgender, and intersex (LGBTI) community.¹⁴⁰ Other human rights concerns include corruption, unequal application of the law, domestic violence, including sexual and gender based violence, trafficking in persons, and child labour. Moreover, the government is slow in investigating, prosecuting, or punishing perpetrators of human rights violations which encourages impunity.¹⁴¹ The human rights situation in general has been very fragile and characterized by: high levels of poverty; challenges in access to health services, water, shelter, education and other

¹³⁷ See SP Marks ‘The Politics of the Possible: The Way Ahead for the Right to Development’ (2011) 2.

¹³⁸ See: Amnesty International ‘We come in and disperse them’ (2015).

¹³⁹ See US State Department ‘Uganda 2016 Human Rights Report’ (2016) and US State Department ‘Uganda 2017 Human Rights Report’ (2017).

¹⁴⁰ As above.

¹⁴¹ As above.

social amenities.¹⁴² For the last ten years or so there are consistent violations of: the right to equality and non-discrimination; violations of the right to liberty; freedom from torture and ill treatment; freedom of assembly and association; freedom of the media and the right to privacy, among others.¹⁴³ Indeed, Uganda has been ranked, in terms of freedom status, as a country that is 'not free' by Freedom House.¹⁴⁴

Similar human rights concerns have also been raised by various treaty bodies in their most recent concluding observations on Uganda.¹⁴⁵ The treaty bodies have also highlighted various concerns regarding participation in decision-making. The CRPD Committee has expressed concern over adoption of policies without the involvement of persons with disabilities and civil society organisations.¹⁴⁶ The Committee also expressed concern about the provisions in the constitution and the electoral laws that deny persons with psychosocial disabilities and intellectual disabilities from standing for elections.¹⁴⁷ Moreover, the Committee noted the challenges of persons with disability to participate in the electoral process such as the inaccessibility of the voting environment; the absence of electoral materials in accessible formats; and the lack of secrecy for persons with disabilities.¹⁴⁸ The CESCR in its last concluding observations raised issues relating to the persistence of patriarchal attitudes which has prevented women from owning property which inevitably affects and prevents their effective political participation.¹⁴⁹ The CEDAW Committee urged Uganda to ensure women's full and equal participation in decision-making in all aspects of life including the

¹⁴² See UHRC *Annual Reports 2007-2017*; Human Rights Watch 'World Report 2016: Uganda, Events of 2015' (2016) and US State Department Reports (n 136 above).

¹⁴³ As above.

¹⁴⁴ See Freedom House 'Freedom in the World 2016: Anxious Dictators, Wavering Democracies: Global Freedom under Pressure' (2016) available at: www.freedomhouse.org (accessed 30 July 2018).

¹⁴⁵ See: Committee on the Rights of Persons with Disabilities 'Concluding observations on the initial report of Uganda' (2016) CRPD/C/UGA/CO/1; Committee on Economic, Social and Cultural Rights 'Concluding observations on the initial report of Uganda' (2015) E/C.12/UGA/CO/1; Committee on the Elimination of All forms of Discrimination Against Women 'Concluding observations of the Committee on the Elimination of Discrimination against Women' (2010) CEDAW/C/UGA/CO/7; Committee on the Rights of the Child 'Concluding observations of the Committee on the Rights of the Child' (2005) CRC/C/UGA/CO/2, among others.

¹⁴⁶ Committee on the Rights of Persons with Disabilities 'Concluding observations on the initial report of Uganda' (2016) CRPD/C/UGA/CO/1 Paras 6 & 7.

¹⁴⁷ Committee on the Rights of Persons with Disabilities (n 146 above) Para 56.

¹⁴⁸ As above.

¹⁴⁹ Committee on Economic, Social and Cultural Rights, Concluding observations on the initial report of Uganda, (2015) E/C.12/UGA/CO/1 Para 18.

adoption of temporary special measures.¹⁵⁰ The Committee also recommended the participation of rural women in the formulation of local development plans.¹⁵¹ The CRC has also recommended the participation of adolescents in formulating health policies and programmes.¹⁵²

The right to participate in development cannot be enjoyed where citizens are not free especially where the right to equality and non-discrimination, freedoms of peaceful assembly and association, opinion and expression and the rights to information and education are not respected and fulfilled. Moreover, the recent UPR reviews of Uganda's human rights record have also reflected concerns over: domestication and implementation of international human rights treaties and challenges in the justice, law and order sector. Recommendations were made to enhance: the independence of institutions; accountability; economic social and cultural rights, human rights education, rights of vulnerable groups, civil and political rights and implementation of the UPR recommendations.¹⁵³ Specifically in relation to the right to participate in development, Uganda was urged during the UPR to: pursue a participatory process in implementing the National Development Plan¹⁵⁴ and to take further steps to strengthen the participation of women and other vulnerable groups.¹⁵⁵

4.3 Concluding remarks

This chapter has highlighted the challenges faced by the citizenry in their participation in development. Specifically there are various barriers and obstacles including: the inadequacy of the law, weak implementation of the existing law due to inadequate resources, low capacity, corruption and political constraints.

¹⁵⁰ Committee on the Elimination of All forms of Discrimination Against Women, CEDAW/C/UGA/CO/7 Paras 29 and 30

¹⁵¹ Committee on the Elimination of All forms of Discrimination Against Women, CEDAW/C/UGA/CO/7 Paras 41 and 42.

¹⁵² Concluding observations of the Committee on the Rights of the Child: Uganda CRC/C/UGA/CO/2 Para 54.

¹⁵³ See Database of recommendations for Uganda, available at: <https://www.upr-info.org/database/> (accessed 18 July 2017).

¹⁵⁴ This recommendation was made by Algeria, <https://www.upr-info.org/database/> (accessed 18 July 2017).

¹⁵⁵ This recommendation was made by Azerbaijan, <https://www.upr-info.org/database/> (accessed on 18 July 2017).

In terms of inadequacy in the law, I discussed the challenge brought on by the fact that the right to participate in development is only particularly provided in the National Objectives and Directive Principles of State Policy. Although this barrier is not insurmountable as its simply a matter of interpretation in relation to the justiciability of National Objectives and Directive Principles of State Policy, the lack of clarity is a cause for concern as this leaves it at the mercy of the judiciary which if it is not as progressive as that of Ghana may not affirm the justiciability of the rights. Indeed this was already experienced in the case of *Centre for Human Rights, Health and Development and Others v Attorney General* as was discussed above. Moreover, the law as it stands is not clear in terms of criteria and parameters for participation.

I also point out the weak implementation of the law not only because of its lack of clarity but also inadequate resources available to implement it including human, technical, infrastructural and financial and the low capacity for implementation and the challenges of corruption and political constraints.

I also discuss other barriers and obstacles to participation in development including peoples' ignorance about rights and lack of awareness on the processes for national development planning; poverty; limited timelines; limited space for civil society participation; cultural and traditional values; lack of special measures to enhance the participation of vulnerable groups, the perception that there is disregard of input given and violations of human rights which hinder citizen participation in development planning in Uganda.

As discussed earlier, people are generally not aware of their rights especially their participatory rights in development planning. Moreover, they are also not aware of the processes of developing the national development plans as information on the themes for consultation and participation is often disclosed late or is inaccessible.

Participation in development in Uganda is also affected by the high levels of poverty in Uganda which increases peoples' vulnerability and exclusion in the process. The poor in Uganda are often left out of the formulation of development plans as they often do not attend or participate in the consultative meetings. Even where they are able to attend consultative meetings, they are not able to adequately express themselves in English which is the official language. The poor also face other barriers including

personal, financial, economic, social and cultural and the unequal power relations with other participants and the facilitators of the consultative meetings.

The public consultation processes are usually short and do not allow the citizenry much time to study and understand the drafts so that they can prepare to effectively participate. The limited time lines for consultations and formulation of development plans coupled with ignorance or limited awareness of the issues for discussion, and the lack of resources to mobilize the citizenry and to provide all the relevant materials and having documentation translated into local languages and in accessible formats, prevents the citizenry from enjoying their right to participate in development.

Traditional, religious and cultural attitudes affect the participation of various groups of vulnerable persons such as women, children, persons with disability and minorities because it is erroneously believed that they are not capable of taking decisions that affect their lives including development. As a result, the vulnerable groups suffer marginalisation, discrimination and exclusion despite the progressive laws protecting them creating an obstacle to their participation in development.

Participation is also hindered by: access to the planning processes by various vulnerable groups; resources to conduct the consultations with such groups including human, technical, financial and infrastructural resources including lack of accessible formats for persons with disability to enable them to participate effectively.

It is important to manage expectations, provide feedback and to implement the development plans. The perception that the input made by the people is disregarded because there is inadequate implementation of the plan creates a barrier for participation as it serves as a discouraging factor. This is compounded by the fact that there is often no feedback provided to the people consulted and information provided on how to challenge the decision-making processes of national development planning administratively.

People have to be motivated to participate in development. This can be done by ensuring equality and non-discrimination. As such, there must be equity, justice and equal opportunity for all and rights must be respected, promoted and protected. It is important that people live in a secure environment that is respectful to human rights and encourages participation. However, an environment where human rights violations are rampant and go unchecked without redress for victims is a barrier to

participation in development. Of major concern is that the ability of Ugandan CSOs to hold the government accountable is not guaranteed and the citizenry need to be empowered to organise better.

It is therefore important to overcome these barriers and obstacles so as to enhance people's participation in development especially for those who are vulnerable and poor. This will be the foundation for the discussion in the next chapter on the best practices to enhance effective participation in development.

Chapter Five

Best Practices for Effective Participation in Development

5.1 Introduction

The barriers and obstacles to participation in development planning in Uganda have been highlighted in the previous chapter as: inadequacy of the law, ignorance about rights and lack of awareness on the processes; poverty; limited timelines; limited space for civil society participation; negative cultural and traditional norms; lack of special measures to enhance the participation of vulnerable groups, disregard of input given and violations of human rights. This chapter particularly discusses various practices that enhance effective participation in development planning especially from Africa which could serve as an inspiration to Uganda.

5.2 Practices that enhance effective participation in development

According to Black's law dictionary a 'best practice' is defined simply as:

The way that shows results every time. It's the benchmark.¹

According to Merriam Webster's Dictionary a best practice is defined as a:

...procedure that has been shown by research and experience to produce optimal results and that is established or proposed as a standard suitable for widespread adoption.²

In the context of participation in development, this study defines best practices as approaches that have been used with results to enhance human rights and have emerged as standards suitable to promote effective participation or have the potential to do so.³

¹ Black's Law Dictionary, Online Version available at: <http://thelawdictionary.org/best-practice/> (accessed on 12 July 2018).

² Merriam Webster's Dictionary, Online Version available at: <https://www.merriam-webster.com/dictionary/best%20practice> (accessed 8 August 2018).

³ Adapted from the dictionary definitions.

Since participation in development is an evolving concept and right, there is not much documentation of the best practices to enhance it from a legal perspective.⁴ However, there are several practices which could enhance effective participation in development as they have worked in other instances. These include the following: having comprehensive legislation; independent judiciary; strong and independent institutions including national development planning authorities, national human rights institutions and civil society. Furthermore, other practices include implementing temporary special measures to enhance participation for vulnerable groups; encouraging independent media; conducting human rights education; use of international and regional mechanisms; and development compacts. I argue that each of the proposed practices is not sufficient on its own and can only work in an interdependent manner with the others. A combination of the majority if not all of these actions has a high chance of increasing participation in development. These are discussed in detail below.

5.2.1 Comprehensive legislation

Legislation is an important tool used by government for organising society and protecting its citizens. In general, legislation is crucial in determining the rights and responsibilities of individuals and authorities for whom it is made. Legislation regulates activities, authorises certain actions including the supply of resources such as funding and guides on the implementation of sanctions and may permit or deny certain activities.⁵ Although laws generally reflect the interests of those with greater bargaining power, law can be used as a powerful instrument in bringing about change including improving lives.⁶ For example, the lives of women have changed as a result of laws that promote gender equality. A study by the World Bank found that:

⁴ See UN OHCHR 'Factors that impede equal political participation and steps to overcome those challenges,' (2014) A/HRC/27/29 available at: <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G14/069/52/PDF/G1406952.pdf?OpenElement> (accessed 12 July 2018). Also see: UN OHCHR 'Draft guidelines for States on the effective implementation of the right to participate in public affairs' (2018) A/HRC/39/28 available at: https://www.ohchr.org/Documents/Issues/PublicAffairs/A_HRC_39_28.pdf accessed 12 July 2018 and UN OHCHR 'Thematic study by the Office of the United Nations High Commissioner for Human Rights on participation in political and public life by persons with disabilities' (2011) A/HRC/19/36.

⁵ Also see SP Marks 'Obligations to Implement the Right to Development: Philosophical, Political, and Legal Rationales' in BA Andreassen and SP Marks (Eds) *Development as a Human Right: Legal, Political and Economic Dimensions* (2010) 59.

⁶ World Bank 'World Development Report: Governance and the Law' (2017) 13.

...lower legal gender equality is associated with fewer girls attending secondary school relative to boys, fewer women working or running businesses, and a wider gender wage gap. Where laws do not provide protection from domestic violence, women are likely to have shorter life spans. But where governments support childcare, women are more likely to receive wages.⁷

In the context of participation in development planning, as is the case for all human rights, legislation is key. The importance of legislation in the enforcement of human rights has been emphasised in most international and regional human rights instruments and by the treaty bodies. States are obliged to ensure that they take legislative measures to promote and protect human rights.⁸ The CESCR has particularly stated in terms of the obligations to take steps in Article 2 (1) of the ICESCR that:

The Committee recognizes that in many instances legislation is highly desirable and, in some cases, may even be indispensable. For example, it may be difficult to combat discrimination effectively in the absence of a sound legislative foundation for the necessary measures.⁹

Similarly, the Human Rights Committee has stated that:

Article 2 of the Covenant requires States parties to adopt such legislative or other measures and provide such remedies as may be necessary to implement the Covenant.¹⁰

The importance of legislation has also been emphasised by other treaty bodies including the Committee on Elimination of Racial Discrimination,¹¹ CEDAW,¹² Committee against Torture¹³ and the CRC.¹⁴

⁷ World Bank 'Women Business and the Law: Getting Equal' (2016) 2.

⁸ See Articles: 2 (1) of the ICESCR; 2(2) of the ICCPR; 2 (c) and (d); 2 CEDAW; 4 of the UN CRC; 2 of the UN CAT; 84 of CMW; Article 4 (1) (a) and (b) CRPD; 1 of the ACHPR; 1 (1) ACRWC; and 2 of the Maputo Protocol; among others.

⁹ CESCR *General comment No. 3: The nature of States parties' obligations (Art. 2, Para.1, of the Covenant)* (1990) E/1991/23 Para 3.

¹⁰ CAT *'General comment No. 2: Reporting guidelines'* (2008) CAT/C/GC/2 Para 2 .

¹¹ CERD *General Recommendation 1 concerning States parties' obligations (art. 4 of the Convention)* (1972) A/87/18.

¹² Committee on the Elimination of All forms of Discrimination Against Women *General Recommendation No. 12: Violence against women* (1989).

¹³ Committee Against Torture *General Comment No. 2: Implementation of article 2 by States parties* (2008) CAT/C/GC/2 Para 2.

¹⁴ Committee on the Rights of the Child *General comment No. 5: General Measures of*

It is therefore crucial to have legislation that specifically protects the right to participate in development. Law used in combination with other strategies can foster commitment and work as a coordination tool to promote accountability and enable citizens participate more in the development of their country. Efficient legislation in this case would be that which can enable the participation in development by those who are usually underrepresented, excluded and discriminated against so as to comply with human rights-based approach to development and the right to equality and non-discrimination. It is thus important for such a law to be made in a participatory and transparent manner and to be applied in a consistent and fair manner as this enhances compliance.¹⁵ If people believe that the law-making process was exclusionary or only reflects the interests of certain groups they may not comply or will oppose it.¹⁶ Moreover, the rule of law is important, to ensure that the law is respected and observed.¹⁷ Obviously, it is not enough to just have the law. For legislation to be effective it has to be effectively enforced and implemented, otherwise its purpose is defeated.

Laws especially at the domestic or national level are important for the promotion and protection of human rights. Such laws lay a firm foundation even for human rights protection at the regional and international level. As has been pointed out by Heyns and Viljoen, if a state cannot respect human rights in its own courts it is likely that they would not respect the human rights judgments of a supranational court.¹⁸ The law as such is imperative to set norms and provide guidance for the process of development planning in particular the role and responsibilities of individuals and authorities. The legislation would thus provide guidance on the activities to be undertaken to fulfill participatory development requirements.

implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, Para. 6) (2003) CRC/GC/2003/5 Paras 1,9, 12, 18 and 20.

¹⁵ See World Bank 'World Development Report' (n 6 above) 13.

¹⁶ As above.

¹⁷ See S Macedo 'The Rule of Law, Justice and the Politics of Moderation,' in I Shapiro (Ed.) *The rule of law* (1994) 156.

¹⁸ C Heyns and F Viljoen 'The Regional Protection of Human Rights in Africa: An Overview and Evaluation' in PT Zeleza and PJ McConnaughay, *Human Rights, The Rule of Law and Development in Africa* (2004) 131.

Basing on international human rights standards and on experience from various countries, such law should be deeply entrenched in the constitutional and other statutory legal framework and should specifically enhance equality and non-discrimination and ensure inclusion of all people in the development process. It is important that key provisions are particularly set in the bill of rights rather than in the national objectives and guiding principles of state policy.

In particular such a law would provide for participation in development without discrimination and prescribe how the citizenry can participate in the various development projects. The law should specifically provide for access to information for the citizenry in relation to the various development plans and projects and specifically provide for how they will participate and where they fail to participate provide for a remedy including a review of the process. Such law should be effectively monitored and enforced. Enforcement is dependent on the quality of the legislation in terms of clarity, precision and being well known by those concerned in the development process. Furthermore, this would be enhanced by an independent and efficient judiciary as will be discussed further below. Moreover, enforcement would also require resources to be set aside for the processes relating to participation in development, especially for the provision of information and for practical remedies where the law is not complied with.

It is also trite that the political leadership of a country is committed to participatory development planning and can take the necessary measures to ensure that government officials and civil servants develop and implement plans and projects in a coordinated manner.¹⁹ As Marks has pointed out, politics is the basis of all law.²⁰ Thus, the national development planning of a country should be guided by the legal framework including the Constitution and its bill of rights, laws that promote and protect the right to equality and non-discrimination and access to information as well as human rights case law from courts of law and national human rights institutions to ensure participation in development. Moreover, consideration has to be made of the international and regional treaties that a country has ratified including commitments

¹⁹ See generally AA Gadir Ali 'Development Planning in Africa: Key Issues, Challenges and Prospects' (2011) 2011/ECA/COE/30/8 AU/CAMEF/EXP/8(VI).

²⁰ See Marks (n 5 above) 77.

made at world conferences and at the Human Rights Council relating to participation in development.

a) Constitutional provisions on the right to participate in development

A review of all the constitutions in the countries in Africa shows that the right to development including the right to participate in development is central. Not surprisingly, all the 55 African countries implicitly or explicitly recognize and provide for the right to development. The right to development, as mentioned earlier in Chapter two while discussing the UN Declaration on the Right to Development, has African roots.²¹ At least half of the African countries specifically and explicitly recognize participation in development as a right. Indeed, some of the countries that are heralded as beacons of success in development have good constitutional provisions enunciating the right to development and the right to participate in development. Examples are particularly given of Cape Verde, Ghana and Ethiopia to illustrate the diverse but effective provision for the right participate in development in some African countries.

The 1980 Constitution of Cape Verde, as amended, specifically provides for effective participation in the political, economic, social and cultural decisions and the free participation of the youth and all in development planning. The Cape Verde Constitution provides as follows:

Article 1(4):

The Republic of Cape Verde shall create the conditions indispensable to the elimination of all obstacles which may impede the full development of human beings and which limit the equality of citizens and their *effective participation* in the political, economic, social, and cultural organization of the State and Cape Verdian society.

Article 71 (2):

The family, society, and State shall promote the *free participation of young people* in political life, economic and social development, and the exercise of social, cultural, political, and economic rights.

²¹ Also see: OC Okafor 'A regional perspective: article 22 of the African Charter on Human and Peoples' Rights' in UN *Realizing the Right to Development: Implementing the Right to Development* (2013) 373-384.

Article 88 (2) (c):

The State shall guarantee conditions for the fulfillment of economic democracy, assuring:

Participation of different social and economic groups through their representatives and local bodies in the process of conception, approval, execution and evaluation of development plans.

Since its independence, Cape Verde has progressively and successfully built a democratic constitutional state that promotes the right to development and the participation of the people in development planning.²² The government of Cape Verde made it a priority to mobilize its population with broad public participation in major policy decisions and ensuring that they all share in the rewards of growth.²³ Cape Verde secured the participation of its people in development by ensuring that there are provisions in the Constitution, as cited above, which minimize exclusion and discrimination in development processes. Cape Verde in its Constitution specifically sets out to create conditions that eliminate all obstacles to effective participation and allows for participation of different social and economic groups in development planning. Cape Verde's constitutional provisions were clearly intentional and proactive in committing the state of Cape Verde to fostering a conducive environment for various groups of people to effectively participate in development. It is thus not surprising that Cape Verde is a success story in terms of development.

Similarly, Ghana also has good provisions to enhance participation in development.

Article 37 (2) (a) of the social objectives provides:

The State shall enact appropriate laws to assure-

- (a) the enjoyment of rights of effective participation in development processes including rights of people to form their own associations free from state interference and to use them to promote and protect their interests in relation to development processes, rights of access to agencies and officials of the State necessary in order to realize effective participation in development

²² See African Development Bank/African Development Fund *Cape Verde: A Success Story* (2012) 18.

²³ African Development Bank/African Development Fund (n 22 above) 30.

processes; freedom to form organizations to engage in self-help and income generating projects; and freedom to raise funds to support those activities.

- (b) the protection and promotion of all other basic human rights and freedoms, including the rights of the disabled, the aged, children and other vulnerable groups in development processes.

Ghana in the provisions cited above guarantees the right to effective participation in development. This right can be enjoyed in association with others and people are allowed to form associations that are independent of the state to enhance their participation including access to agencies and officials to participate in development processes. Furthermore, the associations or organisations can assist the people in income-generation and fundraising for their own personal development. The Ghanaian Constitution also highlights the fact that human rights of all including those who are most vulnerable such as the disabled, the aged and the children are respected during development processes. Notably, the provisions are in the national objectives and Parliament has a specific role of passing the appropriate legislation. However, as was decided and confirmed by the Ghanaian Supreme Court the national objectives and directive principles of state policy in the Constitution are justiciable.²⁴ Ghana is also regarded as a development success story and these provisions are definitely helpful as they provide guidance and inspiration to national development planning.

The Ethiopian Constitution also affirms the right to development and specifically provides that:

1. The Peoples of Ethiopia as a whole, and each Nation, Nationality and People in Ethiopia in particular have the right to improved living standards and to sustainable development.
2. Nationals have the right to participate in national development and, in particular, to be consulted with respect to policies and projects affecting their community.
3. All international agreements and relations concluded, established or conducted by the State shall protect and ensure Ethiopia's right to sustainable development.

²⁴ See *New Patriotic Party v Attorney-General* (1993-94) 2 Ghana Law Reports 35 and *Ghana Lotto Operators Association (and 6 others) v National Lottery Authority* [2009] 3 LRC 235.

4. The basic aim of development activities shall be to enhance the capacity of citizens for development and to meet their basic needs.²⁵

The Ethiopian Constitution further provides:

Government shall at all times promote the participation of the People in the formulation of national development policies and programmes; it shall also have the duty to support the initiatives of the People in their development endeavours.²⁶

Government shall ensure the participation of women in equality with men in all economic and social development endeavours.²⁷

The Ethiopian Constitution clearly affirms the people's right to development and the right to participate in national development including the right to be consulted on policies that affect them. Moreover, the Constitution also recognises that development activities should be aimed at enhancing the capacity of citizens to meet their basic needs. The human rights-based approach is explicit in the Ethiopian Constitution.

Constitutional provisions that effectively protect the right to participate in development as has been highlighted above are useful and lay a good foundation for its protection. Uganda can pick up lessons from other countries that specifically provide for the right in the main texts of their constitutions. Nevertheless, constitutional provisions alone are not enough to protect rights and it may be necessary to have subsidiary legislation.

b) Comprehensive legislation on public participation

Apart from the Constitution, it may be necessary to have other legislation promoting the right to participate in development. Below I highlight the example of Kenya which has some of the most progressive legislation on public participation in Africa. In the past, Uganda was lauded for having gone the furthest in East Africa in terms of enhancing citizen participation through constitutional commitments, among other things, to enhance citizen participation in development.²⁸ However, Kenya now has

²⁵ Article 43 of the 1995 Constitution of the Federal Democratic Republic of Ethiopia.

²⁶ Article 89 (6).

²⁷ Article 89 (7).

²⁸ See J Gaventa 'Legal and Policy Frameworks for Citizen Participation in Local Governance in East Africa: a regional report' (2002) 32.

the most progressive Constitution with the potential to enhance participation in development in East Africa surpassing Uganda.

Under the new Kenyan Constitution, the national values and principles of governance include the participation of the people.²⁹ The State is required to encourage public participation in the management, protection and conservation of the environment.³⁰ Parliament is also required to facilitate public participation and involvement in the legislative and other business of Parliament and its committees.³¹ The Constitution points out that the objects of the devolution of government are to give powers of self-governance to the people and also enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them³² which would also include development. The Constitution also provides for legislation to provide for the governance and management of urban areas and cities which shall, in particular provide for participation by residents in the governance of urban areas and cities.³³ Country assemblies are required to facilitate public participation and involvement in the legislative and other business of the assembly and its committees.³⁴ Furthermore, public participation is one of the key principles that should guide all aspects of public finance.³⁵ County governments are responsible for, among other things, ensuring coordination and capacity for effective participation of communities and locations in governance at the local level.³⁶ The principles of participation are also embedded in Kenya's County Governments Act,³⁷ the Public Finance Management Act,³⁸ the Transition to Devolved Government Act,³⁹ and the Urban Areas and Cities Act.⁴⁰ The Kenyan national development plan also emphasises citizen participation including the participation of vulnerable groups such as the youth, women and other disadvantaged groups and public participation in governance.⁴¹

²⁹ Article 10 (2) (a) of the 2010 Constitution of the Republic of Kenya.

³⁰ Article 69 (1) (d) of the 2010 Constitution of the Republic of Kenya.

³¹ Article 118 (1) (b) of the 2010 Constitution of the Republic of Kenya.

³² Article 174 (c) of the 2010 Constitution of the Republic of Kenya.

³³ Article 184 (1) (c) of the 2010 Constitution of the Republic of Kenya.

³⁴ Article 196 (1) (b) of the 2010 Constitution of the Republic of Kenya.

³⁵ Article 201 (a) of the 2010 Constitution of the Republic of Kenya.

³⁶ See Fourth Schedule, Part 2, Clause 14 of the 2010 Constitution of the Republic of Kenya.

³⁷ Sections 3, 6, 30, 47, 57, 58, 59, 89, 91, 92, 94, 95, 99, 100, 101, 102, 105 and 115 (2).

³⁸ Sections 10, 48, 117, 123 (3), 125, 128, 131, 137, 139, 166 (4c), 175 and 207.

³⁹ Section 14.

⁴⁰ Section 3, 21, 22, 48, and Second Schedule Clauses 1 and 2).

⁴¹ See Kenya Vision 2030 available at: <http://www.vision2030.go.ke> (accessed 30 December 2017).

Kenya is now considering legislation, the Public Participation Act 2018, for the purpose of enhancing and facilitating public participation. The Act, which is likely to have an impact on participation in development, aims at promoting: democracy; transparency and accountability in decision making; public awareness of governance processes; community ownership; and generally, public participation and collaboration in governance.⁴² The Act directly provides for the right to be consulted and involved in the decision-making process for the public, communities and organisations affected by a decision, which also includes development plans and policies.⁴³ The Act also provides for equitable access to information; consideration of public views in decision making; and appropriate feedback mechanisms which are crucial for an effective participatory process.⁴⁴ Various government authorities such as the parliament, executive and judiciary are all required to formulate their own guidelines for public participation based on a schedule in the Act.⁴⁵ Moreover, the government institutions are required to make annual reports highlighting: the activities and outcomes of public participation; complaints against the public participation process; the measures taken to redress the complaints and time it took to resolve each complaint.⁴⁶ Furthermore, the government institutions are required to make their annual reports available to the public.⁴⁷

The general guidelines for participation provided in the schedule of the Act provide for: opportunities for public consultation;⁴⁸ public awareness;⁴⁹ factors to be considered before engaging in a public consultation;⁵⁰ notice of the public participation;⁵¹ accessibility to the public participation processes;⁵² public participation programme;⁵³ e-platform;⁵⁴ reasonable timeframes for participation;⁵⁵ provision of consultation

⁴² Section 3 of the Public Participation Act 2018.
⁴³ Section 4 (a) of the Public Participation Act, 2018.
⁴⁴ Section 4 (c), (d) and (e) of the Public Participation Act, 2018.
⁴⁵ Section 5 & 6 of the Public Participation Act, 2018.
⁴⁶ Section 8 of the Public Participation Act, 2018.
⁴⁷ Section 8 (5) of the Public Participation Act, 2018.
⁴⁸ Guideline 1.
⁴⁹ Guideline 2.
⁵⁰ Guideline 3.
⁵¹ Guideline 4.
⁵² Guideline 5.
⁵³ Guideline 6.
⁵⁴ Guideline 7.
⁵⁵ Guideline 8.

documents;⁵⁶ access to information needed for participation;⁵⁷ analysis of input made from the public;⁵⁸ communication of the final decision taken;⁵⁹ ensuring credibility and integrity of the process⁶⁰ and the general conduct in public participation processes.⁶¹

The Kenyan legislation lays a good foundation to enhance public participation in the conduct of public affairs, including participation in matters relating to national development. The Act provides factors that are relevant to public participation including: the urgency of the matter and level of public participation required; the number and circumstances of those who are interested and affected by the issues for consideration; and their ability to access the necessary information and the venue.⁶² This means that the legislation considers the kind of participation whether direct or representative and ensures that the public institutions adequately prepare and not only provide a conducive environment for participation but also facilitate a meaningful participatory process by providing the information people need to make contributions.

Uganda can pick up lessons from the Kenyan legislation to enhance public participation. However, the constitution and subsidiary legislation has to be complemented by an independent and efficient judiciary, strong national institutions and an informed and empowered citizenry in an environment that is conducive to the rule of law to be able to fulfil the right to participation in development.

5.2.2 Independent judiciary

An independent judiciary is important for the protection of human rights including the right to participate in development. States are required to guarantee the independence of the judiciary in the Constitution or other laws.⁶³ All governmental and other institutions are required to observe and respect the independence of the judiciary.⁶⁴

⁵⁶ Guideline 9.

⁵⁷ Guideline 10.

⁵⁸ Guideline 11.

⁵⁹ Guideline 12.

⁶⁰ Guideline 13.

⁶¹ Guideline 14.

⁶² Guideline 3.

⁶³ See Principle 1 of the Basic Principles on the Independence of the Judiciary, adopted by the Seventh UN Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

⁶⁴ As above.

The judiciary is required to decide matters impartially in accordance with the law without any restriction and unlawful interference.⁶⁵ The judiciary is also required to conduct the proceedings fairly and ensure that the rights of parties are respected.⁶⁶ The State is also required to provide adequate resources to enable the judiciary to perform its functions.⁶⁷

Access to justice and an efficient judiciary is important for development. In the context of enhancing the right to participate in development, the judiciary is crucial in interpreting the law, particularly to determine the scope of the right, what the right entails and its limitations, determine when it is actually violated and provide remedies or redress when the right is violated. The judiciary is an important institution in the enforcement of legislation. Although, courts in general have not yet extensively discussed specific issues relating to the right to participation in development they have discussed issues that are pertinent relating to public participation which is also applicable to participation in development. Below I highlight examples of South Africa and Kenya whose courts have considered issues of public participation.

a) South Africa

Participatory development can be traced in the founding values of the South African Constitution.⁶⁸ The South African Constitution was framed with the aim of transformation from an apartheid era to an inclusive and participatory democratic society based on social justice.⁶⁹ As such, public participation is provided for in the Constitution in various aspects including: allowing the National Assembly, National Council and provinces to receive petitions, representations or submissions from any interested persons or institutions;⁷⁰ and public access to and involvement in National

⁶⁵ See Principles 2 and 4 of the Basic Principles on the Independence of the Judiciary above.

⁶⁶ See Principle 6 of the Basic Principles on the Independence of the Judiciary above.

⁶⁷ See Principle 7 of the Basic Principles on the Independence of the Judiciary above.

⁶⁸ Section 1 of the 1996 Constitution of the Republic of South Africa.

⁶⁹ K Klare 'Legal culture and transformative constitutionalism' (1998) 14 *South African Journal on Human Rights* 153; M Pieterse 'What do we mean when we talk about transformative constitutionalism' (2005) 20 *South African Public Law* 156 16 cited in ON Fuo, 'Public participation in decentralised governments in Africa: Making ambitious constitutional guarantees more responsive' (2015) 15 *African Human Rights Law Journal* 170 available at: <http://dx.doi.org/10.17159/1996-2096/2015/v15n1a8> (accessed 29 December 2017).

⁷⁰ Sections 56, 69, 70, 115, 116 and 118 of the 1996 Constitution of the Republic of South Africa.

Assembly including by the media.⁷¹ Public participation is also emphasised at the local government level as the Constitution provides that municipalities must provide democratic and accountable government to local communities and encourage community participation in local government matters.⁷² The Municipal Council is required to conduct its business in an open manner and may only close its sittings or those of its committees when it is reasonable to do so having regard to the nature of business being conducted.⁷³ There are laws such as the Systems Act which provide for the participation of citizens in the preparation, implementation and review of integrated development plans.⁷⁴ Municipalities are required to build the capacity of communities to participate in local governance processes including people who cannot read or write, people with disabilities, women and other disadvantaged persons.⁷⁵ The National Development Plan of South Africa aims to: eliminate poverty and reduce inequality by 2030 by drawing on the energies of its people, growing an inclusive economy, building capabilities, enhancing the capacity of the state, and promoting leadership and partnerships throughout society.⁷⁶ The plan recognises the importance of participation including citizen participation, community participation and the role of CSOs in development planning.⁷⁷

Public participation in legislation has been a subject for litigation by the South African courts in several cases. The courts have clearly shown that decisions can be overturned or set aside where public participation is inadequate. This has been particularly the case for laws where the National Assembly or the National Council of Provinces in South Africa does not fulfil its obligation to ensure adequate public involvement in the legislative processes. A law will be set aside if the lawmaker (National Assembly or the National Council of Provinces) does not effectively facilitate public participation in the formulation of the law. This has been emphasised in several cases such as *Doctors for Life International v Speaker of the National Assembly and*

⁷¹ Section 59 of the 1996 Constitution of the Republic of South Africa.

⁷² See Sections 152(1)(a) and (e) and 195(e) of the Constitution

⁷³ See Section 160 (7) of the Constitution.

⁷⁴ See Chapter Four of the Systems Act.

⁷⁵ See Sections 16 and 17 of the Systems Act.

⁷⁶ National Planning Commission of South Africa *Our future make it work: National Development Plan 2030*.

⁷⁷ As above.

*Others*⁷⁸ and more recently in the case of *Land Access Movement of South Africa v Chairperson of the National Council of Provinces*.⁷⁹

Doctors for Life clearly highlighted the importance of public participation as a central part of the legislative process and that failure to involve the public can render such legislation as unlawful. Doctors for Life (DLC) argued that Parliament did not perform their constitutional duty to facilitate public participation on four bills on health matters which included: the Sterilisation Amendment Bill; the Traditional Health Practitioners Bill; the Choice on Termination of Pregnancy Amendment Bill; and the Dental Technicians Amendment Bill. All these bills have an impact on human development and human rights especially the right to health. The respondents denied and disputed the assertion by DLC that they had failed to facilitate public involvement in the legislative process. They argued that the obligation to facilitate public involvement did not go beyond ensuring that the public is given an opportunity to make submissions, oral or written, during the process of making laws which they had done.

The Court dismissed the challenge of the Sterilisation Amendment Act because it had not yet been passed, it was a bill at the time of hearing. However, in relation to facilitating public involvement especially with the other Acts: the Traditional Health Practitioners Act and the Choice on Termination of Pregnancy Act it was held that the failure to hold public hearings was unreasonable. The Court found that the nature of these bills required public hearings and that the public had shown interest in the two bills which was demonstrated by the numerous requests for public hearings. Furthermore, that although the National Council of Provinces had decided to hold public hearings in the provinces and informed interested groups of the same, the majority of the provinces did not do so because there was not enough time. The Court found that the failure to hold public hearings on the two bills was unreasonable and did not comply with Section 72 (1) of the Constitution and as such they were declared invalid. With regard to the Dental Technicians Amendment Act, the Court held that when the Bill was publicised for public comment, there was not much public interest

⁷⁸ *Doctors for Life International v Speaker of the National Assembly and Others* (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC) (17 August 2006).

⁷⁹ *Land Access Movement of South Africa and Others v Chairperson of the National Council of Provinces and Others* (CCT40/15) [2016] ZACC 22; 2016 (5) SA 635 (CC); 2016 (10) BCLR 1277 (CC) (28 July 2016).

shown in it. Considering the fact that there was not much interest and given the nature of the bill, the Court found that the National Council of Provinces did not act unreasonably when they did not invite the public to make presentations or hold public hearings. As such the Court decided that the National Council of Provinces did not fail in its duty to facilitate public involvement in relation to the Dental Technicians Amendment Act and the challenge against it was accordingly dismissed.

Thus, participation is not only rooted in the Constitution and other legislation in South Africa but is also enforced in courts of law. Since the case of *Doctors for Life*, similar decisions have been taken in other cases including *Land Access Movement of South Africa v Chairperson of the National Council of Provinces*, among others.⁸⁰ In this case, Parliament had passed a law amending the restitution of land right claims to open up further claims made after 31 December 1998. However, the Amendment Act was passed hurriedly. The Court held that the Constitution requires that the public be given a meaningful opportunity to participate in the legislative process. The standard in such cases is that of reasonableness and the peculiar circumstances and facts of the case including time constraints and potential expense. The amendment was not urgent however a very limited time was used for public participation moreover, proper notice was not given to the public of their right to participate. The Court ruled that interested parties were entitled to a reasonable opportunity to participate in a manner that enables them to influence legislative decisions. Moreover, the Court pointed out that public participation was also not only about being given the opportunity to make inputs but also that the views shared should be taken into consideration in decision making. The Court held that this failure was unreasonable, and the public participation process was held to be constitutionally invalid and the Constitutional Court declared the Restitution of Land Rights Amendment Act 2014 invalid.

b) Kenya

The courts in Kenya have also developed fairly progressive jurisprudence on public participation. Notably, the courts have heavily relied on the South African Court's

⁸⁰ See *Merafong Demarcation Forum & Others v President of the Republic of South Africa & Others* (CCT 41/07) [2008] ZACC 10; 2008 (5) SA 171 (CC); 2008 (10) BCLR 968 (CC) (13 June 2008).

interpretation of public participation particularly the case of *Doctors for Life*.⁸¹ The courts emphasise that public participation is central to Kenya's governance and the conduct of public affairs. The case of *Kenya Small Scale Farmers Forum & 6 Others vs Republic of Kenya & 2 Others*⁸² discussed the State's obligation in facilitating public involvement in public governance, formulation of public policy, legislative processes and in the formulation and conclusion of international agreements and treaties. The facts of that case were that discussions on the Economic Partnership Agreement (EPA) and the *Cotonou Partnership Agreement (CPA)* were at advanced stages but the public had just been involved once in five years of the discussions. Most of the five years, however, were under the old constitutional dispensation that did not have explicit provisions requiring public participation. The Court found that the fact that the State did not directly involve the Petitioners cannot be said to invalidate the whole process, which was in its final stages. The court also found that the State could not be held in breach of provisions which were not in existence at the infant stages of the negotiations. Nevertheless, the Court ruled that this did not exonerate the State of its duty under the new Constitution as the EPA negotiations were still ongoing. The court allowed the government to continue with the discussions but also urged it to allow the petitioners 'to have full access to the information relating to the negotiations so as to make appropriate contributions if they so wished in fulfilment of the Cotonou Protocol.'

In the case of *Robert N. Gakuru & Others v Governor Kiambu County & 3 others*⁸³ the petitioner argued that Kiambu County Assembly did not conduct sufficient public consultation in the enactment of the finance bill. The county had called a few business people to Windsor Hotel, a high-end golf hotel and country club, to discuss the draft finance bill and also had placed an advert in the newspaper inviting public views. The petitioner argued that the information was not well communicated to the members of the public and that their views were not incorporated in the final draft. Odunga J who decided the matter stated:

⁸¹ See *Robert N. Gakuru & Others v Governor Kiambu County & 3 others* [2014] eKLR and *Kenya Small Scale Farmers Forum & 6 Others vs Republic Of Kenya & 2 Others* [2013] eKLR Para 57, among others.

⁸² *Kenya Small Scale Farmers Forum & 6 Others vs Republic Of Kenya & 2 Others* [2013] eKLR.

⁸³ *Robert N. Gakuru & Others v Governor Kiambu County & 3 others* [2014] eKLR.

In my view to huddle a few people in a 5-star hotel on one day cannot by any stretch of imagination be termed as public participation for the purposes of meeting constitutional and legislative threshold. Whereas the magnitude of the publicity required may depend from one action to another a one-day newspaper advertisement in a country such as ours where a majority of the populace survive on less than a dollar per day and to whom newspapers are a luxury leave alone the level of illiteracy in some parts of this country may not suffice for the purposes of seeking public views and public participation.

The Court thus found that there was no public participation as contemplated under the Constitution and the *County Government Act, 2012*. The Court declared the *Kiambu Finance Act, 2013* unconstitutional and thus null and void.

The South African and Kenyan courts have emphasised the importance of public participation but have left that discretion to the legislature to determine how the citizens can participate.⁸⁴ Both the Kenyan and South African courts have not clarified on direct public participation and participation through elected representatives and whether these complements or replace each other. Moreover, the quantitative and qualitative considerations for participation and the application of the reasonable test have not yet been clearly established by both courts. Clearly the law on public participation is evolving and taking shape and the courts have not yet drawn a complete picture. The extent to which these cases increase opportunities for citizens to participate in legislation cannot be measured. However, the courts have affirmed the right to participate in decision making by the citizenry and this is important and can be used by civil society and other actors in advocacy to promote public participation even in development.

Lessons can be learned from the judiciaries of South Africa and Kenya by Uganda in terms of promoting the right to participate in development. The effective role of the judiciary in the promotion of the right to participate in development is dependent on the prevailing circumstances in the country in terms of their independence, political environment and availability of resources. As was said of the other institutions, the

⁸⁴ See Section 5.2.2 above.

judiciary is just one of the many mechanisms available for promoting and protecting the right to participate in development which cannot work in isolation.

5.2.3 Independent National Development Planning Authorities

The term ‘National Development Planning Authorities’ refers to those institutions which have the mandate to prepare development plans for the country. They are often referred to as: authorities or commissions or are departments or units in the Ministries responsible for development planning. The history of national development planning authorities has been described as long and mixed.⁸⁵ National economic and development planning in 1960s and 1970s tended more towards central planning bodies in Africa.⁸⁶ In such systems, planning was a stand-alone process, parallel to budgeting and administration which obviously led to disappointments and failures.⁸⁷ This has changed over the years and countries now have diverse institutional arrangements both in terms of where the authorities or Commissions are located and the extent to which they are integrated into the overall government structure.⁸⁸ As Watkins has rightly pointed out: ‘there is no one-size-fits-all type of planning authority or commission.’⁸⁹

These authorities play an important role in promoting and protecting the rights of citizens to participate in development planning. In general, they often play the following role:

- a) building national capacity for development planning and increasing public understanding and participation in development;
- b) identification of national development priorities to ensure sustainable, equitable and inclusive development; and

⁸⁵ See J Watkins/World Bank Brief ‘National Planning Commission Arrangements’ (2009) available at <https://openknowledge.worldbank.org/handle/10986/10559> (accessed 30 December 2017). Also see AA Gadir Ali ‘Development Planning in Africa: Key Issues, Challenges and prospects’ Background paper presented at the Meeting of the Committee of Experts of the 4th Joint Annual Meetings of the AU Conference of Ministers of Economy and Finance and ECA Conference of African Ministers of Finance, Planning and Economic Development, E/ECA/COE/30/8, AU/CAMEF/EXP/8(VI).

⁸⁶ As above.

⁸⁷ Watkins (n 85 above).

⁸⁸ As above.

⁸⁹ As above.

- c) production of comprehensive and integrated development plans in an inclusive and participatory manner; among other things.⁹⁰

It is important for the planning authority to be established by law and be able to operate independently without illegitimate political interference, which is common in Africa where most democracies are fledgling. It is vital for the authority to have a clear mandate under the law that stipulates its role in the development process, in particular coordinating a national development process that is inclusive, transparent, participatory and non-discriminatory.⁹¹ Moreover, it is also necessary for the law to provide for funding of the authority and an appointment process of the members with reasonable criteria including integrity, professionalism with members having the requisite skills and experience and providing for their security of tenure.

Such authorities in the context of enhancing participation in development should facilitate and build capacity of the ministries, departments and agencies of government and the citizenry to plan for national development rather than be mechanisms for top-down control or central planning.⁹² It is important for them to empower the line ministries to plan, budget and implement according to the budget and guide them on national development priorities in line with their mandates. The authorities need to be well connected to the Executive i.e. President and Cabinet and all the line Ministries including the Ministry of Finance/Treasury.⁹³ In learning from the past, such authorities should not create standalone parallel planning systems that are not integrated with national policy development, management or budget processes.⁹⁴

National development authorities have the potential and have played an important role in the promotion of the right to participate in development by empowering the citizenry and the ministries, departments and agencies of governments by guiding and advising on national development priorities and formulating of national development plans in

⁹⁰ List developed from the mandates of various national development planning authorities especially from Africa including Uganda (Article 125 of the Constitution and Section 7 NPA Act 2002), South Africa (Section 18 of the Draft Integrated Planning Framework Bill, 2018), Namibia (Article 129 of the Constitution and Section 4 of the National Planning Commission Act 2013) and Nigeria (Section 2 of the National Planning Act (1993)), among others.

⁹¹ See SDG 16.

⁹² Watkins (n 85 above).

⁹³ As above.

⁹⁴ As above.

an inclusive, transparent, participatory and non-discriminatory manner. Nevertheless, they are only one of the numerous institutional mechanisms that enhance participatory development planning. Their effectiveness is dependent on their capacities both technical and resources, the political environment in which they operate and their connectivity with government and ability to coordinate and develop integrated plans.

Some national development planning authorities have been at the centre of the success stories of African countries that have grown from low income countries to middle income countries applying participatory development principles. Examples of such authorities include: the Botswana Ministry of Finance and Development Planning; the Cape Verde Ministry of Finance and Planning and the Ghana National Development Planning Commission from which Uganda can pick lessons from.

Botswana has one of the most successful economies in Africa. The economy was boosted by the country's diamonds. However, unlike many countries that are endowed with resources in Africa, where those resources have not resulted into growth and development but led to conflict and bad governance, Botswana has thrived against all odds. Botswana's legal framework for participation and particularly in development is not as progressive as that of South Africa, Kenya or even Uganda. The Constitution of Botswana provides for separation of powers and guarantees citizens a range of human rights including various rights such as life, personal liberty, protection from slavery and forced labour, protection from inhuman treatment, right to property, right to privacy, protection of the law, freedom of conscience, freedom of expression, freedom of assembly and association, freedom of movement, equality and non-discrimination, among others.⁹⁵ However, there is no specific guarantee of public access to information and participation of civil society and other external stakeholders in the development process. Nevertheless, the practice seems conducive for the public to access information and for civil society to participate in the development process. The National Policy for NGOs underscores the need to establish a conducive environment to allow NGOs and the government equal participation in development.⁹⁶

⁹⁵ See Chapter 2 of the 1966 Constitution of Botswana, as amended.

⁹⁶ Ministry of Labour and Home Affairs *National Policy for Non-Governmental Organisations*, (2001) 7- 8.

NGOs are named as vital in promoting peoples' participation.⁹⁷ Participation is specifically regarded as the 'norm or the policy and not an option or a privilege for a few people.'⁹⁸ This is also reflected in the previous National Development Plan which aims at inclusive participation for the prosperity of all.⁹⁹ The current plan which runs from April 2017 to March 2023 particularly aims at: 'Inclusive Growth for the Realisation of Sustainable Employment Creation and Poverty Eradication.'¹⁰⁰

The Tswana culture is largely described as participatory and democratic by nature and the *Kgotla* is still used as a forum for consultation and decision making on various issues, including development.¹⁰¹ The *Kgotla* is an institution that dates way back in the history of the Tswana which provides a forum where matters concerning the community and the nation are discussed at the village level.¹⁰² It is officially recognised and decisions that are taken are respected by members of the community.¹⁰³ The *Kgotla* is used to solicit views from the community, for information dissemination and policy debates.¹⁰⁴ The practice is widespread all over the country including the urban areas.¹⁰⁵ Even Members of Parliament and Councillors use those meetings regularly for dissemination and solicitation of ideas and proposals.¹⁰⁶ However, the depth, breadth and quality of participation at these meetings is a subject of debate.¹⁰⁷ It has been observed that the process is discriminatory especially against women,¹⁰⁸ excludes minorities such as San and that discussions are usually dominated by the elite.¹⁰⁹ Furthermore, the meetings are poorly attended, due to 'consultation fatigue' as there are too many meetings held due to poor coordination among the various

⁹⁷ As above.

⁹⁸ As above.

⁹⁹ Botswana's Vision 2016.

¹⁰⁰ Botswana's 11th National Development Plan 2017-2023.

¹⁰¹ See D Curtis 'Responsibility and its Avoidance: Essays in Public Management and Governance' (2017) 155-156.

¹⁰² See generally JR Denbow and PC Thebe *Culture and Customs of Botswana, Culture and Customs of Africa* (2006) 22.

¹⁰³ As above.

¹⁰⁴ See RH Kempe and G Somolekae 'Public Administration and Policy in Botswana' (1998) 62.

¹⁰⁵ See KA Afzal and M Considine 'Democratic Accountability and International Human Development: Regimes, Institutions and Resources' (2015) 149-166.

¹⁰⁶ As above.

¹⁰⁷ See RH Kempe and G Somolekae (n 104 above) 89. Also see C Molebatsi 'Participatory development planning in Botswana: Exploring the utilisation of spaces for participation' (2013) Vol.62 *Town and Regional Planning Journal (Special Issues)* 9-14.

¹⁰⁸ See N Awortwi and H Musahara *Implementation of the Millennium Development Goals: Progress and Challenges in some African Countries* (2015) 150.

¹⁰⁹ Molebatsi (n 107 above)12.

government departments to hold joint meetings.¹¹⁰ Moreover, as is the case in Uganda, there have been concerns that there are no effective mechanisms for follow up¹¹¹ and that there is no guarantee that the views expressed at these meetings are adopted into policy documents.¹¹² Despite these challenges, Botswana is considered a success in terms of economic growth and political stability which is conducive for participation.¹¹³ Notwithstanding the good practices, the absence of a comprehensive legal framework creates uncertainty for participatory development and human rights in general in the future.¹¹⁴

Botswana was able to succeed mainly because of its good governance; institutions, including the Ministry of Finance and Development Planning; and good policies.¹¹⁵ Although Botswana's legal framework is nothing to write home about, its strong institutions have enabled it to formulate and implement successful national development plans which have led to an improvement in the lives of the people in terms of access to basic social services. There are obvious concerns over the inadequate legislation, because there are no guarantees for the future. Nevertheless, the good governance and strong institutions are commended and should provide a good example for Uganda.

Cape Verde is another development success story that Uganda and other countries in Africa can learn from. The important lessons from Cape Verde's experience relate to not only having good policy but also strong institutions for development planning and good governance.¹¹⁶ Cape Verde generally has well-functioning institutions, including the Ministry of Finance and Planning which is responsible for the formulation of development plans, and exercises good governance, including transparency, inclusiveness, participation, equitable sharing of the rewards of growth of the economy

¹¹⁰ As above.

¹¹¹ As above.

¹¹² As above.

¹¹³ Generally, see: M Lewin 'Botswana's Success: Good Governance, Good Policies, and Good Luck' in Chuhan-Pole, P and Agwafo, M (Editors)/World Bank *Yes Africa Can: Success Stories from a dynamic continent* (2011) 81.

¹¹⁴ A Cook and J Sarkin 'Is Botswana the Miracle of Africa? Democracy, the Rule of Law, and Human Rights Versus Economic Development' (2010) Vol.19 *Transnational Law & Contemporary Problems* 481-485 and K Alexander and G Kaboyakgosi (Eds.) *A fine Balance: Assessing the Quality of Governance in Botswana* (2012) 98.

¹¹⁵ See (Lewin n 113) above 82-85.

¹¹⁶ African Development Bank/African Development Fund (n 22 above) 41.

and delivering results to the people to sustain their confidence and support for new initiatives.¹¹⁷ The lesson learned from Cape Verde is that it is not enough just to have policy, as Uganda does: but also good governance and strong institutions are crucial.

Ghana has also been hailed as a development success story. Ghana has made major democratic and economic developments in the last twenty years. Ghana is ranked among the top African democratic countries especially in terms of rule of law, independent judiciary and the enjoyment of rights and freedoms including freedom of speech, press and media.¹¹⁸ In terms of economic development, Ghana has grown due to its oil revenues to a lower middle-income status from a low-income status according to World Bank country classifications.¹¹⁹ Ghana particularly stands out for its development progress because of establishing appropriate institutions, governance and good economic policies.¹²⁰ The Ghana National Development Planning Commission, which is the institution charged by the 1992 Constitution of the Republic of Ghana to coordinate the preparation, implementation, monitoring and evaluation of national development plans has been central to this success.¹²¹ It is not an easy task to coordinate the formulation and implementation of national development plans as there are various actors and a host of challenges. However, the Ghanaian National Development Planning Commission has performed its tasks and formulated development plans which have had positive outcomes leading the country to grow to a middle-income economy which should be emulated by other African countries including Uganda.

5.2.4 Independent National Human Rights Institutions

National human rights institutions (NHRIs) can be defined as “permanent and independent bodies, which governments have established for the specific purpose of promoting and protecting human rights.”¹²² NHRIs are funded by the State and are a

¹¹⁷ African Development Bank/African Development Fund (n 22 above)11 and 55.

¹¹⁸ See In on Africa ‘Africa Country Benchmark Report’ (2016) 38 and 39.

¹¹⁹ World Bank *Ghana* available at <https://data.worldbank.org/country/ghana?view=chart> (accessed 12 July 2018).

¹²⁰ See W Naudé ‘Development Progress in sub-Saharan Africa: Lessons from Botswana, Ghana, Mauritius and South Africa’ (2010) 6.

¹²¹ Arts. 86 and 87.

¹²² See Danish Institute for Human Rights ‘The Evolution of National Human Rights Institutions: The Role of the UN’ (2006) 6.

central part of the human rights mechanism especially at the national level. The idea of NHRIs started way back in 1946, two years before the adoption of the UDHR, when the Economic and Social Council discussed the issue of national institutions and encouraged member States to consider establishing specific information groups of local human rights committee for the promotion and protection of human rights.¹²³ The Economic and Social Council passed a resolution recognising the unique potential role of national institutions to promote and protect human rights in 1960.¹²⁴ The Council urged governments to establish or strengthen those that were operational and to provide such information to the Secretary General. The Council resolution was followed by a seminar in 1978 which drafted guidelines for the structure and functioning of NHRIs.¹²⁵ These guidelines were subsequently endorsed by the Commission on Human Rights and the General Assembly which also encouraged States to establish NHRIs where they had not yet been established.¹²⁶ Furthermore, the UN Secretary General was also requested to submit a detailed report on the situation of NHRIs. The first international workshop on NHRIs took place in Paris in 1991 and the major outcome of the meeting was the Principles relating to the Status of National Institutions (the Paris Principles).¹²⁷ The Paris Principles were then broadly adopted as the measure of an NHRIs legitimacy and credibility.¹²⁸ The Vienna World Conference of 1993 formally recognised those NHRIs which comply with the Paris principles as important and constructive actors and also encouraged their establishment and strengthening and also affirmed the Network of National Institutions that had been established in Paris in 1991. This Network eventually became the International Coordinating Committee of National Institutions for the Promotion and Protection of human rights.¹²⁹ It has now become the Global Alliance of National Human Rights Institutions. The Commission on Human Rights, in its resolution 2005/74, reaffirmed the importance of establishing and strengthening independent, pluralistic NHRIs consistent with the Paris Principles and of strengthening cooperation

¹²³ See UN OHCHR, National Institutions for the Promotion and Protection of Human Rights, *Fact Sheet No. 19*, available at: <http://www.ohchr.org/Documents/Publications/FactSheet19en.pdf> (accessed 27 July 2018).

¹²⁴ As above.

¹²⁵ As above.

¹²⁶ As above.

¹²⁷ Adopted by General Assembly resolution 48/134 of 20 December 1993.

¹²⁸ See UN OHCHR 'National Human Rights Institutions: History, Principles, Roles and Responsibilities' (2010) 7.

¹²⁹ As above.

among them.¹³⁰ NHRIs that comply with the principles were and are regarded as efficient and key actors in the promotion and protection of human rights. Thus, speaking rights were accorded to “A” status NHRIs under all the Commission’s agenda items. NHRIs were also guaranteed: dedicated seating; and the right to issue documents under their own symbol number.¹³¹ This has continued even currently with the Human Rights Council which replaced the Commission on Human Rights.

The Paris Principles provide that NHRIs should have a wide mandate as possible but with two key functions which are provided by the Constitution or other legislation, namely, the promotion and protection of human rights.¹³² Promotion requires encouraging a culture of human rights where tolerance, equality and mutual respect thrive while protection requires efficient investigation of human rights abuses to provide a remedy and redress for victims. There are a number of duties of NHRIs which are derived from the two main responsibilities including: conducting human rights education; monitoring the human rights situation and governments compliance with ratified international human rights standards; advising the government and parliament on human rights issues including proposed laws; cooperation with national stakeholders, civil society, NHRIs from other countries and with regional and international human rights bodies, among other things.¹³³ It is implied that NHRIs have to promote human rights based approaches to development and support or manage peacebuilding and transitional justice issues in conflict and post-conflict situations.¹³⁴ Increasingly NHRIs have been involved in monitoring businesses to ensure that they promote and protect human rights in their operations.¹³⁵ NHRIs should be independent, established by law, with a transparent appointments procedure for the members which must follow strict criteria including professional skills and knowledge

¹³⁰ As above.

¹³¹ As above.

¹³² See Principle 1 of the Paris Principles.

¹³³ See Principle 3 of the Paris Principles.

¹³⁴ See Kyiv Declaration on the Role of National Human Rights Institutions in Conflict and Post-Conflict Situations (2015). Also see: Network of African National Human Rights Institutions, *The Role of National Human Rights Institutions in Conflict Management, Resolution and Peace Building: A Baseline Survey of the East African Situation* (2014) available at: <http://nanhri.org/wp-content/uploads/2016/03/NANHRI-Baseline-Study-on-NHRIs-in-Conflict-Management-Peace-building.pdf> (accessed 30 December 2017).

¹³⁵ International Coordinating Committee of National Human Rights Institutions for the Promotion and Protection of Human Rights and the Danish Institute for Human Rights, ‘Business and Human Rights: A Guide Book for National Human Rights Institutions’ (2013).

of human rights.¹³⁶ NHRIs are required to have good relations with civil society and other stakeholders, be accessible to the public, have a broad mandate for human rights protection and be publicly accountable on all aspects of their work and have regular consultations with all stakeholders.¹³⁷

In the context of development planning, NHRIs can and do play various key roles:

- a) promote human rights in the national development process;
- b) advise government on the human rights-based approach to development;
- c) monitor the formulation and implementation of development plans and make government accountable for unsatisfactory or uneven progress;
- d) assist the government to address issues of inequality and discrimination in the development process; and also
- e) provide redress for victims of violations related to the development process.¹³⁸

These roles take various shapes including advising national or local governments; raising awareness and promoting dialogue and participation in national development; developing and sustaining partners for implementation of the national development plans; shaping nation indicators; monitoring and reporting on the progress of national development and attainment of the SDGs and holding government accountable by investigating human rights violations and providing access to justice.

For example the Argentina National Human Rights Institution the *Defensor del Pueblo de la Nación* is involved in monitoring the SDGs and has a comprehensive monitoring and evaluation program that was launched in January 2016.¹³⁹ By June 2017, the Argentinian NHRI had initiated 57 investigations, which are all explicitly linked to the SDGs.¹⁴⁰ Its findings will annually be sent to the relevant national authorities and to

¹³⁶ Principle 3 of the Paris Principles.

¹³⁷ As above.

¹³⁸ See: The Mérida Declaration 'The Role of National Human Rights Institutions in implementing the 2030 Agenda for Sustainable Development' (2015); UNDP 'Role of National Human Rights Institutions in implementing the 2030 Sustainable Development Agenda and the Sustainable Development Goals' (2016); and the Danish Institute for Human Rights and Centre for Economic and Social Rights 'Realizing rights through the Sustainable Development Goals: The Role of National Human Rights Institutions' (2015).

¹³⁹ See Global Alliance of National Human Rights Institutions *National Human Rights Institutions Engaging with The Sustainable Development Goals* (2017) 18.

¹⁴⁰ As above.

the Human Rights Council.¹⁴¹ Palestine's Independent Commission on Human Rights also monitors the situation of economic, social and cultural rights and the Palestinian Authority's development plan is its focus of monitoring.¹⁴²

The Kenya National Commission on Human Rights is working with the Kenya National Bureau of Standards to systematically identify the population groups that are 'left behind' in Kenya's development.¹⁴³ This identification of population groups is the first among the many steps that have to be taken to enhance the participation of those groups that are often vulnerable to marginalisation during development processes. Participation in development by the disadvantaged groups will further be ensured by other various measures by the Commission including generally promoting human rights in the national development process; advising government on how to address issues of inequality and discrimination in the development process including those of the population groups that are usually left behind in development; and also providing redress for victims of violations related to the national development process including violations of the right to participate in development.

The South African Human Rights Commission (SAHRC) has been engaged in the human rights-based approach to the collection of data for the SDGs.¹⁴⁴ As mentioned earlier in Chapter two, SDG 16 explicitly provides for governance, inclusion, participation, rights and security. The collection of data for the implementation of the sustainable goals will enhance monitoring and will enable the Commission to make appropriate recommendations in terms of making improvements relating to responsive, inclusive, participatory and representative decision-making at various levels, among other things. The SAHRC will be engaged in investigation and monitoring through its national hearings on the underlying socioeconomic challenges of mining by affected communities in South Africa including the participation of communities and will make recommendations on how to improve the situation.¹⁴⁵ Furthermore, the SAHRC has also made recommendations relating to enhancement of community participation for improvements in housing, local governance and service

¹⁴¹ As above.

¹⁴² See Global Alliance of National Human Rights Institutions (n 139 above) 21.

¹⁴³ See Global Alliance of National Human Rights Institutions (n 139 above) 29.

¹⁴⁴ See Global Alliance of National Human Rights Institutions (n 139 above) 30.

¹⁴⁵ SAHRC *Annual Report* (2017) 37-38.

delivery to the National Department of Human Settlements and the South African Local Government Association.¹⁴⁶

The work of NHRIs highlighted above can be an inspiration to the Ugandan NHRIs. However, the effectiveness of a NHRI in the promotion and protection of human rights and the right to participate in development is dependent on a number of factors such as capacity both technical and resources to fulfil its mandate, the political will of the government to resolve cases and address concerns raised by the NHRI. Moreover, the capacity of the NHRI is also dependent on its cooperation with other stakeholders as human rights issues cannot be addressed by only one institution.

5.2.5 Independent Civil Society Organisations

There are several definitions of civil society and I adopt the ones for the World Bank and the UN Office of the High Commissioner for Human Rights (UN OHCHR) for human rights in this study. The World Bank defines civil society as the:

...wide array of non-governmental and not-for-profit organizations that have a presence in public life, expressing the interests and values of their members or others, based on ethical, cultural, political, scientific, religious or philanthropic considerations. Civil Society Organizations (CSOs) therefore refer to a wide of array of organizations: community groups, non-governmental organizations (NGOs), labour unions, indigenous groups, charitable organizations, faith-based organizations, professional associations, and foundations.¹⁴⁷

The UN OHCHR defines Civil Society actors as:

...individuals and groups who voluntarily engage in forms of public participation and action around shared interests, purposes or values that are compatible with the goals of the UN: the maintenance of peace and security, the realization of development, and the promotion and respect of human rights.¹⁴⁸

Civil society often promote awareness of human rights, assist communities in expressing their concerns, formulate strategies, and provide guidance on policy and

¹⁴⁶ SAHRC *Annual Report* (2017) 39-40.

¹⁴⁷ See World Bank 'Defining Civil Society' (2013) available at: <http://go.worldbank.org/4CE7W046K0> (accessed 30 December 2017).

¹⁴⁸ UN OHCHR *A Practical Guide for Civil Society: Civil Society Space and The United Nations Human Rights System* (2014) 3.

laws, and also press for accountability of governments.¹⁴⁹ Civil society is a link between the government and the communities and the communities often channel their views on public policy through them if they cannot directly participate.¹⁵⁰ Civil society also provide services for those who need them especially the vulnerable groups who are often forgotten in development projects.¹⁵¹ Civil society play an important role in governance and as has been pointed out by the UN Secretary General Ban Ki-moon:

A free and independent civil society is the foundation for healthy, responsive governance at the local, national and global levels.¹⁵²

The relationship between government and civil society is founded on key human rights principles such as participation, non-discrimination, dignity and transparency and accountability.¹⁵³ There must be recognition that civil society has the right to participate in decision making including issues relating to development. Furthermore, there should be no discrimination of any kind in terms of invitation for civil society to participate in public life. Civil society and government need to have mutual respect for each other and acknowledge that they all have to work towards improving lives to affirm the dignity of persons. Moreover, civil society and government also have to work in an open environment to enhance transparency and accountability in all their operations.

A World Bank Study on the role of civil society in promoting accountability for development in Africa found that indeed civil society has a potential role to play in terms of increasing accountability of the government in development.¹⁵⁴ However, this is dependent on political commitment by government to development, their ability to influence, the effectiveness of the law protecting the right to participate in development and how organic the strategies civil society decides to use to press the State for

¹⁴⁹ As above.

¹⁵⁰ See CIVICUS/L Fioramonti & VF Heinrich 'How Civil Society Influences Policy: A Comparative Analysis of the Civil Society Index in Post-Communist Europe' (2007).

¹⁵¹ See C Tortajada 'Non-governmental Organizations and Influence on Global Public Policy' (2016) Volume 3, Issue 2 *Asia and the Pacific Policy Studies* 266.

¹⁵² Secretary-General Ban Ki-moon 'Video Message to the Twenty-Fifth Session of the UN Human Rights Council' March 2014.

¹⁵³ See UN OHCHR (n 148 above).

¹⁵⁴ See World Bank/S Devarajan, S Khemani and M Walton 'Civil Society, Public Action and Accountability in Africa' (2011).

accountability.¹⁵⁵ The success of civil society is dependent on a conducive political environment, supportive legislative framework for their operations, access to information, availability of resources, spaces for dialogue and collaboration with the government.¹⁵⁶

CSOs in various countries in Africa always face several challenges in terms of promoting participation in development especially given the unconducive policy contexts, difficult processes, financial insecurities, weak capacities and feeble networks. For CSOs to play an important role in influencing development policies better and enhancing participation in development by the citizenry requires that their capacity is built: to be able to be effective even in an unconducive environment; to understand how the policy processes work; to conduct and provide credible research to inform the processes; and to influence their governments.

CSO Coalitions have especially been successful in influencing development policy and enhancing the participation of the citizenry in development. For example, in Mali, the Coalition of the African Alternatives Debt and Development (CAD) gathers some of the best practices and lessons learned from various partner social movements and organisations in other countries to adopt and replicate them in the Malian context.¹⁵⁷ It has also changed its functions to suit the country's prevailing needs. It started off initially with the objective of raising awareness of the negative impacts of development-based debt programmes, but then shifted its focus to include research and development around the overall policies of development assistance programmes.¹⁵⁸ The activities CAD enhance participation in development especially by providing information for the citizenry which would enable them to contribute to the national development process in the long run. This can be emulated by Ugandan CSOs.

5.2.6 Independent media

Media can be defined as:

¹⁵⁵ As above.

¹⁵⁶ UN OHCHR (n 148 above) 7-9.

¹⁵⁷ UN Economic and Social Council/Economic Commission for Africa 'Assessment of the Impact and Effectiveness of CSOs and NGOs in Promoting Governance in Africa' (2011) 11-12.

¹⁵⁸ As above.

...the main means of mass communication including: broadcasting, publishing, and the Internet, regarded collectively.¹⁵⁹

Media is important for informing, educating and entertaining the public. As such media plays an important role in the promotion of human rights. The media today does not only inform people of what is happening around them but also shapes the peoples' opinions on the subject matter depending on how they choose to portray the matter. There is no doubt that the media plays an important role in political, social and economic development and in influencing public decision making. Media raises awareness on various issues including creating and shaping public opinion and enhancing participation in development.

Indeed, the media has played an important role in highlighting development issues especially on the Millennium Development Goals and more recently the SDGs. The media can also be used to highlight and advocate for the public participation of the citizenry in development planning. Specifically, in relation to enhancing the right to participate in development the media can provide information on the development planning process including dates of consultation and issues to be considered, among other things. Moreover, the media can also be used to mobilise people to attend the meetings and to contribute their views. Furthermore, the media can report and give feedback on the development planning process which governments can use to improve the process. As was pointed out by a World Bank guide on 'Developing independent media as an institution of accountable governance,' a strong media sector supports: good governance; promotes voice and accountability; and complements and reinforces other good governance goals.¹⁶⁰

The media can hold the state holds state and non-state actors in the development process accountable making it central to a participatory development process. However, the effective role of the media is dependent on: its financial sustainability; editorial independence from the government, private sector and other powerful interests; enabling laws and regulations; access to information and technical

¹⁵⁹ Oxford Dictionary.

¹⁶⁰ The World Bank/S Kalathil, *Developing Independent Media as an Institution of Accountable Governance: A How-To Guide* (2011) 5-6.

capacities including on development issues. Though the media is a powerful watchdog it can be and is often restricted and limited by repressive governments. Free and independent media is a necessary component of representative democracy and definitely plays an important role in enhancing participation in development. Media would help in increasing levels of awareness and in conducting human rights education.

The media has in the past been used to build the capacity of people to participate in decision making and in the conduct of public affairs including participation in development. In the Philippines, the media working with civil society organisations and the Philippines Commission on Human Rights worked together to sensitize the communities about their right to participate in the conduct of public affairs and how to demand good governance from their government.¹⁶¹ CSOs and the Philippines NHRI began by building the capacity of the media to enable them to identify important public policy issues for discussion by the local community.¹⁶² Furthermore, the media was trained on how to interact with the public to encourage the full participation of the public to ensure that all could participate without discrimination.¹⁶³ The trained media then contributed by providing a platform for political debate and enabling networking between communities, local government and CSOs.¹⁶⁴ The media particularly highlighted issues of the poor, marginalised and disadvantaged groups in the development process and also examined various policies in relation to education, health, food security, and the environment.¹⁶⁵ The public debates, it is reported, led to the reform of some policies and the design of new policies which enhanced the protection of human rights.¹⁶⁶ The media can still be used and more recent examples of the role of media in promoting the right to participate in development need to be documented. The media in Uganda can also be used to enhance participation in development as was the case in the Philippines.

¹⁶¹ UN OHCHR 'Good Governance Practices for the Protection of Human Rights' (2007) 15-17.

¹⁶² UN OHCHR (n 161 above) 15-16.

¹⁶³ UN OHCHR (n 161 above) 16.

¹⁶⁴ UN OHCHR (n 161 above) 15 & 16.

¹⁶⁵ See UN OHCHR (n 161 above) 16 & 17.

¹⁶⁶ See UN OHCHR (n 161 above) 16 & 17.

5.2.7 Temporary special measures for vulnerable groups

The term temporary special measures has been used to refer to measures aimed at accelerating the improvement of the position of women with a view to 'achieving substantive equality with men, and to effect the structural, social and cultural changes necessary to correct past and current forms and effects of discrimination against women, as well as to provide them with compensation for inequalities and harm suffered.'¹⁶⁷ Such measures are designed to serve a specific goal to secure equal opportunities in participation and competition in various fields of social life, where social, health and economic burdens may be placed on women as a result of gender stereotypes or their role in maternity.¹⁶⁸ States are permitted to use temporary special measures for as long as inequalities continue to exist to promote equality of opportunity and equality of outcome.¹⁶⁹ Temporary special measures are thus lawful and necessary but should be removed when equal status has been achieved.¹⁷⁰ Such measures have been used by various countries to reserve seats for women in the legislatures and local councils, provide scholarships for women, and finance their participation in business opportunities.

The participation of women in development is crucial and it is important to mainstream gender concerns into the development process to ensure women's full participation in development. The CEDAW Committee has noted that where there is full and equal participation of women in public life and decision-making, the implementation of their rights and compliance with the Convention improves.¹⁷¹ As has been pointed out by earlier studies, public policy and the legal and institutional framework can significantly enhance women's participation in development.¹⁷² Notably, most countries have already taken this important step. What is needed is to continuously train and support both the governmental and non-governmental agencies working for the promotion and

¹⁶⁷ See Article 8 of the Convention on the Elimination of All Forms of Discrimination against Women.

¹⁶⁸ See UN OHCHR 'Women's Rights are Human Rights' (2014) 6.

¹⁶⁹ See UN OHCHR (n 168 above) 123.

¹⁷⁰ As above.

¹⁷¹ CEDAW *General recommendation No. 23: Political and public life* (1997) Para 14.

¹⁷² See World Bank 'Enhancing Women's Participation in Development: A World Bank Policy Paper' (1994) available at: <http://documents.worldbank.org/curated/en/764641468135599885/pdf/multi0page.pdf> (accessed 31 December 2017).

protection of women's rights to ensure that women's participation in development is enhanced. The training should also extend to the communities, parents and to religious and cultural leaders.

It is necessary to go beyond the policies to ensure that the development outcomes are beneficial to both women and men. It is important to invest in attitudinal changes through education for all. It is also vital to increase women's participation in development through their own economic empowerment by ensuring equal legal access to jobs, assets, credit facilities and services.¹⁷³ It is crucial to have specific administrative and institutional arrangements to ensure the participation of women in development as has been done in parliament.

However, the term and application of temporary special measures should extend beyond women to enhance the participation of all other vulnerable groups in development. As such it may be necessary to have specific quotas for the vulnerable groups required for the development planning processes so as to increase their participation and ability to influence development outcomes. This is separate from the already existing quota system in Parliament, which has its benefits though it may be far from perfect.¹⁷⁴ The one suggested in this study is an addition to that and would be specifically to enhance the participation and benefit of vulnerable groups from development processes. Temporary special measures have the potential to increase vulnerable group's participation in development and can be considered and adopted by Uganda. However, the ability of vulnerable group's to effectively participate and benefit from development processes can only be achieved where there is committed leadership of the government, community and religious and cultural leaders. Moreover, the vulnerable groups have to be empowered through education including human rights education which is discussed below.

¹⁷³ As above.

¹⁷⁴ D Dahlerup 'Women, Quotas and Politics' (2006).

5.2.8 Human rights education

Human rights education, which is ‘all learning that develops the knowledge, skills, and values of human rights,’ is a right to which everyone is entitled.¹⁷⁵ The aim of human rights education is to enable people to know their rights, be able to claim them and promote them. Human rights education enables the citizenry to participate in democracy including participating in development through formulation of policies and laws. Human rights education is essential for the full development of the human personality and the sense of its dignity and the promotion of people-centred sustainable development and social justice, among other things.¹⁷⁶ As the UN Commission on Human Rights pointed out:

...human rights education contributes to the long-term prevention of human rights abuses and violent conflicts, to the promotion of equality and sustainable development and the enhancement of people’s participation in decision-making processes within democratic system.¹⁷⁷

In the context of participation in development it is important for the citizenry to know what their rights are. They need to know what does the right to participation in development entail. How can they exercise it? What can they do when it is violated? How can they promote it? It is therefore important for people to know what these standards are so that they are empowered to make claims including by individuals and groups that might otherwise have remained marginalised and powerless. Human rights education brings about empowerment and protection from violations of human rights.¹⁷⁸ Human rights education can thus be used to increase participation and ownership of development processes by the citizenry even in Uganda.

¹⁷⁵ See Article 26 UDHR, Article 13 ICESCR, Article 29 UN CRC, Article 10 CEDAW, and Article 7 CERD, among others.

¹⁷⁶ See UN OHCHR, Speech of Ms. Louise Arbour, UN High Commissioner for Human Rights, Human Rights Day 2004 - Human Rights Education Key Messages, 2004 available at: <http://www.ohchr.org/EN/NewsEvents/HRDay2004/Pages/hre.aspx> (accessed 31 December 2017).

¹⁷⁷ See Resolution 2004/71 of the former UN Commission on Human Rights.

¹⁷⁸ Also see The World Bank/S McInerney-Lankford and H-O Sano, *Human Rights Indicators in Development: An Introduction*, 2010 6-7.

5.2.9 Use of international and regional human rights mechanisms

The right to participate in development is heavily embedded in the legal human rights framework at the international and the regional levels in various treaties as was demonstrated earlier in the second chapter the right has been enunciated. Nevertheless, the articulation on the right to participate in development that has been made so far can be improved. It is vital that the right to participate in development is continually affirmed and clarified at the international level by the: treaty bodies, special procedures; UPR; the human rights council and the UN office of the High Commissioner for Human Rights, among others.

Despite their limitations in providing quick remedies for human rights violations, the international and regional human rights mechanisms play an important role in the promotion and protection of human rights. In the context of promoting the right to participate in development, there is a whole lot more than can be done. Human rights treaty bodies have the potential to further guide States and other stakeholders on how they can implement the right to participate in development through the monitoring process of examining state reports and hearing individual complaints where States have agreed. In Chapter two I illustrated examples of how the various treaty bodies have interpreted the right to participate in development. Here, I would like to emphasise that they can be used to further refine and define the scope of the right.

Furthermore, the work of special procedures including special rapporteurs and independent experts has contributed to the further development of international human rights standards including the right to participate in development as was discussed in Chapter two. The special procedures can be used to engage in more advocacy and provide further advice and guidance especially for legislative reform and technical cooperation to promote and protect the right to participate in development in Uganda. However, their credibility and effectiveness are dependent on perceptions of their independence and objectivity by the States they monitor and advise and whether the States implement their recommendations.

Human rights treaty bodies and special procedures have the potential to constitute an advocacy platform to enhance the right to participate in development by engaging the

State and other stake holders which can enhance implementation. This is dependent on: the quality and coherence of the recommendations they make; if these recommendations are accepted by the State; and if they are widely disseminated and implemented.

Moreover, the right to participate in development can also benefit from the UN mechanism of the UPR, a process involving a periodic review of the human rights records of all 193 UN Member States, which puts political pressure on States to act to resolve human rights issues raised. The UPR provides an opportunity for all States to discuss the efforts they have made to improve the human rights situations in their countries to promote the enjoyment of human rights including the right to participate in development. The UPR also includes a sharing of best human rights practices around the globe. Issues of participation in development have been raised at the UPR and should continue to be raised for attention and redress by countries. The UPR is also another opportunity to bring together various primary stakeholders on human rights issues, including the right to participate in development, giving hope of improving the human rights situation with the 'peer pressure' from other countries.

The right to participate in development has already been highlighted by the African Commission in the *Endois* and *SERAC* cases as was discussed in chapter two. However, this also needs to be affirmed by the African Court on Human and Peoples' Rights and other bodies such as the African Committee of Experts on the Rights and Welfare of the Child, special procedures and even AU Commission. Nevertheless, this can only be done if there are relevant cases brought before the African Court or the African Committee of Experts on the Rights and Welfare of the Child and the UN and AU special procedures. The regional mechanisms have the potential to clarify the right to participate in development further whether through another individual communication, resolution or observation the nature and scope of this right and the specific obligations of the state to facilitate participation in development.

5.2.10 Development compacts

A development compact is a mechanism proposed for fulfilment of the right to development that is advocated by Arjun Sengupta, the former Independent Expert on

the Right to Development. He proposed that countries can get into arrangements where they agree on having shared development obligations between developing countries, the UN, IFI and bilateral donors.¹⁷⁹ Under such an arrangement of a development compact, each developing country has the obligation to fulfil and implement the right to development, which includes the right to participate in development, and the international community would have the duty to provide resources and share the costs to implement the development activities.¹⁸⁰

The developing country would have to fulfil its obligations on the right to development and the international community would provide resources and technical assistance as agreed with an arrangement including a special fund for pooling resources.¹⁸¹ In a development compact, the developing country has to accept to formulate, develop and implement its national development programmes in a rights-based manner. This would require domestication of ratified international human rights instruments, participation of civil society organisations in the development process and recognition for the monitoring role of NHRIs which would make appropriate recommendations for the observance of human rights in the development process which would be addressed by the developing country.¹⁸² The international community of development partners would also provide a support group that would consider, evaluate and agree on the priorities and decide on how to share the financial burden and the specific responsibilities and duties of the parties to the compact.¹⁸³ Sengupta suggested that the compact can be in terms of fulfilling three specific rights deemed essential for the right to development and the right to life, that is: the right to food; the right to primary health care and the right to education.¹⁸⁴

However, the operation of a development compact is yet to be adequately tested and proven, but it needs to be given serious consideration as it has the potential to lead to a politically acceptable solution in promoting the right to development including the

¹⁷⁹ A Sengupta 'The Human Right to Development' in BA Andreassen and SP Marks (Eds), *Development as a Human Right: Legal, Political and Economic Dimensions*, (2010) 9.

¹⁸⁰ As above.

¹⁸¹ As above.

¹⁸² As above.

¹⁸³ As above

¹⁸⁴ Generally, see: A Sengupta, 'Study on the current state of progress in the implementation of the right to development,' (1999) E/CN.4/1999/WG.18/2 and A Sengupta, Report of the Independent Expert on the Right to Development, (2000) E/CN.4/2000/WG.18.

right to participate in development.¹⁸⁵ The development compact would have to be properly defined in a way that will enhance human rights-based development and development cooperation as agreed by the partners in the compact. Moreover, it should allow the state to maintain its core obligations despite the assistance from development partners so that it can maintain its independence.

For development compacts to work there must be sufficient accountability for development processes and outcomes by the government; rights must be promoted without undermining domestic accountability; special attention has to be paid to enhancing legal accountability and adequate participation, consultation and ownership of development processes by the citizenry. Otherwise the development compact can be self-serving to the development partners who would only enlarge their own agendas of human rights including imposition of human rights norms and values that are not home grown leading to tension.

5.3 Conclusion

In this chapter I defined best practices as approaches that have been used with results to enhance human rights and have emerged as standards suitable to promote effective participation or have the potential to do so. As such there are various practices discussed which though not tested in the context of enhancing the right to participation in development, have worked in other instances of human rights promotion and protection. These include the following: enacting comprehensive legislation and ensuring its effective enforcement; establishment of independent institutions including national development planning authorities; national human rights institutions; civil society and the judiciary. Furthermore, implementing temporary special measures to enhance participation for vulnerable groups; encouraging independent media; conducting human rights education; use of international and regional mechanisms; and development compacts.

I emphasised the importance of legislation as it is key in the enforcement of any right. From the discussion and examples given of South Africa, Kenya and Botswana, it is

¹⁸⁵ Also see, LH Piron 'The Right to Development: A Review of the Current State of the Debate for the Department for International Development' (2002) 8.

clear that the legal framework is necessary for enhancing participation in development, but it is not sufficient on its own for guaranteeing citizen participation. The legal and policy framework combined with other factors enhances participation in development. The examples highlighted above demonstrate the importance of legislation. South Africa and Kenya specifically show how legislation can be used to promote participation in public affairs, which includes development, and how courts actually use such legislation to protect the right to participate in decision making. The example of Botswana shows that political will combined with stability and economic growth can have good results. Nevertheless, the absence of a comprehensive legal framework in Botswana creates uncertainty for participatory development in the future.

I also highlighted the fact that all African constitutions directly or indirectly provide for the right to development including the right to participate in development. At least half of them specifically provide for the right to participate in development and examples of the constitutional provisions of Cape Verde, Ghana and Ethiopia are used to show how African countries have protected the right. Nevertheless, as discussed earlier in this chapter constitutional provisions are not enough to protect the right to participate in development and should be complemented by other factors including an independent and efficient judiciary, strong national institutions and an informed and empowered citizenry in an environment that is conducive to the rule of law, among other things. Moreover, the judiciary can only be effective where their independence is guaranteed, the political environment is conducive, and resources are available for their work.

National development planning authorities are central to enhancing participation in development as their mandate requires them to promote participation in the formulation of development plans and have contributed to the success stories of African countries that have grown from low income countries to middle income countries applying participatory development principles. Examples have been given of the Cape Verde Ministry of finance and planning, Ghana National Development Planning Commission and the Botswana Ministry of Finance and Development Planning.

NHRIs can and do play an important role in promoting the right to participate in development including: promoting human rights in the national development process;

advising government on the human rights-based approach to development; monitoring the formulation and implementation of development plans and making government accountable for unsatisfactory or uneven progress; assisting the government to address issues of inequality and discrimination in the development process; and also providing redress for victims of violations related to the development processes. I highlighted the work of various NHRIs and the Kenyan, South African and Argentinian NHRIs are inspirational with their work on promoting the right to participate in development especially on the SDGs and other development issues. However, the effectiveness of NHRIs is dependent on their capacity both technical and financial, the political will of the government to resolve cases and heed their recommendations. Moreover, the efficiency of NHRIs is also dependent on its cooperation with other stakeholders.

CSOs especially through their coalitions are vital in influencing development policy and enhancing the participation of the citizenry in development. An example is given of the Mali Coalition of the African Alternatives Debt and Development which enhances participation in development by providing information for the citizenry which enables them to contribute to the national development process. However, for CSOs to be effective they must be able to overcome challenges of uncondusive policy contexts, difficult processes, financial insecurities, weak capacities and feeble networks.

The media can be useful in promoting the right to participate in development by mobilising the people, providing information on the development planning process including dates of consultation and discussion of issues to be considered, report and give feedback which governments can use to improve the process. However, the effective role of the media is dependent on: financial sustainability; independence; legislative and regulatory frameworks; access to information and technical capacities including on development issues. In order to play an effective role media has to be free and independent media which is essential for representative democracy.

It can be a good practice to have specific administrative and institutional arrangements to ensure the participation of vulnerable groups in development such as temporary special measures. I also discussed human rights education and the use of

international and regional mechanisms to promote participation in development. Human rights education is empowering and informative and would enhance citizen participation and enforcement of their rights in cases of violations. The international and regional mechanisms have played an important role on promoting the right to participate in development and can continue to define and shape the right which would enhance it.

Finally, I discuss the use of development compacts which are proposed for implementing the right to development in general but would also have an impact on participation in development which is central. Countries can support each other in development activities on condition that the developing country does so following a human rights-based approach. Nevertheless, this has not been tested and needs further consideration.

Each of the practices discussed above is not sufficient on its own and can only work in an interdependent manner with the others. A combination of the majority if not all of these actions has a high chance of increasing participation in development. In the next chapter I make a conclusion of this study and make recommendations with specific reference to enhancing participation in development in Uganda.

Chapter Six

Conclusion and recommendations

6.1 Introduction

In the previous chapter, I discussed various practices that can enhance participation in development including: comprehensive legislation; independent judiciary; independent institutions including national development planning authorities and national human rights institutions; civil society; temporary special measures; use of media; human rights education; use of international and regional mechanisms; and development compacts. This Chapter makes overall concluding observations on the study and makes specific recommendations on how participation in development planning can be enhanced in Uganda.

6.2 Summary of findings

This study is on participation in development, particularly on the right to participate in national development planning. As I conclude, it is necessary to highlight certain key aspects in answer to some key questions so as to make appropriate recommendations for enhancing the right to participate in development in Uganda. The following questions are crucial: is participation in development a right; if so, what is the status of this right in Uganda; what is the role of the law in the fulfilment of the right; what barriers and obstacles need to be addressed for the people of Uganda to enjoy this right; what can we learn from other countries to enhance participation in Uganda?

6.2.1 Participation in development is a right

Participation in development is a right. As has been discussed earlier, the right to participate in development is heavily and deeply embedded in the legal human rights framework at the UN and at the regional and national levels.

At the UN Level, the right to participate in development can be traced in the international bill of rights and the core international human rights treaties right from the

UDHR,¹ ICCPR,² ICESCR,³ CERD,⁴ CEDAW,⁵ CRC,⁶ CRPD,⁷ to the CMW.⁸ The right is also enunciated in several declarations including: 1969 UN Declaration on Social Progress and Development,⁹ 1978 Declaration of Alma-Ata,¹⁰ 1982 World Charter for Nature,¹¹ 1988 UN Declaration on the Right to Development,¹² 1992 Rio Declaration on Environment and Development,¹³ 1992 UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities,¹⁴ 1993 Vienna Programme of Action,¹⁵ 1998 UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms,¹⁶ 2000 Millennium Development Goals, 2001 Durban Declaration and Programme of Action,¹⁷ 2007 UN Declaration on the Rights of Indigenous Peoples,¹⁸ 2011 UN Guiding Principles on Business and Human Rights,¹⁹ the 2030 Agenda for Sustainable Development and the 17 SDGs,²⁰ 2015- 2030 Sendai Framework for Disaster Risk Reduction,²¹ Addis Ababa Action Agenda of the Third International Conference on Financing for Development,²² and the Paris Agreement on climate change.²³

1 Article 21 (1) and Article 27 (1).

2 Article 25.

3 Article 15 (1) (a)

4 Article 5 (c).

5 Article 7 (b) and (c), 8

6 Articles 12 and 31

7 Articles 4 (3), 29,

8 Article 41 and 42

9 G.A. res. 2542 (XXIV), 24 U.N. GAOR Supp. (No. 30) at 49, U.N. Doc. A/7630 (1969). See Articles 5 (c), 6, 11 (d), 15, 20 (a) and 21 (c).

10 See Paras V and VII (5).

11 Article 23.

12 Articles 1(1), 2 (1) and (3), 8 (2).

13 Principle 10.

14 Article 2 (2).

15 Vienna Declaration and Programme of Action, part I, Para 9.

16 Article 8.

17 See Preamble and Paras 32 and 34.

18 Article 5 and 18.

19 Article 18.

20 See Goal 16.6 and 16.7

21 Para 19 (c) of the Framework.

22 General Assembly Resolution 69/313 of 27 July 2015.

23 See Preamble and Articles 8 (b) and 12.

The right to participate in development has also been affirmed by the Human Rights Council,²⁴ treaty bodies,²⁵ special procedures,²⁶ UPR²⁷ and the UN OHCHR.²⁸ However, the right to participate in development faces stiff challenges especially in terms of acceptance as it is tied in with the right to development. The right to development has not yet been well accepted as states still lack clarity and have disagreements on the nature of States duties including international development cooperation and the criteria for measuring progress towards implementation of the right.²⁹ This is all in the context of ‘adverse global trends’ as articulately described by the UN Special Rapporteur on the Right to Development such as the various global crises: financial, economic, energy, climate, natural disasters, new pandemics and the loss of jobs due to increase in automation in many sectors.³⁰ This is compounded by the increase in nationalistic tendencies and departure from international solidarity and cooperation weakening international governance.³¹

At the regional level, the right to participate in development has been affirmed. Most regional frameworks emphasise the right to participate especially in relation to governance, politics and decision making where the right to participate in development is rooted. There is no doubt though that participation in development is a right in Africa. Participation is provided for in various treaties and declarations of the AU ranging from the Constitutive Act,³² ACHPR,³³ Maputo Protocol,³⁴ ACRWC,³⁵ the AU Convention on the Conservation of Nature,³⁶ AU Convention on Preventing and Combating of

²⁴ See Resolutions: 4/4, 6/7, 7/23, 8/5, 17/14, 18/6, 19/20, 20/10, 21/11, 35/8 and 35/21, among others.

²⁵ See Human Rights Committee, General Comment 25; CESCR General Comments 11, 12, 14, 15, 21, 22, among others.

²⁶ See Report of the UN Special Rapporteur on the Right to Development.

²⁷ See Database of recommendations for Uganda from Ghana, Singapore, Cuba, Slovakia, Singapore, Angola, Zimbabwe, Algeria, and Azerbaijan available at <https://www.upr-info.org/database/> (accessed 3 January 2017).

²⁸ See

²⁹ See *Report of the Special Rapporteur on the Right to Development (2017) A/HRC/36/49* <https://undocs.org/en/A/HRC/36/49> (accessed 3 January 2018).

³⁰ See Report of the Special Rapporteur on the Right to Development above.

³¹ See the report of the UN Special Rapporteur on the Right to Development above.

³² Articles 3(g), 4 (c) and 17.

³³ Articles 13 and 17 (2).

³⁴ Articles 2 (1) (c), 9, 18, 19 and 23.

³⁵ Articles 13 and 14.

³⁶ Articles 16 (1) (c), 17 (3).

Corruption;³⁷ the African Charter on Democracy, Elections and Governance³⁸ the Statutes of the Economic, Social and Cultural Council of the AU,³⁹ and the African Youth Charter,⁴⁰ among others. Participation in development has been affirmed by the African Commission in the cases of the *Ogoni* and of the *Endorois* where the Commission emphasised the importance of participation of the people in making decisions relating to development. Moreover, the East African Treaty to which Uganda is party also provides for the participation of the private sector,⁴¹ women,⁴² and CSOs.⁴³

Despite the progressive provisions and affirmation by the African Commission, the continent still has low levels of economic growth, political insecurity and upholds some traditions cultures and customs which have a negative impact on human rights, which also affects the right to participate in development. Moreover, the institutional framework for human rights protection is still budding. Yet the realisation of the right to participate in development is even more needed now than ever with the increasing demand for resources for development. The right to participation in development as part of the right to participate in the conduct of public affairs is often overshadowed by the focus on electoral rights such as the right to vote or be elected in genuine periodic elections yet it is equally important.

At the national level participation in development is a right, which is embedded in the right to participate in conduct of public affairs, which is provided for in most African constitutions, including the Ugandan Constitution as was discussed in Chapter three. The right to participate in the conduct of public affairs covers several areas including: elections; access to public service; cultural life; scientific advancement; education; health; environment; natural resources management; formulation and implementation of government policy; development and development planning and all activities of the community including at the national, regional and global level.

³⁷ Article 12.

³⁸ Articles 3 (7), 27, 29, 30, 31.

³⁹ Articles 2 (3) and 5.

⁴⁰ Article 16.

⁴¹ Article 102 (j) of the Treaty Establishing the EAC.

⁴² Article 121 (a) and 122 (a) of the Treaty Establishing the EAC.

⁴³ Article 127 (3) of the Treaty Establishing the EAC.

An analysis of the legal framework at the international, regional and national levels as highlighted above shows that the right to participate in development:

1. Is generally entrenched within the right to participate in the conduct of public affairs although it can also stand as a right on its own;
2. Is linked to civil and political rights such as the right to equality and non-discrimination; freedom of opinion and expression, right to peaceful assembly, freedom of association and access to information;
3. Is interrelated and interconnected to economic, social and cultural rights such as the rights to education, health, property, housing, food, water and a clean and healthy environment;
4. Is attendant to the rights of certain groups whose participation is required such as women, persons with disabilities, children, older persons, migrant workers, refugees, minorities, human rights defenders and indigenous people, among others;
5. Gives both State and Non-State actors' obligations to enforce it;

The content of the right to participate in development includes: free, active and meaningful contribution and involvement of the citizenry in decision making relating to development. Free refers to participation which is not imposed; active means that the process of participation is leading somewhere; and meaningful means that the participation is consequential to the goals of development. Participation can be through direct representation or through representatives. Notably, citizens cannot just choose whether to participate directly or through representatives as this is determined by law.

6.2.2 Status of the right to participate in development in Uganda

Participation in development has evolved and grown in Uganda over the years from the pre-colonial, colonial and post-independence periods. By and large participation in development seems to be increasing. Over time, there have been more opportunities for citizens to participate in development.

It is important to note that participation in development has been largely enhanced because of the legal, policy and institutional framework in Uganda. The bill of rights in the Constitution provides for the citizens a right to participate:

- a) in the affairs of government, individually or through representatives;⁴⁴
- b) in peaceful activities to influence the policies of government through civic organisations;⁴⁵
- c) by minorities in decision-making processes and for their views and interests to be taken into account;⁴⁶ and for
- d) minority participation in Parliament.⁴⁷

The Constitution further provides in relation to the right to participate in development:

1. for the involvement of the people in the formulation and implementation of development plans and programmes;⁴⁸
2. to encourage the active participation of all citizens at all levels in their own governance;⁴⁹
3. broad representation which reflects the national character and diversity;⁵⁰
4. that the State shall be guided by the principle of decentralisation and devolution of governmental functions and powers to the people at appropriate levels where they can best manage and direct their own affairs;⁵¹ and that
5. the State also recognises the role of CSOs and NGOs in managing and directing public affairs and in the promotion and protection of human rights.⁵²

The right to participate in development in Uganda is thus not only a right on its own but also part of the right to participate in the affairs of government⁵³ comprising the formulation and implementation of policies, plans and programmes including those relating to development⁵⁴ without exclusion. The law requires that in the formulation

44 Article 38 (1).

45 Article 38 (2).

46 Article 36.

47 Article 78 (1).

48 Article X of the National Objectives and Directive Principles of State Policy.

49 Article II (i) of the National Objectives and Directive Principles of State Policy.

50 Article II (iv) of the National Objectives and Directive Principles of State Policy.

51 Article II (iii) of the National Objectives and Directive Principles of State Policy.

52 Article II (v) and (vi) and Article V of the National Objectives and Directive Principles of State Policy.

53 Article 38.

54 See Article X of the National Objectives and Directive Principles of State Policy.

and implementation of national plans, special attention has to be paid to ensure that: all citizens are involved including women, persons with disabilities, children and youth, older persons and CSOs, among others.⁵⁵ However, the specific right to participate in development particularly the participation of the people in the formulation and implementation of development plans is particularly provided in the national objectives and directive principles of state policy.

Although the framework is far from perfect some milestones have been made. The study noted an improvement in the participation of women, CSOs and development partners in development. Despite the progress there are numerous challenges in relation to participation in development. There are still limitations in participation especially for individuals, children, persons with disability, IDPs, minorities, elderly persons and persons living with HIV and AIDS. Even with the decentralization efforts so far, there is still dissatisfaction by citizens about the level of democracy; the kind of representation made by their members of parliament; high levels of corruption; poor service delivery especially in terms of provision of social services such as education, health, food, water and housing, among others; the inequalities and regional imbalances in development; poverty; and the high youth unemployment rates.

6.2.3 Barriers and obstacles to the right to participate in development in Uganda

The study noted that people face barriers and obstacles to participate in development in Uganda. With specific regard to participation in development planning in Uganda, the study identified the barriers and obstacles as: the inadequacy of the law including its weak implementation due to inadequate resources; low capacity; corruption; and political constraints. The fact that the specific right to participate in the formulation and implementation of development plans is in the National Objectives and Directive Principles of State Policy puts it in a susceptible position and at the mercy of the interpretation of the justices of the courts. Other challenges include ignorance about rights and the lack of awareness on the processes for national development planning; poverty; limited timelines; limited space for civil society participation; negative cultural and traditional values; the lack of specific special measures to enhance the

⁵⁵ See Article II (i) and X of the National Objectives and Directive Principles of State Policy.

participation of vulnerable groups; disregard of input given; and violations of human rights which hinder citizen participation in development planning in Uganda.

6.2.4 Best Practices

Best practices were defined as those practices that can enhance participation in development that have been undertaken in other countries or have the potential to do so. The study specifically highlighted the following practices: comprehensive legislation; independent institutions such as national development planning authorities; national human rights institutions; civil society and the judiciary. Other practices identified include: the use of temporary special measures; media; human rights education; use of international and regional mechanisms; and development compacts.

The study notes that each of the practices identified cannot apply on their own. Some of the practices have not even been tested especially in terms of specifically promoting the right to participate in development. This is particularly with regard to use of the judiciary; specific temporary measures for participation in development particularly development planning and development compacts. Nevertheless, the identified practices have the potential to contribute and enhance the right to participate in development. Having considered these practices, specific recommendations are made below for enhancing participation in development in Uganda.

6.3 Conclusion

I conclude by asserting that participation in development is a right affirmed at the international, regional and national levels. Participation in development in Uganda has evolved and grown over the years from the pre-colonial period, colonial period and post-independence. By and large participation in development seems to be increasing. Over time, there have been more opportunities for citizens to participate in development. This is partly because of the current legal and policy framework which though far from perfect has enabled participation. The study has noted an improvement in the participation of women, civil society and development partners in development. Nevertheless, there are still limitations in participation especially for individuals through their elected representatives especially the members of

parliament, children, persons with disability, IDPs, minorities, elderly persons and persons living with HIV and AIDS, among others. Even though participation for women and civil society has improved over the years, there is need and room for further improvements.

The study identified barriers to participation as the inadequacy of the law including its weak implementation due to inadequate resources; low capacity; corruption; and political constraints. Other barriers and obstacles include ignorance about rights and lack of awareness on the processes for national development planning; poverty; limited timelines; limited space for civil society participation; cultural and traditional values; lack of special measures to enhance the participation of vulnerable groups, disregard of input given and violations of human rights.

The study specifically highlighted the following practices as some of the best practices to enhance participation in development: legislation; independent institutions including the judiciary, national development planning authorities, national human rights institutions and civil society; temporary special measures; media; human rights education; use of international and regional mechanisms; and development compacts.

The enjoyment of the right to participate in development is largely dependent on political will, democracy, respect for human rights, transparent and accountable government with strong institutions – parliament, judiciary, executive, ministries, departments and agencies of government including the National development planning authority complemented by independent civil society and national human rights institutions.⁵⁶ The right to participate in development is contingent on a government that is willing to implement participatory procedures in its development processes and is responsive to the needs and aspirations of its people.⁵⁷

⁵⁶ Also see Human Rights Council Resolution 18/6.

⁵⁷ Also, generally see the Report of the Special Rapporteur on the right to development (2017) A/HRC/36/49 available at: <https://undocs.org/en/A/HRC/36/49> (accessed 7 August 2018).

6.4 Recommendations

Having asserted that participation in development is a right and considering the situation in Uganda and of the emerging best practices, I make several recommendations on how to enhance the right to participate in development in Uganda. Recommendations are made in terms of legal, administrative and policy and strengthening institutional frameworks, among others. Other recommendations include: human rights education and use of media; strategic litigation and judicial activism and the use of regional and international mechanisms.

6.4.1 Legal, administrative and policy recommendations

In terms of the legal, administrative and policy the following proposals are made: legislation, resources, temporary special measures, use of local, cultural and traditional mechanisms and development compacts.

a) Legislation

The law provides for the right to participate in development. However, the nature and scope of this right or what it entails is not clear. There is a need to affirm the right to participate in development. This can be done by either amending the Constitution or amending current or enacting a new legislation that specifically provides for it.

Uganda's Constitution is very similar to that of Ghana in terms of provisions for participation in development which are framed as an objective of the State. If the Ugandan Constitution is to be amended, the examples in the Ethiopian Constitution which explicitly provides for the right to development and specifically also provide for the right to participate in development are recommended.

In order to avoid ambiguity and to clearly set criteria and parameters for participation, it is necessary for other legislation in particular the Local Government Act to be amended. The Local Government Act provides broadly for participation in decision making including development plan formulation without being specific on how it should be implemented. It would be important for the legislation to clarify the nature and scope of participation in development answering key questions of how participation in development is implemented, whether direct or representative, among other things.

As such there should be guidelines which provide: for the involvement of the people and ensure the equality of opportunity for various groups of people, including those who are often vulnerable to marginalisation and discrimination, to participate; ensure that the development processes are accessible to the public and provide timely information to participants. The guidelines would provide clear guidance on how and when representatives can participate on behalf of the people or how individuals can directly participate. Furthermore, they would have to provide for the procedures for participation including administrative remedies, besides judicial remedies, for those who feel that the procedure was not followed.

As mentioned earlier there is need to clarify the nature, scope, breadth, width, depth of this right which has to be enunciated as such beyond a national objective and directive principle. Article 8A of the Constitution provides that: Uganda shall be governed based on principles of national interest and common good enshrined in the national objectives and directive principles of state policy which provide for the right to participate in development including in the formulation and implementation of development plans.⁵⁸ Furthermore, the provision requires Parliament to make relevant laws for that purpose. It is vital that the Parliament is supported to draft a law that enhances the right to participate in development in Uganda. Such law should be enacted in a participatory manner and should be able to be enforced by the judiciary whose role is to interpret the law and provide redress to victims of violations. The various ministries, departments and agencies of government are key in the enforcement of the right to participate in development, especially the ministry of finance, planning and economic development.

Nevertheless, as mentioned earlier legislation is not enough. The legal and policy framework combined with other factors is what enhances participation in development. It is thus important to have political will and respect for the rule of law which are also still a challenge in Uganda. In general, apart from legislation, it is also necessary to work towards increasing the political will to enhancing participation in development and strengthening the respect for rule of law in Uganda, among other things which are discussed below.

⁵⁸ See Article 8A of the 1995 Constitution of the Republic of Uganda as amended.

b) Commitment of resources towards participation in development

Participation in development is not easy or cheap and requires adequate resources. In order to enhance participation in development, it will be necessary to reinforce or buoy the law with the appropriate and requisite capacity of human, technical, financial and infrastructural resources for its enforcement. Moreover, in relation to the managing of resources, it is important to prevent corruption so that the decentralization process may not only promote efficient service delivery but also citizen participation and empowerment simultaneously.

c) Temporary special measures

Temporary special measures are needed to bring disadvantaged or marginalised persons or groups of persons to the same level of participation in development as others. It is recommended that government specifically takes measures in favour of women and other marginalised groups such as persons with disability, among others, in order to prevent their discrimination in development planning processes. The government should therefore have specific quotas required for the development planning processes during the consultative meetings so as to increase the participation of any vulnerable groups who are usually left out of the development process, separate from the already existing quota system in Parliament. As has been pointed out by the CEDAW Committee, government policy cannot be comprehensive and effective when women are not widely represented in key decision-making positions or where they are not sufficiently consulted. As such temporary special measure are necessary to ensure the participation of women and other vulnerable groups.

d) Use of local, cultural and traditional mechanisms

It is important to enhance participation using methods that are home grown. According to the World Bank Study: development projects which have strong adaptability to the local context are the ones that function well.⁵⁹ Similarly participation methods that fit within the local context which have due regard to the traditions, cultures, religions and the situation of the communities in terms of history, geography, existing inequalities,

⁵⁹ See The World Bank, G Mansuri and V Rao 'Localizing Development: Does Participation Work?' (2014) 12.

the way people relate and have social interactions and the political, social and economic environment are likely to be more successful.⁶⁰ There is no one size fits all and those engaged in implementing the right to participate in development in Uganda need to be sensitive and adaptable to the local context within which they operate.

e) Development compacts

The use of development compacts can be done in cooperation with development partners. Uganda could design and implement the national development plans using the human rights-based approach, including increased participation by civil society and domestication of international human rights instruments. Furthermore, there is need to equip the relevant institutions such as the Ministry of Finance, Planning and Economic Development, NPA and the local government to implement the human rights based approach. The NHRIs such as the UHRC and the EOC can be used to monitor and make recommendations, as they already do, which should be followed up with action. Then a community of development partners who are willing to support Uganda in this process can scrutinise, review and agree on the priorities and find avenues for financing and sharing of responsibilities for specific outcomes for the national development plans. This is not so different from the current arrangement but this would be more formal with definite and concrete development goals which include participatory development processes so as to enhance the right to development and the right to participate in development. However, the operation of a development compact is yet to be adequately tested and proven. Nevertheless, it needs to be given serious consideration as it has some potential to lead to a politically acceptable solution in promoting the right to development including the right to participate in development. It is not really far-fetched to suggest it for Uganda as the development partners have always played an important role in the development process including financing the participation of civil society and the implementation of the national development plans.

⁶⁰ Also see the World Bank (n 59 above).

f) Strengthening institutional frameworks for participation in development

Recommendations are also made for strengthening institutional frameworks for participation in development including strengthening key institutions with the mandate to promote the right to participate in development and capacity building for CSOs. In general the executive, legislature and judiciary play an important role in protecting the right to participate in development. The Executive is responsible for providing guidance through policies for the administration of government. By and large the Executive has provided that to some extent. However, the executive can do more to ensure that the right is respected. The role of the legislature is to enact laws and have oversight over the executive. While that of the judiciary is to interpret the law and provide a remedy where necessary. Capacity to enhance participation in development is necessary at all levels by the executive, legislature and the judiciary and in all ministries, departments and agencies of government. However, special efforts have to be made for the NPA, UHRC and the EOC.

I. National Planning Authority

The NPA by the nature of its mandate plays an important role in promoting the right to participate in development. Like most government institutions, the NPA is affected and limited by resources. The Authority needs adequate resources, both human, technical and financial to fulfil its mandate. Resources are needed to: raise awareness to enhance public understanding and participation in development; and to identify and produce comprehensive integrated development plans in an inclusive and participatory manner. Furthermore, it would be necessary to support the NPA by training officials and equipping them with the interpersonal skills needed for participatory engagement while formulating national development plans so that they are able to facilitate inclusive participatory processes.

II. Uganda Human Rights Commission

The capacity of the UHRC should be built in terms of provision of resources including technical, financial and infrastructural resources so as to effectively enhance the awareness of rights and duties of citizens and to protect their rights without hindrances. Citizen awareness of their rights enriches their participation in

development. This is because awareness-raising on rights and duties would also include information on the cycle for development planning so that the citizens can fit in within the limited timelines to provide their input on national development. Apart from raising awareness on rights and the right to participate in development, the UHRC can do more. The UHRC should investigate violations relating to the right to participate in development. It should also monitor and document the status of implementation of the right to participate in development. The status of the right to participate in development should be reflected in the UHRC reports with appropriate recommendations on how to fulfil the right to the various stakeholders.

III. Equal Opportunities Commission

It is also crucial to bolster the work of EOC, as was suggested for the UHRC in terms of capacity building and provision of resources including technical, financial and infrastructural resources so as to effectively enhance equal opportunities for all in development, among other things. The EOC so far has an office in Kampala and no regional offices spread out all over the country making it difficult for the citizenry to access their services. It would be important that it is supported so that its services can reach people at the grassroots levels. Moreover, it is important for the EOC to investigate whether there is equality of opportunity particularly for participation in development by all citizens. Furthermore, the EOC should also monitor and document the situation of equal opportunities particularly in terms of participation in development especially of the historically marginalised groups and make proposals on how to improve the situation.

IV. Capacity building for civil society

Apart from enhancing citizen participation in development through raising awareness of rights and duties of citizens, it will be necessary to build the capacity of the civil society to constructively engage and effectively advocate and lobby for their input to be adopted in the development plans. It is particularly important to build the capacity of CSOs engaged in governance issues to effectively advocate and influence the process and the formulation of national development programmes including monitoring their implementation.

CSOs need to be equipped to participate beyond the ‘invited spaces’ and be able to open up ‘closed spaces’ and preserve the already ‘claimed and created spaces.’ It is important for them to use organic strategies to press the State for accountability. Civil society need capacity to effectively operate within the current political and legislative environment that is not necessarily perfect, to claim spaces for dialogue to impact the government on development issues. It is essential to increase the levels of awareness on the right to participate in development so that civil society can effectively engage government for its implementation. High levels of awareness of the right to participate in development among grass-roots organisations would strongly boost advocacy efforts.

CSOs should also be strengthened so that they are more open for multi-stakeholder processes and actively identify opportunities for and demand meaningful participation at the local, national, regional, and international level. There is need for strong and broad coalitions among CSOs with the capacity to gather and analyse information necessary for national development that is empirical so that they gain respect by government and development partners and also claim their space to participate in development. The existence of strong civil CSOs is fundamental for enhancing participation in development. A strong and diverse civil society fosters a respect for human rights and dignity of the citizenry as it enables people to express various views and helps to build the confidence of the citizenry to engage and interact with the government.

6.4.2 Other Recommendations

Other recommendations include: human rights education and use of media; strategic litigation and judicial activism and the use of regional and international mechanisms.

a) Human rights education and use of media

As discussed earlier, it is important for the citizenry to know what their rights are. They need to know what does the right entail. How can they exercise it? What can they do when it is violated? How can they promote it? The government needs to invest in human rights education in order to increase participation and ownership of development processes by the citizenry. Most Ugandans can access radios and

indeed many government officials and CSOs use radios as a form of communication to the public. Radio programmes, among other media including social media, can be used to provide information on the development planning process including dates of consultation and issues to be considered, among other things. Moreover, the media can also be used to mobilize people to attend the meetings and to contribute their views. Furthermore, the media can report and give feedback on the development planning process which governments can use to improve the process.

b) Strategic litigation and judicial activism

Strategic litigation refers to taking on a legal case by an organisation or individual as part of a wider strategy to achieve a broader systemic change, in this particular study in reference to enhancing participation in development. Such a case may create change through the success of the suit and its effect on law, policy or practice or by publicly exposing human rights violations, exposing injustice raising awareness and bringing about change. Strategic litigation is often used as one part of a wider campaign and not on its own as an end in itself. In the case of Uganda, it may be necessary to pick up an issue for litigation for violation of the right to participate in development. Litigation can be based on violation of the right including: limited access to information on the processes for national development planning; limited timelines for consultations; limited space for civil society participation; lack of special measures to enhance the participation of vulnerable groups; and disregard of input given, among other things. This may bring about the desired change on law, policy or practice by setting an important legal precedent. Moreover, the effects of the case including media coverage and exposing the issue as matter of public concern can significantly help even if the suit fails. However, litigation is costly and takes a lot of time in Uganda with the heavy case backlog. Nevertheless, it is a worth a try.

It may also be necessary to use judicial activism to enhance participation in development in Uganda.⁶¹ Judges in our courts should and can be moved by lawyers including through public interest or strategic litigation to enforce participation in development as a right including for vulnerable and marginalised groups. Although the

⁶¹ See C Mbazira 'Public interest litigation and judicial activism in Uganda: Improving the enforcement of economic, social and cultural rights' *Human Rights and Peace Centre Working Paper No. 24* (February 2009).

benefits of judicial activism may be limited depending on the prevailing circumstances in the country, the use of judicial power to articulate and enforce what is beneficial for the society in general and people at large should be encouraged.

c) Use of the regional and international human rights bodies

The right to participate in development has already been highlighted by the African Commission. In the event that the right is not being sufficiently addressed at the national level and where local remedies have been exhausted, an individual communication can be brought before the African Commission or Court and other international bodies.

Apart from the African Court and African Commission, other international bodies could receive a complaint relating to violation of the right to participate in development in Uganda such as the Human Rights Committee which oversees the implementation of the ICCPR. Uganda has accepted the jurisdiction of the Human Rights Committee to receive and consider communications from individuals who claim to be victims of a violation.

Moreover, the special procedures, UPR and the Human Rights Council can be used to promote the right to participate in development. The UPR was already used to raise issues relating to women's participation in development in Uganda. There is also an opportunity provided in accordance with Article 22 of the ICESCR for Uganda to identify in its reports any particular needs it has for technical assistance or development cooperation and this can be geared towards enhancement of the right to participate in development particularly development planning.⁶² Uganda could benefit from inviting the Special Rapporteur on the Right to Development who can assess the situation and make recommendations on how to improve the situation in terms of the right to development and the right to participate in development in particular. Depending on how serious the issue of participation in development is, the matter can also be taken to the Human Rights Council.

⁶² See Para 10 of *General comment No. 2: International technical assistance measures (art. 22 of the Covenant)*.

6.5 Final remarks

Although participation in development is a right in Uganda, the practice indicates that it is a privilege. It will take a lot of efforts to make the right to participate in development a reality. It is important to keep a tab on this right to further determine and define the scope of this right and how best it can be implemented. Further research may be necessary to determine the extent to which the right to participate in development is affected by the developments at the global and regional levels.

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