

Partakers or Spectators? An Analysis of Civil Society Participation in the Formulation of Environmental Policy and Legislation in Uganda

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DECLARATION

I, Adda Kaone Angula, do hereby declare that this research is my original work and that to the best of my knowledge and belief, it has not previously, in its entirety or in part, been submitted to any other university for a degree or diploma. Other works cited or referred to are accordingly acknowledged.

Signed:

Date:

This dissertation has been submitted for examination with my approval as University Supervisor.

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Date:.....

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My love, you got me through this.

Dedication

For Priscilla Angula, the princess; my sunshine and inspiration

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Table of Abbreviations

ACHPR	African Charter on Human and Peoples' Rights
ACODE	Advocates Coalition for Development and Environment
CBO	Community Based Organisations
CSO	Civil Society Organisations
ICNL	International Centre for Not-for-Profit Law
NEMA	National Environmental Management Authority
NGO	Non-Governmental Organisation
NORAD	Norwegian Agency for Aid and Development
PEAP	Poverty Eradication Action Plan
PRSP	Poverty Reduction Strategy Papers
UN	United Nations

Chapter 1: Introduction

1.1 Background

The growing interest in civil society academic discourse in relation to Africa's democratisation process has been in reaction to pervasive state weakness and authoritarianism throughout the continent.¹ Hence an autonomous civil society is seen as a safeguard against undemocratic state power and its participatory role is seen as providing a basis for the limitation of state power by society.² Even in a democratic state, civil society's participation in governance is considered essential as it provides a means for individuals and groups to 'mitigate majoritarianism for marginal groups that are not otherwise able to win sufficient backing to see their values reflected in the policies and laws of the state'.³ For these groups civic organisations offer a way in which they can peacefully pursue their interest and goals without being suppressed by the wishes of the majority.⁴

At the same time current developments in Africa, such as the increasing tendency to discourage direct government involvement in economic activities and instead support and encourage private investments to boost economic growth, have turned attention to and shifted the burden onto civil society as the new custodian and protector of human rights, not least environmental rights.⁵ This approach of many states, combined with their limited ability *or willingness*⁶ to monitor the environmental impacts of private activity, make it critical for civil society to play a greater role in environmental management.⁷ Therefore, whereas before governments and businesses had the monopoly on environmental decision-

¹ J A Okuku 'Civil society and the democratization processes in Kenya and Uganda: A comparative analysis of the contribution of the Church and NGOs' (2003) 30(1) *Politikon* 51

² F Golooba-Mutebi 'Reassessing Popular Participation in Uganda' (2004) 24 *Public Administration and Development* 290

³ Golooba-Mutebi (n2 above) 290

⁴ 'Guidelines for Laws Affecting Civic Organisations' Open Society Institute 2nd Ed 2004

http://www.soros.org/resources/articles_publications/publications/lawguide_20040215/osi_lawguide.pdf (accessed 25 August 2008)

⁵ World Resources 2002-2004: Decisions for the Earth: Balance, voice and power Chapter 4 Awakening civil society www.wri.org/pubs/pubs_pdf.cfm?PubID=3764 (accessed 15 September 2008)

⁶ My emphasis

⁷ C Odote & MO Makoloo 'African initiatives for public participation in environmental management' in C Bruch 2002 *New Public* 121

making, recently civil society has emerged as a third force, participating in decisions about the environment and development.⁸

However, as commentators have previously stated, it is not enough to simply juxtapose participation with top down democracy.⁹ Claims of participation's benefits must be guided in evidence and theoretically informed argument, rather than in opposition to previously dominant models.¹⁰ Well time and again in numerous cases it has been shown that public participation enhances community ownership of decisions and outcomes because of the community being part of the wider decision-making process, and that stakeholder engagement has resulted in partnerships or alliances between interested parties and local government, and that public confidence in the reviewers and decision-makers is enhanced when citizens see that their issues have been fully and carefully considered.¹¹ In Uganda two often cited and often lauded examples have justifiably been pointed out as evidence of the success and value in civil society participation in the policy and law making process. One such example is the Poverty Eradication Action Plan (PEAP) and Poverty Reduction Strategy Papers processes.¹² The PEAP is Uganda's comprehensive development framework and all policies after 1997 are linked to this plan.¹³ Both were highly consultative with extensive collaboration with government. Another celebrated example is the constitution making process in which, among many others, the initiative of one civil society organisation's program kept the electorate, with a special focus on women, connected to the Constituent Assembly delegates as the draft constitution was being debated.¹⁴ As a result,

⁸ World Resources: Awakening Civil society (n 5 above) 1

⁹ S Hickey & G Mohan *Participation: From tyranny to transformation* (2005) 4

¹⁰ S Hickey & G Mohan (n 9 above) 4

¹¹ C Schwarte 'Access to environmental information in Uganda Forestry and oil production' 2008

http://www.field.org.uk/PDF/FIELD_Access_Uganda.pdf (accessed 14 September 2008)

¹² The Parliamentary Commission Parliament of Uganda. Report of the National Policy Inventory Bank (2003) 5, Norwegian Agency for Development Cooperation 'Report of a study on the civil society in Uganda for the Royal Norwegian Embassy in Uganda' (2002)

<http://www.norad.no/items/1029/38/2057014607/UGA%20civsociety%20report.doc> (accessed 14 August

2008), CIVICUS Civil Society Index Report for Uganda 'Civil Society in Uganda: At a crossroads?' (2006) 38

http://www.akdn.org/publications/civil_society_uganda_crossroads.pdf (accessed 18 August 2008), DENIVA 'Participation in Uganda's Development Processes. What mechanisms are in place?'

http://www.deniva.or.ug/files/programme-governance_APRM_reports.doc (accessed 15 September 2008),

and Mukasa, et al 'Civil society participation evaluation - Uganda country report' (2003-2006) CFP Evaluation Series No 4 all cite the PEAP/PRSP process as the best example of participation in policy making in Uganda.

¹³ Report of the National Policy Inventory Bank (n 12 above) 5

¹⁴ ACFODE Link Programme see Mukasa (n 12 above) 43

many women were able to articulate their issues for incorporation in the Constitution. Today Uganda's constitution is lauded as one of the most gender sensitive, next only to that of South Africa.¹⁵ The Uganda Land Alliance has greatly contributed to the Land Act 1998 and Land Policy and ensured the protection of tenant's rights at a time when the state was more interested in the granting of investor incentives, than the impacts of development on the land and land rights of tenants.¹⁶ Their input assured the redress of land rights of the poor and the right of access to land for vulnerable and disadvantaged groups and individuals, especially women.¹⁷

The relationship between democratization and environmental management is evident. The protection and realization of environmental rights and the effective management of the environment depend on the power that democracies give to citizens to affect decision-making processes and hold government officials, corporate authorities, and other individuals accountable.¹⁸ Furthermore, democratic freedoms encourage access to information, such as planning documents, budgets, reports on local environmental conditions, or pollution records that can help citizens protect their environmental interests.¹⁹ The more citizens are able to know about the environment, to express their opinions, and to hold their leaders accountable for their performance, the more likely it is that they will be able to prevent gross environmental mismanagement.²⁰ Therefore the extent to which the state creates space and mechanisms for participation is an important factor in determining the participatory role civil society can play.

Environmental rights are third generation rights beneficial to human life and well-being that belong to members of existing and future generations. They concern the state of the environment; the relation and interaction between people and their environment; as well as

¹⁵ Mukasa (n 12 above) 43

¹⁶ OO Kanyangareng 'The Uganda Land Alliance: Experience in the struggle for land rights in Uganda' (2005) 4

¹⁷ MO Odhiambo 'Advocating for land policy reforms in Kenya, Uganda and Tanzania: NGO lessons and prospects' (2002) 2

¹⁸ World Resources 2002-2004: Decisions for the Earth: Balance, voice and power Chapter 4 Environmental governance today 32 www.wri.org/pubs/pubs_pdf.cfm?PubID=3764 (accessed 15 September 2008)

¹⁹ World Resources: Environmental governance today (n 18 above) 32

²⁰ World Resources: Environmental governance today (n 18 above) 29

the dependency of human life on the natural resource base.²¹ The African Charter on Human and Peoples Rights article 24 provides that all people shall have the right to a general satisfactory environment favourable to their development. The Ugandan Constitution lays the foundation for all laws concerning the environment under the National Objectives and Directive Principles for State Policy article XXVII which provide the foundation for the protection of the environment in Uganda. It is provided, inter alia, that the state shall promote sustainable development and management of air lands and water resources in a sustainable manner for present and future generations. The National Environmental Policy 1995 sets the broad policy framework for the protection of the environment.

The significance of participation in environmental decision making has been recognised for some time now. Internationally, the United Nations Conference on Environment and Development²² recognised that in order for environmental governance to be successful the active involvement and participation of citizens and non-state actors was required. Regionally, a Memorandum of understanding between the Republic of Kenya, the United Republic of Tanzania and the Republic of Uganda for Cooperation on Environmental Management 1998 contains provisions guaranteeing public participation. In Uganda the Constitution provides that “every Ugandan has a right to participate in peaceful activities to influence the policies of Government through civic organizations”.²³

Environmental issues are many and far-reaching, and this evaluation does not seek to address the entire scope of the subject and the environmental problems affecting Uganda. Rather it intends to study civil society’s participation in environmental law and policy making in different instances relating to environmental management – ranging from exploitation of natural resources to concerns around pollution and environmental

²¹ A Du Plessis ‘Public participation, good environmental governance and fulfillment of environmental rights’ PER 2008(2)

http://www.puk.ac.za/opencms/export/PUK/html/fakulteite/regte/per/issuepages/2008Volume2/2008x2x_6a_Du_Plessis_art.pdf (accessed 14 September)

²² 1992

²³ Article 38(2)

degradation. The paper documents instances of civil society participation in environmental policy and law making, and explores the role played by civil society in these instances.

1.2 Problem statement

Civil society participation in the policy and law making process is necessary in environmental management as it ensures the consideration and inclusion of the views of those affected by decisions made by the state. Despite the recognition of the importance of participation, it is not clear what role CSOs in Uganda have actually played in the formulation of environmental policies and laws. The aim of this research therefore is to analyse the participatory role played by CSOs in these processes.

1.3 The Research Questions

- a) What are the legal and institutional mechanisms available for civil society participation?
- b) What role has civil society played in the environmental policy and law formulation process?
- c) What are the legal, political, and social factors which promote or inhibit participation?

1.4 The Study Objectives

- a) To assess the law and policy regulating civil society activity.
- b) To critique the legal and institutional mechanisms for civil society participation in environmental policy and law making.
- c) To analyse the role played by civil society in the formulation of environmental policy and law.
- d) To identify the legal, political, and social factors influencing or affecting civil society participation.

1.5 Scope of the study

The study is conducted around the conceptual framework of participation in environmental management as a part of the broader notion of participatory governance as a necessary element for the consolidation of democracy. It studies the role of civil society actors working

in the area of environmental rights and protection in the formulation of environmental policy and law. The study will not extensively deal with the meaning of civil society and participation save to define these terms and put them in context. The time frame is from the advent of the Constitution and National Environmental Management Act both enacted in 1995 which provide the overall legal framework for environmental policy and law and for participation in its formulation.

1.6 Significance of the Study

The need for civil society organisation's inclusion in environmental decision making is acknowledged by the state. However how they actually participate in the formulation of state policy and law has yet to be assessed. Furthermore environmental issues are increasingly becoming topical, especially with regard to concerns about the exploitation of natural resources, and the impact of international trade and foreign investment on the environment.

1.7 Methodology

The study is primarily based on desktop research which is mainly a review of the literature. Various secondary sources were consulted, including written publications, laws and policies around civil society organization and participation. Libraries and different websites of government institutions, ministries and civil society organisations were visited for a range of published material, official documents, national constitutions, legislation and newspaper reports.

The research also incorporates interviews with civil society actors, parliament and state officials. The informants chosen for the study were all concerned with environmental issues. The information from the interviews is secondary and is intended only to illustrate the participatory role of civil society. This method was adopted to provide a sense of the experiences lived by specific actors in concrete situations. It is not intended to provide generalised conclusion about the state of all civil society organisations.

In selecting the organisations to be interviewed, a purposive sampling technique was used, where civil society organisations were consciously selected. On this basis, organisations that are easily accessible and have documented information were approached to be informants for the study. From the state, key informants were identified. These were people from government and parliament occupying strategic positions and who in one way or another are involved either with governance and/or environmental issues.

1.8 Limitations

Due to time limitations the study cannot be an extensive investigation into the participation of all civil society organisations thus only select organisations were interviewed to illustrate experiences and challenges faced by civil society in engaging the state. Civil society organisations in Uganda are broad ranging and dispersed all over the country, however, only Kampala based and so called elite organisations were interviewed, this due to no other reasons than convenience and time constraints.

1.9 Literature Review

Surveyed literature on Uganda presents predominantly a view of civil society as a collaborator with the state in the provision of services. One of the reasons given for this is that due to long years of authoritarianism and repression, dating back to colonial and postcolonial experiences, civil society tends to take a non-confrontational stance with the state.²⁴ In 2002 a study by the Norwegian Agency for Development Cooperation noted a growing trend of government involving CSO's in processes of policy formulation and implementation.²⁵ However the CIVICUS Civil Society Index Report for Uganda still found civil society to be more involved in social empowerment rather than policy advocacy work.²⁶ Friedman and Robinson, writing on civil society in South Africa, Uganda and Ghana, have said that despite there being an unquestioned assumption that CSO's are able to play an important role in strengthening democracy little is known about their

²⁴ See J A Okuku (n 1 above) 51 ; J Makumbe *Is there a civil society in Africa* (1998) 17;

F Golooba-Mutebi (n 2 above) 290 ; MW Katusiimeh 'Civil Society Organisations and Democratic Consolidation in Uganda' (2004) 7 *African Journal of International Affairs* 104

²⁵ NORAD 'Report of a study on the civil society in Uganda for the Royal Norwegian Embassy in Uganda' (n 12 above)

²⁶ CIVICUS Civil Society Index Report for Uganda (n 12 above) 38

effectiveness and impact.²⁷ This study will try to address this gap by assessing how civil society actually contributes to the policy formulation process.

1.10 Chapter overview

Chapter 1 Provides an introduction and background to the study.

Chapter 2 Outlines the conceptual framework around which the study will be conducted. It also provides a historical overview of civil society and provides a description of the current relationship between civil society and the state.

Chapter 3 Discusses the law and policy regulating civil society activity. It further discusses and analyse the legal and policy framework for civil society participation in the formulation of environmental policy and law and determines whether it hinders or advances participation.

Chapter 4 Describes the role played by civil society participation in the formulation of policy and law affecting the environment. It will rely on case studies as a basis for analysis.

Chapter 5 The responses from the interviews and the literature will be integrated here to determine the factors and challenges affecting civil society participation. Chapter 5 concludes the paper by making some concluding observations and providing recommendations.

²⁷ M Robinson and S Friedman 'Civil society, Democratisation and Foreign Aid in Africa' Institute for Development Studies Discussion Paper 383 April 2005 10 <http://www.ids.ac.uk/ids/bookshop/dp/dp383.pdf> (accessed 18 August 2008)

Chapter 2: Civil society, the environment and participation in environmental management.

2.1 Conceptual framework: Civil society, the environment and participation

The framework around which the discussion of civil society participation will take place is outlined below. The concepts of civil society, participation in the policy and law making process and the environmental issues which are addressed by CSOs today will be discussed with a view to setting the scene against which the analysis will take place.

2.2 What is civil society?

All the literature on civil society commence with the difficulty of defining the term. Nevertheless, a general understanding of the term has been reached, notwithstanding some variations depending on the writer. This section will define civil society for the purposes of this study by borrowing from the various literature to arrive at a general definition.

Civil society has been defined as the space that the citizenry has carved for itself to enable it learn more about their rights and how to exercise them at the private, personal and familial level so as to be politically-conscious at the community or national level and thus be in a position to protect their interests, make claims and contribute to general community development.²⁸ Sachikonye defines it as ‘an aggregate of institutions whose members are engaged in a complex of non-state activities – economic cultural, production, voluntary associations, household life- who in this way preserve and transform their reality by exercising all sorts of pressures or controls upon state institutions.’²⁹ They relate to the state in a way not seeking to control it but rather to obtain from it concessions, benefits, policy changes, relief redress or accountability.³⁰

²⁸ Kwadwo Appiagyei-Atua ‘Civil Society, Human Rights and Development in Africa. A critical analysis’ <http://www.peacestudiesjournal.org.uk/docs/Civil.pdf> (accessed 12 September 2008)

²⁹ LM Sachikonye ‘Democracy, Civil Society and Social Movements an Analytical Framework’, in L.M.Sachikonye (ed.) *Democracy, Civil Society and the State: Social Movements in Southern Africa* quoted in Okuku (n1 above) 51

³⁰ MI Camerer ‘Civil society, state and democracy’ PHD Thesis, University of Stellenbosch

Thus civil society is often defined in relation to the state and as operating in opposition to the state. However it should not (and it is not) taken for granted that civil society is uniformly progressive in challenging authoritarianism and advancing democratisation or that it is naturally virtuous.³¹ However the focus here is on those civil society organisations that are involved in the advancement of democratisation and which rely on participation mechanisms to do so. I am in agreement with Kasfir when he says that any conception of civil society and its contribution to the democratisation process in Africa must take note of the interconnectedness between civil society and the state as well as its limitations in causing authoritarian states to become more democratic.³² This caveat has been noted, and part of the studies objectives is to investigate this relationship between the state and civil society and the inevitable limits to participation in Uganda.

In order for civil society to be part of and contribute to the democratisation process it has to function according to democratic values itself. Whatever the specific goals and interests of different associations are they will in some way contribute to democracy if in their own affairs they govern themselves democratically that is, follow the democratic norms of participation, tolerance, cooperation, accountability, openness and trust.³³ In Kazemi's view only a democratic civil society can sustain a democratic state.³⁴ According to him the 'civility that makes democratic politics possible can only be learned in the associational networks; the roughly equal and widely dispersed capabilities that sustain the networks have to be fostered by the democratic state'³⁵

Civil society is believed to be sufficiently democratic when citizens recognise themselves as authoritative and responsible participants in at least some of its parts.³⁶ Thus, a democratic civil society is one controlled by its members. Makumbe writing on NGOs specifically as members of civil society, states that an organisation that does not empower its members,

³¹ Okuku (n1 above) 3

³² N. Kasfir 'Civil Society, the State and Democracy in Africa', (1998) 36(2) *The Journal of Commonwealth and Comparative Politics* 142 quoted in Okuku (n1 above) 4

³³ Camerer (n 30 above) 59

³⁴ F Kazemi 'Perspectives on Islam and Civil Society' in Rosenblum, Nancy L and Robert C Post *Civil Society and Governance* t2002 319 quoted in E Obadare 'The alternative genealogy of civil society and its implications for Africa: Notes for research' (2004) 24 *Africa Development* 14

³⁵ Kazemi quoted in Obadare 14 (n 34 above) 319

³⁶ Camerer (n 30 above) 58

even though it may pluralize civil society merely by its own existence does naught for democratisation.³⁷

David Lewis writes that civil society is seen not only about associational life, but it is also about individuals and associations which take parting wider rule-setting activities.³⁸ Hence civil society's activities may take the form of behaviour modification, information gathering,³⁹ educating and implementation of programs and provision of services.⁴⁰ In many budget-strapped nations, CSOs, and more particularly NGOs, are the institutions most capable of implementing environment and development programs.⁴¹

Accordingly, civil society for the purposes of this study, is the array of organisations operating with the intent to promote the needs and views of a particular group, distinct or indistinct, and which are neither part of the state machinery nor part of the business sector; and which carry out a number of activities including advocacy, policy research and civic education as a means of demanding accountability, relief or benefits from the state.

2.3 Historical development of civil society and its relationship with the state

The idea of civil society emerged in the late seventeenth century and eighteenth century Europe as a result of a 'crisis in social order and a breakdown of existing paradigms of the idea of order.'⁴² At that time Europe was undergoing rapid industrialisation. This developing economy of market relations challenged social existence by creating, for example, the highly autonomous social actor.⁴³ This in turn produced greater emphasis on community and the reestablishment of some public space to mediate the adverse effects of

³⁷ J Makumbe (n 24 above) 17

³⁸ D Lewis 'Civil Society in Africa: Reflections on the usefulness of a concept' (2002) 33(4) *Development and Change* 581

³⁹ B H Hutter 'The role of non-state actors in regulation' Economic and Social Research Council Discussion paper no 37 April 2006 The London School of Economics and Political Science
<http://www.lse.ac.uk/collections/CARR/pdf/DPs/Disspaper37.pdf> (accessed 31 August 2008)

⁴⁰ Awakening civil society (n 5 above) 7

⁴¹ Awakening civil society (n 5 above) 7

⁴² A Seligman *The Idea of Civil Society* 1992 14 quoted in Obadare 'The alternative genealogy of civil society and its implication for Africa: Notes for research' (2004) 24 *Africa Development* 5

⁴³ Seligman (n 42 above)

individualism.⁴⁴ In contrast, according to Makumbe, the experience of African civil society is largely focussed on the peoples struggle against despotic rulers, repressive regimes and governments that violated both their individual and collective rights. He contends that 'tyranny has produced the massive social contradictions from which have sprung isolated rebellions, collective actions and civil society'.⁴⁵ Colonial regimes actively discouraged the formation of civic groups which could have participated in political process unless they were those of settlers and colonists. Africans responded to this by creating seemingly apolitical organisations such as burial societies. Over time these 'innocent' organisations became crucial for the expression of the political demands of the oppressed colonised people.⁴⁶ So successful was this approach in fulfilling civic needs of the colonised Africans that in some countries, soon after the attainment of national independence, the new government sought to control these civic groups through legislation, registration and various other measures which would enable the regime to know what was going on in these organisations.⁴⁷ Thus, generally, the cyclical tendency in Africa has been that before the end of the colonial era, governments in place had confrontational relationships with civil society organisations while after the end of the colonial era, governments usually started with cordial collaborative relationships with civil society up to a point; that point being either when the state's governance and service delivery capacity/confidence was reaching its peak or when the state's governance and service delivery capacity/confidence was on a downward spiral.⁴⁸

According to Makumbe, the growing presence of civil society and in particularly NGOs in all sectors of development and their overtaking of states in some instances due to the states decreasing capacity has put the two on a collision course.⁴⁹ CSO activities that overshadow the state tend to be viewed as direct challenges to the imperatives of statehood, that is, territorial hegemony, security, autonomy, legitimacy and revenue.⁵⁰ Governments are

⁴⁴ E Obadare 'The alternative genealogy of civil society and its implications for Africa: Notes for research' (2004) 24 *Africa Development* 6

⁴⁵ Makumbe (n 24 above) 2

⁴⁶ Makumbe (n 24 above) 2

⁴⁷ Makumbe (n 24 above) 2

⁴⁸ 'Situation Assessment of participation of civil society in environmental assessment in Southern Africa' SAEIA December 2003 <http://www.saiea.com/html/dsa.pdf> (accessed 15 September 2008) 10

⁴⁹ Makumbe (n 24 above) 21

⁵⁰ Makumbe (n 24 above) 21

concerned about the growth of CSOs (and in particular NGOs) activities on two counts: one they constitute a network of resourceful organizations that are growing more autonomous of the state, two because they have the potential to change the state-society relations in the grassroots community they work in. In addition, states see CSOs as their competitors for aid, as more often now donors prefer to provide aid to these organisations instead of to states.⁵¹ The ensuing jealousy has led to government trying to control civil society and their resources in the name of preserving national sovereignty.⁵²

According to Celestine Monga, the states apprehension of civil society is not entirely unwarranted. 'The structures of civil society are particularly amenable to leaders who adopt slogans in line with populist illusions'.⁵³ The misery suffered by ordinary citizens tends to increase societies receptiveness to dangerous ideas.⁵⁴ Thus a threat is posed to the future stability and viability of each African state by the potential of an emergence of an ill-defined civil society.⁵⁵ He addresses this threat by proposing that civil operate in a framework of transparent rules, with an emphasis on cooperation, bargaining and accommodation. He notes disturbing developments in the rediscovery of civil society in Africa, two of which have caught my attention. One is the role of international NGOs in politics and the need to be awake to the fact that some may have hidden agendas. A second one is the using of civil society to engage in subtle strategies of political entrepreneurship. Because political parties are increasingly mistrusted by the public many 'mysterious' organisations have been created by people who are really running for office.⁵⁶

Monga put forward recommendations to avoid civil society becoming a threat to state stability: he proposes the building of links among social groups and across countries to connect people with similar concerns; he suggests the representation of influential socio-political organisations in parliament; and stresses the need to improve the bond between

⁵¹ Makumbe (n 24 above) 21

⁵² Makumbe (n 24 above) 21

⁵³ Monga *The anthropology of anger: Civil society and democracy in Africa* (1998) 154

⁵⁴ Monga (n 53 above) 154

⁵⁵ Monga (n 53 above) 154

⁵⁶ Monga (n 53 above) 155

civil society and the state. He proposes that all mechanisms and institutions should be dedicated to the best possible regulation of relations between the state and society.⁵⁷

CSOs and particularly NGOs in Uganda are relatively young organizations and most were founded after the National Resistance Movement (NRM) regime came into power in 1986. Under colonialism, civil society in Uganda was marginalised and recruited into the state machinery to contain the African majority, which was completely excluded from any institutional role in governance⁵⁸ As Uganda moved closer to independence, the institutions of civil society were weakened to the point where political parties clashed with each other rather than advancing the common cause of democratic participation.⁵⁹ Independence saw the complete demise of these institutions of civil society. Most were either incorporated into the state machinery or severely restricted in their operations.⁶⁰

When the NRM took over it introduced decentralization, which was a direct result of the commitment to local participation in governance. Thus it was founded on participatory democracy which enables every person to participate in his or her own governance at all levels of government. It laid an emphasis on the people's sovereignty in making decisions.⁶¹ Yet even after the NRM came to power many institutions of civil society did not 'wake up from the slumber of containment adopted by the British and perfected by the post-independence regimes.'⁶² According to the Human Rights Commission, civil society capacity to influence political processes is still weak; many lack knowledge, skills exposure and finances.⁶³ Civil society is more active in the areas of social empowerment rather than policy advocacy work.⁶⁴

⁵⁷ Monga (n 53 above) 159

⁵⁸ Katusiimeh (n 24 above) 104

⁵⁹ Katusiimeh (n 24 above) 104

⁶⁰ Katusiimeh (n 24 above) 104

⁶¹ K Stephen 'The value of participatory democracy' <http://ssrn.com/abstract=1112642> (accessed 15 September 2008)

⁶² Katusiimeh (n 24 above) 104

⁶³ J Nabunya Mulumba 'Civil society vital in the transition' Human Rights Commission monthly magazine Vol. III No.5 2005

⁶⁴ CIVICUS Civil Society Index Report for Uganda (n 12 above) 38

Katusiimeh attributes the slow development of civil society in Uganda to the lack of a strong private economic sector.⁶⁵ Many of the working and middle classes are tied to government through employment and the private sector is dependent on government contracts, subsidies credit and protection from foreign investment. As a result social groups and their organisations are dependent on government and vulnerable to government bullying. Uganda is still emerging from the shadow of repressive rule and they still fear to take on the state. Political activism and political advocacy has not been widely embraced by civil society. Writing about NGOs in Uganda Katusiimeh posits that, as they gained prominence in the economic and political life in Uganda the NRM government became determined to control them. He describes the relationship between NGOs and the government as characterised by suspicion and confusion about roles and rights and the existence and activities of NGOs as subject to stringent legal restrictions.⁶⁶ Therefore, NGOs are tolerated and, for the most part, embraced as partners of development. Yet, many hesitate to become politically active. They are often co-opted by the regime, which uses the NGOs for legitimacy building and social gap filling⁶⁷

Arthur Larok provides a critical assessment of the role of civil society in the new era of multi-partyism in Uganda.⁶⁸ At times civil society is mistaken, often times *mala fides* ⁶⁹, with political parties and the opposition.⁷⁰ However the main difference between civil society and political parties which should always be kept in mind is that political parties seek to capture power whereas CSOs do not. Another challenge arising out of the change to multi-partyism is that civil society needs to rediscover its role in political life. Although acknowledging the weakness of civil society in politics, Larok explains that civil society still played an opposition role, albeit more in technocratic policy processes. Now with the return to political pluralism they face the possibility of being 'driven out of business' by political parties. He suggests that in order to secure its political survival civil society in Uganda should adopt a nature, tone and approach which clearly transcends the limited objectives of

⁶⁵ Katusiimeh (n 24 above) 105

⁶⁶ Katusiimeh (n 24 above) 107

⁶⁷ Katusiimeh (n 24 above) 106

⁶⁸ A Larok 'Civil society and politics: a niche for CSOs in the revived multiparty political system in Uganda' (2007) National NGO Forum Working Paper no.1 17

⁶⁹ The state in my view is aware of the difference but manipulates the ignorance of the public by alleging CSOs critical of the government to be in bed with the opposition.

⁷⁰ Larok (n 68 above) 27

political parties, that is, the acquisition of power, and pushes for causes grounded in sound theory and evidence instead of opportunistically playing to popular sentiments.⁷¹

2.4 The basis for civil society participation in environmental law and policy making

‘Those decisions that affect the public must also be subject to scrutiny by the public.’⁷²

The participation of citizens through their CSOs is critical to the governance process as it allows the voicing of opinions about proposed government policies. There is, however, the perception that the government will protect citizens’ basic rights at critical moments, such as national elections, and that there is therefore no need for policy advocacy as citizen participation is guaranteed.⁷³ This is a very narrow view of participation. It leaves citizens feeling excluded from the process of policy formulation and implementation. The participation of CSOs in policy and law making can greatly expand the reach, effectiveness and legitimacy of government efforts. Also, meaningful participation enhances the capacity of a government to deliver appropriate services as it will be well-informed of the needs of the public.⁷⁴ Thus both civil society and its members (whom they represent) on the one hand and the state on the other, stand to benefit from public participation.

Participatory governance refers to a

regulatory framework in which the task of running public affairs is not solely entrusted to the government and the public administration, but involves cooperation between state institutions and civil society groups.⁷⁵

Civil society ensures public participation by coordinating, facilitating and representing their constituencies in decision making processes. Participation is not limited to ways of collecting information on public needs and aspirations, nor as channels for information

⁷¹ Larok (n 68 above) 35

⁷² D Kaniaru ‘The general principles of environmental law including access to justice, information, and public participation, on the precautionary principle, polluter pays, intergenerational equity and the doctrine of public trust’ in RA Wabunoha (ed) *Handbook on environmental law in Uganda* Vol II 2006 76

⁷³ P Kapaama et al ‘Consolidating democratic governance in Southern Africa: Namibia’ EISA Research Report No 34 2007 74

⁷⁴ E Tadesse et al ‘The People Shall Govern: A research report on public participation in policy processes’ (2006) Centre for the Study of Violence and Reconciliation (CSVR) Action for Conflict Transformation (ACTION) 9

⁷⁵ E Tadesse (n 74 above) 11

provision on government plans and accomplishments.⁷⁶ Participatory governance mechanisms must be meaningful opportunities for citizens to engage their governments and influence decision-making. It is not only the existence of public participation that is important, but also the extent and meaningfulness of this participation.⁷⁷ Whereas making final policy decisions falls within the domain of elected officials based on their electoral mandate, meaningful participation of people in policy processes that affect their lives should nevertheless be acknowledged, respected and valued.⁷⁸

Meaningful participation consists of the following characteristics; CSOs are provided with technical information in an understandable form, information is communicated through appropriate channels such as radio, newsletters and TV, providing relevant and specific information in a timely manner, there is no predetermined outcome, engagement with stakeholders is from the beginning of the process and is collaborative.⁷⁹ Effective consultation allows groups to express their views so that conflicts can be addressed and solutions which are acceptable to all developed.⁸⁰

Environmental governance refers to the body of values and norms which guide the state and society in the use, control and management of the natural environment. These norms and values are expressed in a complex chain of rules, legislations, policies, plans and institutions that constitute an organisational mechanism through which both the broad objectives and the specific planning targets of environmental management must be articulated.⁸¹

There are many reasons why CSOs should participate in environmental governance. CSO participation provides affected persons likely to be unrepresented in decision-making processes an opportunity to present their views and communities, as represented by CSOs, may provide useful additional information to decision-makers – especially when cultural,

⁷⁶ E Tadesse (n 74 above) 11

⁷⁷ E Tadesse (n 74 above) 10

⁷⁸ E Tadesse (n 74 above) 12

⁷⁹ P Bagnoli et al *People and biodiversity policies: Impacts, issues and strategies for policy action* (2008) 151

⁸⁰ Bagnoli (n 79 above) 151

⁸¹ C Ireland & G Tumushabe 'The evolving roles of environmental management institutions in East Africa: From conservation to poverty reduction' in S Bass et al (eds) (2005) *Reducing poverty and sustaining the environment: The politics of local engagement* 106

social or environmental values are involved.⁸² Accountability of political and administrative decision-makers is likely to be reinforced if processes are open to public view, for example, openness will put pressure on administrators to follow a required procedure in all cases.⁸³ Public participation enhances community ownership of decisions and resultant outcomes because the community through their CSOs is part of the wider decision-making process.⁸⁴ In addition there is an increased likelihood of successful implementation of policies and laws when communities have a hand in its formulation.⁸⁵ Stakeholder engagement may result in partnerships or alliances between interested parties and local government and public confidence in the reviewers and decision-makers is enhanced since citizens clearly can see in every case that all relevant issues have been fully and carefully considered.⁸⁶

The origins of the right to participation in environmental governance can be traced back to the Stockholm Conference on the Human Environment.⁸⁷ The resultant Declaration of the United Nations Conference for the Human Environment stated that the protection and preservation of the environment was the duty of all persons. It recognised the importance of public participation by agreeing that in order to defend and improve the environment the responsibility of all citizens and institutions at every level needed to be accepted.⁸⁸ At the United Nations Conference on Environment and Development 1992 it was recognised that in order for environmental governance to be successful the active involvement and participation of citizens and non-state actors was required.⁸⁹ Principle 10 of the 1992 Rio Declaration (which was the outcome of the UN Conference of the Environment and a reaffirmation of the 1972 Declaration of the UN Conference on the Human Environment) provides that environmental issues are best handled with the participation of all concerned citizens, at all relevant levels. It refers to participation in the preparation and implementation of environmental policies and laws frameworks, plans and projects.⁹⁰

⁸² Schwarte (n 11 above)

⁸³ Schwarte (n 11 above)

⁸⁴ A Lakwo 'Decentralization, democratic centralism and citizens' exclusion: A case study of Nebbi district in Uganda' in GM Mudacumura and MS Haque *Handbook of Development policy studies* (undated) 611

⁸⁵ Lakwo (n 84 above) 611

⁸⁶ Schwarte (n 11 above)

⁸⁷ R Mwebaza 'Improving environmental procedural rights in Uganda' in N Islam *Environmental rights in developing countries* (2002) 9

⁸⁸ R Mwabeza (n 87 above) 9

⁸⁹ C Odote & MO Makoloo (n 7 above) 122

⁹⁰ Rio Declaration Rio Declaration on Environment and Development 1992

According to Mwebaza, the Rio Declaration not only recognises the right to participation but also places a positive obligation to ensure the full and proper enjoyment of the right to participation.⁹¹ Principle 10 of the Rio Declaration further states that at the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

An additional outcome of the UN Conference on Environment and Development is Agenda 21. It crystallises the Rio Declaration provisions by requiring action to be taken by states for the realisation of access to information, participation and access to justice.⁹² Governments are urged to develop and improve mechanisms to facilitate the involvement of concerned individuals, groups and organisations in decision making at all levels.⁹³

The United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters 1998 also known as the Aarhus Convention has elaborated on the procedural rights guaranteeing public participation in decision making found in principle 10 of the Rio declaration.⁹⁴ The right to participation in the Convention is of three kinds. It covers participation where the public is interested in decision-making on particular activity, participation in the development of plans and policies relating to the environment and public participation in the preparation of laws, rules and legally binding norms.⁹⁵ The right of everyone to receive environmental information that is held by public authorities includes not only information on the state of the environment, but also on policies or measures taken, or on the state of human health and safety where this can be affected by the state of the environment. In addition, public authorities are obliged, under the Convention, to actively disseminate environmental information in their possession.

⁹¹ Mwebaza (n 87 above)10

⁹² Mwebaza (n 87 above) 11

⁹³ Mwabeza (n 87 above) 11

⁹⁴ Mwabeza (n 87 above) 12

⁹⁵ Articles 6,7,8 Aarhus Convention

At the regional level, the African Charter on Human and Peoples' Rights 1986 contains provisions relevant to participation in environmental governance. It provides for the right to receive information and to express and disseminate opinions. In addition, the right to free association and the right to a general satisfactory environment favourable to development are guaranteed. These provisions can be used and expanded upon to exercise the right to participation.⁹⁶ The African Charter for Popular Participation in Development and Transformation states that popular participation needs to be viewed both as a means and as an end in itself.⁹⁷

As an instrument for development popular participation provides the driving force for collective commitment to the determination of people-based development processes and willingness by the people to undertake sacrifices and expand their social energies for its execution. As an end in itself popular participation is the fundamental right of the people to fully and effectively participate in the determination of the decisions which affect their lives at all levels and at all times.⁹⁸

Still at the regional level, the Memorandum of Understanding between the Republic of Kenya, the United Republic of Tanzania and the Republic of Uganda for Cooperation on Environmental Management 1998 contains provisions guaranteeing public participation. It states that the governments of the republic of Kenya, the United Republic of Tanzania and the Republic of Uganda co-operation in the management and sustainable use of the environment and natural resources to ensure sustainable development. Article 7 guarantees the full involvement of the people in the sustainable use and management of environment and natural resources. Though not a formally binding legal convention it still offers a strong basis for arguing for participation and access to information.⁹⁹

In Uganda the National Environment Statute 1995 and the National Environmental Policy 1995 provide for the sustainable management of the environment and for access to environmental information. Both provide for the full participation of the people in the

⁹⁶ Article 9, 10, 24

⁹⁷ African Charter for Popular Participation in Development and Transformation. Adopted at the International Conference on Popular Participation in the Recovery and Development Process in Africa, held in Arusha in 1990

⁹⁸ 'African Development Forum Report of the symposium' Addis Ababa 2004 <http://www.uneca.org/adfiv/> (accessed 12 September 2007)

⁹⁹ C Odote & MO Makoloo (n 7 above) 130

development of policies, plans and legislative proposals. These then form the basis of the right to public participation in the formulation and implementation of environmental decisions and programmes. These will be discussed in greater detail in chapter 3.

There are limits and challenges to participation. Some of which are the fact that governments cannot consult everyone, and to what extent can representatives (civil society) articulate the views of the people they represent without actually having to get the views of each and every person? Another challenge is ensuring downward accountability, that is, to communities, as opposed to upward accountability, that is, ministries and donors.¹⁰⁰ Whereas participation was introduced as a way of 'involving patients in their own care', in many cases the 'patients' have ended up being NGOs who are now viewed by the cynical as promoters or professionals of participation. They are seen as agents for the delivery of projects and according to critics even donors *and governments*¹⁰¹ have not taken long to conclude that they could become their best allies in all projects needing a participatory brand.¹⁰² These issues are raised here but it is not intended that they be addressed in this paper. They serve to explain that the virtues of public participation should not be and are not being romanticized.

2.5 Current environmental issues in Uganda

Uganda is gifted with a diversity of natural resources but which are currently undergoing fast depletion and degradation. However this is not a recent occurrence. When political turmoil hung over the country between 1970 to 1985, state responsibility was non-existent and the management of natural resources and the environment was not a priority. Today, although Uganda is in political peace the environment continues to take strain. The current growth of industries, rural urban migration and expansion of urban areas and therefore contraction of forests due to population increase all impacting negatively on the environment.¹⁰³ These environmental problems manifest themselves *inter alia* as soil degradation a result of poor farming methods such as over utilization of land and

¹⁰⁰ DENIVA 'Participation in Uganda's Development Processes. What mechanisms are in place?' (n 12 above)

¹⁰¹ My emphasis

¹⁰² M Rahnema 'Participation' in W Sachs (ed) (1999) *The development dictionary: A guide to knowledge as power* 116

¹⁰³ CM Akol and CK Sabiiti 'Environmental issues and the evolution of environmental policy and law in Uganda' in RA Wabunoha (ed) *Handbook on environmental law in Uganda* Vol II 2005 63

overgrazing; deforestation due to high fuel demand, agriculture encroaching upon forest areas, logging; loss of wildlife due to poaching; wetland degradation and pollution.¹⁰⁴ This is by no means a closed list of the problems facing the environment. It merely serves to highlight some of the issues the country currently faces.

Of the various types of civil society groups, non-governmental organizations (NGOs) and Community Based Organisations (CBOs) are the most prominent in environmental issues. And where this paper discusses participation by civil society organizations in practice this mostly refers to these two types of organisations. Participation by civil society in law making can take various forms, such as public interest litigation, advocacy for the enactment, repeal or review of laws and participation in the law and policy formulation process.

2.6 Conclusion

The role of civil society in the formulation of policy and law affecting the environmental issues described above is the issue at the heart of this paper. Participation in decision making processes of all affected stakeholders is now generally viewed as a requirement; this is clear from the various statements to that effect, from the Rio Declaration to the Uganda Constitution. Citizens via CSO have valuable knowledge to contribute policy and law making. But what role does civil society have in the formulation of environmental law and policies? How do the national policies and laws creating the space for participation promote real participation so that civil society contributes to decision making in a meaningful way. And finally what are the factors that contribute to or detract from the ability of civil society to contribute meaningfully to policy and law making processes? The rest of the paper intends to answer these questions, beginning with an analysis of the legal and policy framework for civil society activity in the next chapter.

¹⁰⁴ See RA Wabunoha (ed) *Handbook on environmental law in Uganda* Vol II 2005 63 for an general overview of environmental issue in Uganda.

Chapter 3: The legal space for civil society activity and participation in environmental policy and law making

3.1 Introduction

The regulatory framework governing civil society activity and participation has a direct bearing on the exercise of the rights to freedom of association, assembly and participation and consequently the role which civil society can play in the formulation of state policy and law. The following section aims at providing a critical analysis of the legal and policy framework for civil society activity and participation in the formulation of environmental policy and law.

3.2 An analysis of the legal and policy framework for civil society activity

In Uganda different laws and policies define and regulate the work and existence of CSOs. They can be incorporated as a company limited by guarantee in terms of the Companies Act 1961 or as a trust in terms of the Trustees Incorporation Act 1939. The civil society sector, specifically NGOs, is further regulated by the NGO Registration Act 1989, the NGO Registration Amendment Act 2006 and the NGO Regulations 1990. Community Based Organizations (CBOs) are required to register with and obtain certification from the District Local Authorities.

Over time guidelines have been developed against which the suitability of laws regulating this sphere can be tested. The purpose of these is to set standards for laws permitting, protecting, and regulating civic organizations and their activity. They are useful tools for the evaluation of laws governing civic organizations. For purposes of this study guidelines created by various organisations have been adopted and will serve the basis upon which to analyse the legal and policy framework for civil society activity. The analysis will restrict itself to those acts and provisions affecting civil society activity and impact on the right to association and participation.

3.2.1 Registration and legal existence

The NGO Registration act defines NGOs as 'an organization established to provide voluntary services, including religious, education, literary, scientific, social and charitable services to the community or any part of it.¹⁰⁵ Under the registration act all NGOs are required to register with the National Board for Non-Governmental Organisations, the NGO Board which then issues a Certificate of Registration to a successful applicant subject to conditions or directions it may deem fit. The amendment act requires NGOs to obtain a permit in addition to registration. Thus NGOs are not permitted to operate in Uganda without being duly registered with the Board and without a valid permit issued by the Board.¹⁰⁶ Wide discretion is given to this Board to impose "conditions or directions as it may think fit" to insert in the certificate of registration.¹⁰⁷ NGOs are also periodically required to renew their Certificates of Registration. The NGO Board has the power to grant or refuse registration, and to revoke registration once granted if the board deems it "in the public interest to do so." In the case of the revocation of registration, the NGO Board is not required to provide detailed reasons or disclose evidence in support of its decision to revoke registration. Recourse to the courts or an independent judicial body is not available; NGOs are permitted to appeal only to the minister responsible for appointing the NGO board. The law provides for an appeal against the decision of the Board to refuse or revoke a certificate of registration to the Minister for Interior Affairs, who also appoints the chair, vice chair and other members of the Board and can give it written directions of a general or specific nature which it is bound to comply with.¹⁰⁸ NGOs are required to furnish to the District Development Committee in each area of operation, estimates of income and expenditure for consideration and approval.¹⁰⁹ This is in addition to the requirement to submit to the Board, a comprehensive annual return indicating the names of the office bearers as well as a list of immovable assets owned or acquired by the organisation as well as the manner in which they were acquired.¹¹⁰

¹⁰⁵ NGO Registration Act s 1(d)

¹⁰⁶ Section 2 (1) NGO Registration Act, 1989 as amended by NGO Registration (Amendment) Act, 2006

¹⁰⁷ Section 2 (2) NGO Registration Act, 1989

¹⁰⁸ Sections 4 and 12 NGO Registration Act, 1989 as amended by NGO Registration (Amendment) Act, 2006

¹⁰⁹ Regulation 15 (b) NGO Regulations, 1990

¹¹⁰ Regulation 15 (a) NGO Regulations, 1990

In order to protect the freedom of expression, association and assembly, CSOs should be allowed to come into existence freely and should not be required to obtain legal personality in order to engage in lawful activities.¹¹¹ According to CIVICUS World Alliance for Participation, the legal framework for the registration and operation of NGOs in Uganda reflects a deep distrust of their activities and discounts their vital role in socio-political development.¹¹² The registration provisions ‘create a web of bureaucratic red tape constituting a hurdle for individuals wishing to form an NGO’. For example, the requirement to submit a work plan to the Ministry of Planning and Economic development and obtain its approval for the same.¹¹³ Also the requirements to register as well as obtain a permit in order to operate are unnecessary and tedious. Ideally, the process of registration should be quick, simple and inexpensive, in line with the law and consistently applied. By prescribing multiple authorities from whom recommendations or endorsements are required, the procedure is made complicated and time consuming, which can be intimidating for people who wish to form an NGO but do not ordinarily have access to the bureaucracy or political representatives.¹¹⁴

In addition, it is good and well established practice to include in legislation an appeals process for judicial review of executive actions.¹¹⁵ Although the legislative framework provides for an appeal against the decision of the Board to refuse or revoke a certificate of registration to the Minister for Interior¹¹⁶ it does not envisage an independent appeals process in the courts of law. Decisions not to register CSOs should be appealable to an independent court.¹¹⁷

The overall regulation of the NGO sector is placed under the Ministry of Internal Affairs. Certificates of registration are issued for only one year at a time. After the first year,

¹¹¹ ‘Checklist for CSO laws’ International Centre for Not-for-Profit Law 2006
<http://www.icnl.org/knowledge/pubs/NPOChecklist.pdf> (accessed 15 September 2008)

¹¹² MS Tiwana ‘Uganda: Legal framework restricts civil society CIVICUS (2007) 1

¹¹³ Regulation 5 (1) (b) (i) NGO Regulations, 1990

¹¹⁴ Tiwana (n 112 above) 3

¹¹⁵ A G Debono ‘Rule and regulations affecting civil society space’ 2005 Commonwealth Human Rights Initiative
http://www.humanrightsinitiative.org/advocacy/chogm/chr2005/rules_regu_affecting_civil_society_space.pdf (accessed 21 September 2008)

¹¹⁶ Sections 4 and 12 NGO Registration Act, 1989 as amended by NGO Registration (Amendment) Act, 2006

¹¹⁷ ICNL Checklist (n 111 above)

registration is renewed for three years at a time and thereafter every five years. Civic organizations should be allowed to have perpetual existence.¹¹⁸ Uncertainty regarding the renewal of registration is a serious deterrent to NGOs wishing to express their views on policies and other state action.¹¹⁹

3.2.2 Civil society activity

The Ugandan Constitution¹²⁰ guarantees every person the right to freedom of association - which includes the right to join and form civic organisations. Its National Objectives and Directive Principles of State Policy¹²¹ also recognises CSOs. It is also expressly provided that every Ugandan has the right to participate in peaceful activities to influence the policies of government through civic organisations.

An organization is not permitted to operate in Uganda unless it has been duly registered with the Board and a certificate issued. A written recommendation is required from the chair of the Local Council I which is to be endorsed by the chairs of Local Council II and III as well as by the Resident District Administrator of the area where the organisation intends to operate.

NGOs are prohibited from engaging in any act prejudicial to the "national interest" of Uganda.¹²² Where an organisation contravenes (i) any provisions of the NGO Act or, (ii) operates contrary to conditions or directions specified in its permit or, (iii) carries out any activity without a valid permit or certificate, any director or officer whose act or omission gave rise to the offence is made personally liable with fine and/or imprisonment, in addition to a fine being imposed on the organisation.¹²³ Moreover, an organisation is made liable for "*all* acts of its members and employees".¹²⁴¹²⁵ The principle of limited liability, that

¹¹⁸ L Irish et al 'Guidelines for laws affecting civic organisations' Open Society Institute 2004 22
http://www.soros.org/resources/articles_publications/publications/lawguide_20040215/osi_lawguide.pdf
(accessed 15 September 2008)

¹¹⁹ Tiwana (n 112 above) 3

¹²⁰ Article 29(1)(e)

¹²¹ Article V(ii) provides that the state shall guarantee and respect the independence of nongovernmental organizations which protect and promote human rights

¹²² Regulation 12 (g) NGO Regulations, 1990

¹²³ Sections 2 (6) and 2 (5) NGO Registration Act, 1989 as amended by NGO Registration (Amendment) Act 2006

¹²⁴ Regulation 12 (e) NGO Regulations, 1990

is employees should not be held personally responsible for official acts committed on behalf of their organizations, should inform entities with legal personality. It is unfair to hold officers and employees liable for acts committed in the course of their work on behalf of the organization. On the other hand, it is equally unfair to hold an organization liable for the private acts of its members. The act is in effect creating a dual liability which is not justified in law. It is unreasonable and unjust to hold an organization liable and at the same time its officers liable for the same offence.

NGOs are prevented from making direct contact with the people in rural areas unless they have given seven days notice in writing of their intention to do so to the Local Council and the Resident District Administrator of the area.¹²⁶ NGOs are also required in their operations to "cooperate" with Local Councils and Committees in the area.¹²⁷ There is excessive and unwarranted supervision and monitoring of NGO activity provided for in the laws. The requirement to "cooperate" with Local Councils and Committees in the area¹²⁸ hinders their independence and autonomy.

Uganda is party to both the ICCPR and the ACHPR and is obliged to protect and promote the enjoyment of all rights contained therein including the freedom of association through civic organisations. One of the fundamental principles with regard to civil society's regulation is that the legal framework governing the operation of NGOs should lean towards minimum official interference in their lawful activities.¹²⁹ Moreover, placing their overall regulation under the Ministry of Internal affairs insinuates that regulation of civil society is a security issue. The requirement of cooperation with Resistance Councils and Committees amounts to excessive supervision and monitoring which can impede day to day project work that requires constant contact with the local population.¹³⁰ Regarding the regulation of NGO activities, the term national interest as opposed to 'public interest' is subjective and can be manipulated to prevent NGOs from offering legitimate dissent against

¹²⁵ My emphasis

¹²⁶ Regulation 12 (a) NGO Regulations, 1990

¹²⁷ Regulation 12 (b) NGO Regulations, 1990

¹²⁸ Regulation 12 (b) NGO Regulations, 1990

¹²⁹ Tiwana (n 112 above) 3

¹³⁰ Tiwana (n 112 above) 4

official policies.¹³¹ CSOs are important participants in debates on public policy and should have the right to speak freely about all matters of public significance such as state policies and actions.¹³² There should be no restrictions on the right of civil society to carry out public policy activities, such as education, research, advocacy and publication of position papers.¹³³

The regulation of CSO activity is a necessary exercise in any democracy as it provides a measure of protection for the state and its citizens from activities of individuals or organisations which may be negative to society's development. While it is necessary to give freedom to civil society to function with flexibility, too much freedom can lead to abuses by certain groups thus bringing the whole of civil society into disrepute. A consequences of which is low trust in civic organisations, which in turn leads to a situation where funding is not easily obtained and where the public is less ready to contribute to the sector.¹³⁴ Thus it is important to have laws regulating accountability and monitoring civil society so as to maintain a high trust level and good functioning of CSOs.

The regulation of civil society in Uganda verges on the extreme. Any regulatory framework must be equitable, just and fair. In its present form, the framework falls substantially short of these standards.¹³⁵ It impacts negatively on the work and operations of civil society organisations. By legally restricting such groups, many of which are involved in providing vital public services and forums to communities, the government could risk undermining ongoing development efforts in the country and also undermine the ability to participate in law making. For example, the National Environmental Act provides for NGO participation, however, where an NGO is unable to register because of these legal barriers they will not be recognized and thus prohibited from taking part. The value of participation is the inclusion of ideas and promotion of interest which may otherwise be ignored; restraining organisations from participating simply because of non-registration would detract from the aim and purpose of participation. The state should not impose excessively stringent

¹³¹ Tiwana (n 112 above) 4

¹³² ICNL Checklist (n 122 above)

¹³³ L Irish et al (n 118 above)

¹³⁴ Debono (n 115 above)

¹³⁵ Tiwana (n 112 above) 4

regulations which can delay the formation of organisations or intimidate others from being formed and registered.

Although Uganda civil society has also been described as weak, the state is still threatened by it as NGOs gain increasing prominence and the suspicion and confusion referred to by Katsiimeh continues to grow. Nevertheless, the state cannot continue to inhibit civil society activity on the basis of such suspicions. Rather than focusing on the regulation of the sector, it has been suggested that government should realise how it could benefit substantially by working together with civil society in a constructive manner.¹³⁶

3.3 Analysis of the policy and legal framework for civil society participation

Internationally public participation in the environmental issues has been recognised for over 30 years. The United Nations Popular Participation Program culminated in the publication of two major documents, namely Popular Participation in Development 1971 and Development 1975. The former reviewed the emergence participation with reference to community development in the third world, while the latter offered a formal definition of the concept with reference to its implementation.¹³⁷ Public participation was further emphasised at the Rio Summit in 1992 and the World Summit on Sustainable Development in 2002. The international and regional instruments guaranteeing the right to participation have already been discussed in chapter 2 above. The following section aims to deal with the legal framework nationally and determine their compatibility with international standards in providing for public participation.

Article 38(2) of the Constitution provides that “every Ugandan has a right to participate in peaceful activities to influence the policies of Government through civic organizations”. The National Environment Statute 1995 and the National Environmental Management Policy 1995 further expand on this right. The act provides for the sustainable management of the environment and section 86 provides for the right of access to environmental information. It provides the right of every person to access any information relating to the implementation of the statute, excluding ‘proprietary information which shall be treated as confidential.’ One

¹³⁶ Tiwana (n 112 above) 4

¹³⁷ SAEIA Paper (n 48 above) 25

of the guiding principles of the statute is the encouragement of maximum participation by the people of Uganda in the development of policies, plans and processes for the management of the environment.¹³⁸ The act establishes the National Environmental Management Authority which is charged with initiating legislative proposals, environmental standards and guidelines on the environment and proposing environmental policies and strategies to the policy committee - in doing this it is required to liaise with nongovernmental agencies on issues relating to the environment. The act also provides for access to information relating to the implementation of the act¹³⁹

The National Environmental Management Policy provides the broad policy framework for the promotion and protection of the environment. Its objectives include integrating environmental concerns in all development policies, planning and activities at national, district and local levels with the full participation of the people.¹⁴⁰ In addition, and notably, the policy contains special provisions for the participation of NGOs. It recognises the importance of NGOs in mobilising and sensitising the public in environmental matters and in ensuring that the voices of the underprivileged are incorporated in national development processes.¹⁴¹ Various other sectoral policies provide for the public participation as one of its objectives, taking their cue from the National Environmental Management Policy.¹⁴²

According to Mwebaza neither the policy nor the statute recognise the *right* to public participation in environmental matters.¹⁴³ Thus, according to her, the provisions relating to participation are general provisions aimed at encouraging and promoting public participation but do not go as far as creating such a right. Therefore, so the argument goes, there is no legal basis for enforcing the right to participation in the formulation of policies, plans and programmes.¹⁴⁴ To the contrary, the fact that public participation is provided for in the policy indicates the states acceptance of this right. In any case, even if no right is

¹³⁸ Section 3(2)(b)

¹³⁹ Section 85

¹⁴⁰ Chapter 2.1

¹⁴¹ Chapter 5.3

¹⁴² For example the National Policy for the Conservation and Management of Wetlands 1995, the Uganda Wildlife Policy 1999, the National Water Policy 1999, the Uganda Forestry Policy 2001, the Plan for Modernization of Agriculture 2000

¹⁴³ Mwebaza (n 87 above) 36

¹⁴⁴ Mwebaza (n 87 above) 36

recognised, the encouragement of civil society participation and its recognition in the national policy and law signifies the states acceptance of its value. Though there may be no basis for a legal claim by CSOs, it will be difficult for the state to renege on its commitment to participation as expressed in the policy and statute.

Although providing for participation, neither the environmental policy nor the statute creates administrative or institutional mechanisms or programs through which participation is supposed to occur. Therefore, there is no guidance as to how when and where participation should take place. It is left to CSOs to insert themselves in the process. It is submitted that the policy and the act should create clear and legally enforceable mechanisms for participation and access to environmental information and policy and legislative processes to strengthen and make realisable the commitment to participation.

3.3.2 Access to environmental information

The Universal Declaration on Human Rights led the way to recognition of the right to access to information,

‘everyone has the right to freedom of expression, this right includes the right to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers’¹⁴⁵

Subsequently the International Covenant on Civil and Political Rights and then the African Charter on Human and Peoples’ Rights included provisions on the right of access to information. The Constitution of Uganda guarantees citizens’ rights of access to official information and an Access to Information Act was enacted in 2005, after a long campaign.

The Access to Information Act prescribes the procedure for access to official information in Uganda. Its objectives are inter alia to promote an efficient, effective, transparent and accountable government and to empower the public to effectively scrutinize and participate in government decisions that affect them.

¹⁴⁵ Article 19 UDHR

However, access was less than anticipated by critics, with one commentator describing it as a “catalogue of exceptions”.¹⁴⁶ Exceptions in the act are very broad for example those excluding access to cabinet records or those of its committees. This means that a substantial amount of government information at its highest level is rendered inaccessible to the public, and this is where most decisions that affect the nation are made – and this is what people will be most interested to be informed about.¹⁴⁷ In the meantime, the State has often successfully restricted access to information, using various pieces of legislation such as the Official Secrets Act or Public Service Standing Orders.¹⁴⁸ It has been suggested that the Access to Information Act should take precedence over other legislation with regard to the request for and release of information in possession of public bodies, such as the Official Secrets Act.¹⁴⁹

Section 5 of the Act provides for the right of access to information in the possession of the state or any public body. This needs to be expanded to include private bodies that carry out public functions and exercise public trust such as CSOs. Many private bodies provide public services and exerting significant influence on policy affecting the rights of individuals and thus should be subject to public scrutiny.¹⁵⁰

Section 5(1) provides for the right of access to citizens. This means that non-citizens cannot access information on the basis of this act. This can prevent the work of international organisations seeking information in order to protect and promote the rights of people.¹⁵¹

The Access to Information Act is a great stride taken and commendable commitment by Uganda, one of the few African countries to develop such legislation. However the problematic provisions named above may serve to hinder the full realization of the right of

¹⁴⁶ ‘Analyses of the Access to Information Act’ HURINET-U 23
<http://www.hurinet.or.ug/downloads/the%20Access%20to%20information%20Analysis.pdf> (accessed 18 September 2008)

¹⁴⁷ R Ikoja-Odongo & D Kawooya ‘Access to information in Uganda: An examination of recent developments’ (2005) East African Journal of Peace and Human Rights 334

¹⁴⁸ CIVICUS Civil Society Index Report for Uganda (n 12 above) 42

¹⁴⁹ HURINET-U (n 146 above) 34

¹⁵⁰ HURINET-U (n 146 above) 12

¹⁵¹ HURINET-U (n 146 above) 15

access and curtail the ability of civil society to participate effectively. It goes without saying that meaningful participation requires at the very least access to information.

3.4 Conclusion

The policy and law has provided for civil society participation. However it remains to be seen if these provisions are actually put into practice by the various institutions dealing with environmental management, despite the lack of direction and guidelines on how participation is supposed take effect. It also remains to be seen how in practice CSOs have participated in the policy and law making process. This is the purpose of the next chapter.

Chapter 4: Civil society participation in the policy and law making process

4.1 Introduction

A few examples have been chosen to illustrate the role played by CSOs in the formulation of policy and law relating to the environment. These provide the basis upon which the participatory role of civil society in the policy and law making process is assessed.

The chapter is divided into three categories, namely advocacy, contribution to research and debate on policy and legislation and public interest litigation. For each of these categories examples of where CSOs played a role in the formulation of policy and law by using the category as a tool will be discussed.

4.2 Research and debate on policy and legislation

Land Act 1998 and Land Policy 2005

The Land Act was passed in 2005 with much collaboration with and input from the Land Alliance, a consortium of CSOs with a membership of about 47 organisational members and 17 individual members. Its policy advocacy work was seen as especially important as it 'ensured that the rights of the poor are protected, especially as Uganda underwent liberalization and privatization which placed great value on investors' incentives including removing hindrances to their access to factors of production, especially land'.¹⁵² The Alliance made a contribution towards the protection of land rights of tenants, women and children.¹⁵³ Members of Parliament largely relied on information provided by the Land Alliance during the debate on the Land Act and its amendments¹⁵⁴

When the Land Act was passed in 1998, there was no policy. When the government began to develop a policy to close the gap between law and policy and to operationalise the Land

¹⁵² Mukasa (n 12 above) 46

¹⁵³ OO Kanyangareng 'The Uganda Land Alliance: Experience in the struggle for land rights in Uganda' (2005) <http://www.hakiardhi.org/HA-Docs/REGIONAL%20INITIATIVES%20AND%20EXPERIENCES%20FOR%20LAND%20RIGHTS%20%20%20%20%20STRIGGLES.pdf> (accessed 22 October 2008)

¹⁵⁴ Kanyangareng (n 153 above)

Act, the Alliance gathered public views to feed into the policy making process.¹⁵⁵ The Alliance collaborated with the Ministry of Lands, Water and Environment, the Ministry of Finance and Economic Planning, Civil Society Organizations, the Parliamentary Committee on Natural Resources and key parliamentary caucuses. The lobby for the Land Policy went on for three years and as a result the Alliance developed an issues paper for the National Land Policy. The issues paper was developed through consultations of key stakeholders and the rural community. The paper was handed over to the Ministry of Water Lands and Environment for inclusion into the National Policy Document. The Alliance has also participated in the National Land Policy working Group at Ministerial level and shared its findings. The alliance is part of the harmonization group on land tenure legislation under the Ministry of water, Lands and Environment. The members attended meetings, workshops, and debates on behalf of the Alliance.¹⁵⁶

Forestry policy 2001

The public was invited to take part in regional consultations of the draft policy document.¹⁵⁷ According to ACODE extensive consultations were undertaken with various stakeholders including CSOs, the business community and industry and other interest groups. Government made deliberate efforts to obtain comments from all the major stakeholders.¹⁵⁸ The process and the drafting were guided formally by a Policy Working Group, whose membership included all key government ministries and representatives from CSOs.¹⁵⁹

4.3 Advocacy

The most visible of CSO advocacy activities in Uganda is in the domain of forestry and natural resources. Thus it is these examples that will be used to illustrate the role that CSO advocacy has played in the formulation of environmental policy and law.

¹⁵⁵ As above

¹⁵⁶ As above

¹⁵⁷ Tumushabe et al 'Consolidating environmental democracy in Uganda through access to justice, information and participation' (2002) ACODE Policy Research Series No. 5

¹⁵⁸ Tumushabe (n 157 above) 22

¹⁵⁹ Ministry of Water, Lands and Environment 'The Uganda Forestry Policy' 2001

Butamira Forest

In 1998 parliament passed the Land Act which prohibited alienation of public trust resources. Land use is gazetted by publishing a notice in the Government Gazette.¹⁶⁰ The process of changing the legal status of land from protected status to commercial use is known as degazettement. In 2001 government issued a permit to Kakira Sugar Works to convert Butamira Forest for sugar cane growing. Civil society first opposed the degazettement of this land, by protesting against it through the print and electronic media.¹⁶¹ However, parliament went through with the decision. Thereafter civil society opposed the degazettement in the High Court on the grounds of illegality due to lack of consultation and no impact assessment being carried out. The court upheld the claim but the government ignored the ruling.¹⁶²

Pian Upe Game Reserve

In 2003 the government attempted to change the legal status (degazette) of Pian Upe Game Reserve, one of Uganda's largest, in order to allocate it to a Libyan investor for flower growing. The proposal was opposed by several CSOs and after subsequent discovery that the Libyan company did not exist and mounting pressure from civil society the investor pulled out of the project.¹⁶³

Mabira forest

In 2006 the government proposed to give away 7100 of the 30000 hectares of Mabira forest to sugar producing group of companies known as the Mehta Group. This proposed degazettement was meant to increase government tax revenue and foreign exchange from imports.¹⁶⁴ However, research done by Environmental Alert, a local NGO, found that it would cost the country more to give away the land than it would gain and therefore it made no economic sense. CSOs launched the 'Save Mabira Crusade', which was conducted by the carrying out of empirical research regarding the legal, social, economic, cultural and political implications of the proposed degazettement; a media campaign which fed

¹⁶⁰ Article 44(5) Land Act

¹⁶¹ B Twesigye 'Lessons from citizen activism in Uganda: Saving Mabira forest (2008) *SAIIA Occasional Paper Series 4*

¹⁶² Twesigye (n 161 above) 4

¹⁶³ As above

¹⁶⁴ Twesigye (n 161 above) 6

information to the public and conducted social responsibility programs, by targeting the investor by boycotting its goods; petitioning parliament and thereby pre-empting governments submission.¹⁶⁵

4.4 Public interest litigation

Public interest litigation refers to legal actions brought to protect or enforce the rights of members of the public. It is also an indirect means of participating in the policy and law making process as it can lead to judicial decisions which amend existing laws or order the enactment of new laws by the state. Several cases litigated by CSOs have led to the changing of policies and/or the enactment or amendment of statutes dealing with the environment.

*Greenwatch Ltd v Attorney General and Uganda Electricity Transmission Company Ltd*¹⁶⁶

The Government of Uganda had entered into a series of agreements with the AES Nile Power Company covering the building, operation and transfer of a hydro electric power complex on the River Nile. The Uganda Electricity Company is a limited company wholly owned by the government. Greenwatch sought to obtain the power purchase agreement from the government but was refused on the grounds that it contains the company's technical and commercial secrets and therefore cannot be made available to the public. Greenwatch then commenced action against the Attorney General, on the grounds that it was entitled, in terms of article 41 of the constitution, to access to information in the hands of the state. The respondent argued firstly, that the applicant was not a citizen entitled to access in terms of the section, secondly that the Electricity Company being a limited company was not a state organ in terms of the same section. The court dismissed both arguments and held that corporate bodies are entitled to enforce the rights in the bill of rights and that the Electricity Company being a state owned company was a state organ. However, it refused the application because Greenwatch failed to prove it was a company incorporated in Uganda. Nevertheless the significance of the case lies in its refusal to allow the state to prevent the exercise of access to information rights. Following this case, and many other contentious deliberations, the Access to Information Act was passed in 2005.

¹⁶⁵ Twesigye (n 161 above) 7

¹⁶⁶ Miscellaneous cause no. 139 2001

*Greenwatch v Attorney General and National Environmental Management Authority*¹⁶⁷

Greenwatch sought a declaration that the manufacture, distribution, use, sale and disposal of plastic bags and containers violates the right to a clean and healthy environment, and an order banning the manufacture, use, distribution and sale of plastic bags and containers of less than 100 microns. The suit is still pending, however it has led the government to issue a policy regarding the banning of the manufacture, importation and use of plastic bags and containers of less than 30 microns.¹⁶⁸

*The Environmental Action Network v National Environmental Authority and Attorney General*¹⁶⁹

TEAN instituted an action seeking a declaration that smoking in public places violated the rights of non-smoking Ugandans to a clean and healthy environment and the right to life. The court upheld the claim and NEMA was directed to put in place measures to address smoking in public places and in 2003 The National Environment (Prohibition of Smoking in Public Places) Regulations was passed.

¹⁶⁷ Miscellaneous application no. 140 2002

¹⁶⁸ 'Government unsure about polythene recycling' WBS-TV <http://www.wbs-tv.com/Polythenerecycling.php> (accessed 19 October 2008)

¹⁶⁹ Miscellaneous cause no. 39 2001

Chapter 5: Lessons learnt: Factors and challenges affecting participation

5.1 Introduction

Observations have been made and taken from the literature and from the informants for the research on the various factors affecting and the challenges facing participation. These will be discussed below. Although the analysis has been divided into separate categories most of the issues are overlapping. The informants for the study have been involved in the case studies discussed above and thus their views on the nature of participation are directly relevant to the ensuing discussion.

5.2 Social factors

5.2.1 Civil society capacity and effectiveness

A CIVICUS study conducted in 2006 on the state of civil society in Uganda found that the capacity of CSOs to influence policy affecting the environment is undermined by factors such as a lack of collective voice and strategy, limited skills and lack of accountability amongst others.¹⁷⁰ CIVICUS also noted the desire to complement the work of government, rather than to question it.¹⁷¹

CSO capacity and effectiveness is also negated due to heavy reliance on outside consultants, with most relying on government technical experts. Most technical experts are in government and many times CSO approach them to advise them.¹⁷² An interview with NEMA Director for Policy Planning and Information, revealed this as one of the reasons for CSOs low capacity and effectiveness in influencing government policy. According to him, 'they just come to express sentiments'.

All policies involve technical information which complicates the dialogue in policy making processes. Technical experts tend to claim ownership of the technical issues and close of

¹⁷⁰ CIVICUS Civil Society Index Report for Uganda (n 12 above) 79

¹⁷¹ CIVICUS Civil Society Index Report for Uganda (n 12 above) 84

¹⁷² Interview with NEMA Director for Policy Planning and Information 17 October 2008

public debate even though these issues may have a serious impact on the public.¹⁷³ This results in marginalisation of the CSOs as the state often believes that they do not understand the complex technical nature of policy decisions and as a result cannot participate effectively in decisions on such issues and are mostly seen as only delaying and further complicate the issues.¹⁷⁴ It may be true in most cases that CSOs do not have the technical knowledge. Nevertheless they are closely connected to the persons whose interests they serve. Though these interests may not be 'technical', but merely 'sentimental', this is no reason to disregard them. Good policy decisions require both scientific knowledge and social justice.¹⁷⁵

Nevertheless, there are organisations like Advocates Coalition for Development and Environment who conduct policy research. As a member of The Access Initiative, which brings together environmental organisations to promote Principle 10 of the Rio Declaration, they were involved in the drafting of the Access to Information Act. Although in the end the act was complained of as having been 'inserted with all sorts of diluting provisions,'¹⁷⁶ it was an important milestone not only for environmentalists but for all Ugandans. In order to ensure the inclusion of its voice and opinions ACODE produces policy briefs targeting the policy maker making them brief and easy to read. They are often invited to sit on various strategic working committees such as the national land policy working group and the environment and natural resources sector working group.¹⁷⁷ Their input is thus appreciated and their opinions respected as they are seen as having done their homework before engaging the state. Apparently not many CSOs operate this effectively.¹⁷⁸

All of the organisations interviewed consider their work as having a great impact on the outcome of policy and law. TEAN provided considerable input into the drafting of the regulations prohibiting smoking in public spaces albeit with a lot of changes in the final outcome, whereas TEAN sought after an outright ban on smoking in public spaces the final outcome was control of smoking in public spaces.¹⁷⁹ Both Greenwatch and ACODE have

¹⁷³ MM Simmons *Participation and power: Civic discourse in environmental policy decisions* (2007) 4

¹⁷⁴ Simmons (n 173 above) 85

¹⁷⁵ Simmons (n 173 above) 4

¹⁷⁶ See chapter 3

¹⁷⁷ Interview with ACODE researcher 30 September 2008

¹⁷⁸ Interview with NEMA Director for Policy Planning and Information 17 October 2008

¹⁷⁹ Interview with TEAN advocate 29 September 2008

been involved in the National Forestry Policy and in the ongoing National Land Policy. Most CSOs form coalitions with other CSOs working on similar issues in order to ensure their work has impact.¹⁸⁰ Their collective and organised voice adds pressure to government to consider and incorporate their voices.

Another problem affecting CSO capacity and effectiveness is the series of administrative requirements that they have to go through in order to operate and the uncertainty of continuity.¹⁸¹ This poses problems and hindrance to participation as approval of activity depends on local council and needs to be vetted by the Ministry of Internal Affairs. It becomes clear that CSOs have to choose their activities carefully and their opinions carefully in order to ensure survival of the organisation. The unfettered discretion given to the Board and Minister to regulate NGO operations leads to uncertainty in NGO programming, fundraising, continuation of projects and initiatives.¹⁸²

CSOs also face questions of representativity. According to Simmons, even where the development of policies have been lauded for the consultative nature, it is clear that although involving CSOs, these were not developed through client participatory processes as they are often followed by campaigns to 'inform and educate people as to what the law says'.¹⁸³ Many CSOs lack the capacity to decentralize due to low financial resources, staff, transport and other operational costs plus the technical and managerial expertise to manage from a distance.¹⁸⁴

Parliament has also been found to be lacking in capacity or ability to engage with civil society. As a result many programs have been instituted by foreign donors to create links between parliament and the people.¹⁸⁵ However due to the high turnover rate of parliamentarians it is difficult to continue and build on old programs, the focus being on

¹⁸⁰ Interview with Greenwatch researcher 29 September 2008

¹⁸¹ See Chapter 3 above

¹⁸² Interview with Greenwatch researcher 29 September 2008

¹⁸³ Wily & Mbaya (n 225 above) 102 Used the example of the Land Act

¹⁸⁴ Mukasa (n 12 above) 73

¹⁸⁵ For example the Legislative Support Activity run by Development Associate Inc with USAID 2001-2002, the Linkages Program run by State University of New York Centre for International Development and the Research Triangle Institute International

capacity building of parliamentarians.¹⁸⁶ An interview with the Parliament Development and Planning officer revealed that parliament itself has not demonstrated interest in forming links with CSOs and therefore where there are no such programs to encourage such engagement no efforts are initiated by parliament.¹⁸⁷

Thus though the interviewed CSOs have been able to boast of significant impact and effectiveness of their input in policy and law making, it is clear from the literature this is not often the case. The organisations interviewed were all urban based and so called elite and are not, to a certain extent, plagued by the capacity and skills constraints as are the majority of CSOs in Uganda.

5.2.2 State-civil society relationship

The relationship between the state and civil society has been defined as one characterised by mutual suspicion.¹⁸⁸ The NGO Amendment Act provides that NGOs should work together with government, however does not specify how this should be done, for example by providing administrative requirements for how collaboration should occur. This coupled with the requirement for supervision and monitoring of NGO activity implies a need to watch over civil society as if they are not to be trusted. Furthermore, the requirement for permission to make community consultations not only indicates a mistrust of CSOs but also cripples CSO activity.¹⁸⁹

On the other hand donors have described the relationship between government and civil society as 'too cosy', with many practising self-censorship.¹⁹⁰ In cases where CSOs have worked as sub-contracted agents of government this has compromised CSO independence, legitimacy and autonomy to hold government accountable. Despite some mistrust between

¹⁸⁶ Interview with Senior Planning Officer -Planning and Development Coordination Office Parliament 16 October 2008

¹⁸⁷ As above

¹⁸⁸ Mukasa (n 12 above) 74

¹⁸⁹ The provisions hindering CSO activity and participation have been discussed in chapter 3 above

¹⁹⁰ NORAD 'Report of a study on the civil society in Uganda for the Royal Norwegian Embassy in Uganda' (n 12 above) 33

CSOs and Government, the trend is for more collaboration, especially at district level in terms of delivering services.¹⁹¹

When asked during the interviews about the relationship between the state and civil society, informants from the state described it as cordial¹⁹², with confrontation being limited to technical issues, whereas informants from civil society described it as professional¹⁹³ and 'good depending on what we are pursuing.'¹⁹⁴ CSOs are sometimes referred to as development saboteurs when taking a stance on projects which could harm the environment. 'We are often accused of being the voices of the opposition and reminded of the registration laws which require NGOs to not be political or partisan'.¹⁹⁵

According to the interview with NEMA director for policy planning, many CSOs act as consultants for the government and as a result they cannot confront their employers. 'In Uganda the assumed divide between civil society and the state does not exist.'¹⁹⁶ Brock also found this to be true, saying that often, the assumption is made incorrectly that civil society in Uganda is a separate entity from the state.¹⁹⁷ Civil society actors often have more than one identity, being at once active in government, civil society as well as their geographical and social constituencies.¹⁹⁸

The assertion made in the report by the Parliamentary Commission of Uganda¹⁹⁹ that CSOs need to be aware that in developing policies jointly with government they lose some of their autonomy only serves to make matters worse. According to this line of reasoning, jointly developing policies with government requires consensus, harmonization and collective responsibility. This may lead to a dilemma where they find it difficult to criticise what they helped create. The arguments goes on to say that civil society also has to strike a balance

¹⁹¹ Mukasa (n 12 above) 77

¹⁹² Interview with NEMA Director for Policy Planning and Information 17 October 2008

¹⁹³ Interview with ACODE researcher 30 September 2008

¹⁹⁴ Interview with Greenwatch researcher 29 September 2008

¹⁹⁵ As above

¹⁹⁶ Interview with NEMA Director for Policy Planning and Information 17 October 2008

¹⁹⁷ Brock, K (2004) 'Ugandan civil society in the policy process: Challenging orthodox narratives' in Brock, K et al *Unpacking policy: Knowledge, actors and spaces in poverty reduction in Uganda and Nigeria* 97

¹⁹⁸ Brock (n 197 above) 97

¹⁹⁹ Report of the Parliamentary Commission (n 12 above) 16

between when to speak as one with government and when to raise unresolved concerns.²⁰⁰ This is an incorrect and misguided line of reasoning. Firstly, CSOs have to remain accountable to and represent the views of their members, that is the bottom line, regardless of whether these views in a certain instance coincide with those of government. Agreement on issues does not take away the right and duty to criticise in future. Secondly self-criticism is a sign of maturity which neither CSOs nor government should shy away from. Thirdly there is no question of speaking as one with government on the basis that the policy or law was created in collaboration with government. As stated before accountability is towards members and constituencies.

5.3 Legal factors

5.3.1 Institutional limitations

Civil society relies greatly on government or international development actors to open spaces for participation.²⁰¹ They are mostly reactive and responsive to resources offered for a particular activity.²⁰² The problem lies in continuity when the donors leave, for example when the Legislative Support Activity program came to an end so did the efforts to continue linking parliament with CSOs. This is evident from the interviews where the former parliamentary liaison officer for the program noted that after the program CSOs were better informed about the legislative process and increasingly and actively participated and engaged with parliamentary committees²⁰³ but the former clerk for the Committee on Natural Resources however recalled only two instances in her time (1999-2008) when CSOs got involved in the legislative process, that is during the formulation of the Land Act and the National Forest and Tree Planting Policy 2003.²⁰⁴

The basis on which CSO engagement with government takes place is cited as often unclear or contradictory, cosmetic and with limited impact.²⁰⁵ It is unclear which groups constitute

²⁰⁰ Report of the Parliamentary Commission (n 12 above) 16

²⁰¹ Brock (n 197 above) 100

²⁰² As above

²⁰³ Interview with Legislative Support Activity former liaison officer 16 October 2008

²⁰⁴ Interview with former clerk for Natural resources Committee 16 October 2008. Unfortunately parliament does not keep record of attendance of stakeholders and therefore reliance had to be placed on the memory committee clerks who were involved in the legislative process.

²⁰⁵ NORAD 'Report of a study on the civil society in Uganda for the Royal Norwegian Embassy in Uganda' (n 12 above) 32

legitimate participants in processes and why. Inclusion in the policy process is unpredictable and civil society relates to the state on the basis of clientelism and patronage.²⁰⁶ There is no systematic involvement of CSOs in policy and law making process and invitation occurs on an ad hoc basis.²⁰⁷ It has been stated that the interface between the government and CSOs primarily exists when the government stands to benefit from the engagement.²⁰⁸

According to the Parliamentary Commission of the Parliament of Uganda, Uganda's policy formulation procedure emphasises stakeholder participation through a series of consultative workshops, technical and political meetings. Though government has encouraged civil society to participate actively in influencing planning and formulation of policy at all levels, the combined input of legislators, local administration and civil society remains very low.²⁰⁹ NEMA has also as one of its guidelines regarding its work in initiating policies the invitation of CSOs to participate in the process. However it is not clear how and when it should occur.

The ACODE assessment of Uganda's implementation of Principle 10 of the Rio Declaration found that there is very limited institutional support for public participation in environmental decision-making.²¹⁰ Public involvement is initiated at the later stages. The public does not receive notification of the intent of a sectoral agency to develop a policy.²¹¹ It also found that where government sectors or programmes had significant donor funding, there seemed to be a more systematic process of generating and disseminating information and effective engagement of the public in decision making processes.²¹² The Parliamentary

²⁰⁶ NORAD 'Report of a study on the civil society in Uganda for the Royal Norwegian Embassy in Uganda' (n 12 above) 42

²⁰⁷ NORAD 'Report of a study on the civil society in Uganda for the Royal Norwegian Embassy in Uganda' (n 12 above) 32; CIVICUS Civil Society Index Report for Uganda (n 12 above) 42

²⁰⁸ NORAD 'Report of a study on the civil society in Uganda for the Royal Norwegian Embassy in Uganda' (n 12 above) 32

²⁰⁹ Report of the Parliamentary Commission (n 12 above) 5

²¹⁰ Tumushabe (n 157 above) 32

²¹¹ As above

²¹² Tunushabe (n 157 above) 34; Brock (n 197 above) 100

Commission also found the nature of participation to be ad hoc and dependent on a few people in government who are aware of its value.²¹³ One of the informants has said,

Parliament does not have the resources to advertise and the attempt to publish information on the website has proved unsuccessful. Only those NGOs that keep their ears to the ground get information and invite themselves to take part in the legislative process. The committees are not obliged to invite them but they are free to come.²¹⁴

Regarding public interest litigation the lack of clarity in the concept of *locus standi*, litigation fees, absence of administrative mechanisms for seeking administrative redress were cited as problems.²¹⁵

5.3.2 Access to environmental information

There is a lack of access to information with respect to key economic aspects of natural resource management.²¹⁶ The ACODE assessment also found that administrative information to facilitate access to public participation was lacking.²¹⁷ No information is publicly available about mandate, point of contact or procedures for making administrative claims. Although it found that officers are ready to provide information upon request, the public most of the time does not even know which institution or department to contact for information. There is also no evidence of administrative mechanisms for hearing claims for refusal of access to information.²¹⁸ Access to information on social sectors found to be more forthcoming than on the economic sector for example information on the award of concessions or water quality.²¹⁹ The former parliamentary liaison officer for the LSA program cited as problematic access to information about bills. CSOs have to rely heavily on the media.²²⁰

²¹³ Report of the Parliamentary Commission (n 12 above) 8

²¹⁴ Interview with former clerk for Natural resources Committee 16 October 2008

²¹⁵ Tumushabe (n 157 above) 35

²¹⁶ Ireland & Tumushabe (n 81 above) 118

²¹⁷ Tumushabe (n 157 above) 34

²¹⁸ Tumushabe (n 157 above) 35

²¹⁹ As above

²²⁰ Interview with former clerk for Natural resources Committee 16 October 2008

5.4 Political factors

Although many policy and legal frameworks in environmental management provide for participation of relevant stakeholders, in practice government has felt uncomfortable with CSOs advocating on certain types of political issues.²²¹ It tends to discourage and react harshly towards organisations which address political issues such as corruption, human rights and opposition oriented opinions.²²² Dialogue is thus limited and reflects suspicion and mistrust of CSOs.²²³

The state faces the dilemma of both needing and fearing participation. They need it for effective implementation but fear loss of control.²²⁴ Thus although there is increase in public participation, the practice is less common with respect to decisions of a more economic nature,²²⁵ for example in the granting of forest concession permits, fish processing licences and wastewater discharge permits.²²⁶ Thus CSOs are operating in an enabling or disabling environment depending on the issues that they are pursuing.²²⁷ Wily and Mbaya noted that where forests are important enough to be co-opted as government forest reserves, participation is more erratically posed in the new policies and laws.²²⁸

Also depending on the controversial and technical nature of the policy or law, participation may or may not be encouraged. Consultation of CSOs has been avoided in issues such as the controversial nature of tenure reform due to fear that demands may get out of hand or unrest be provoked, and the view that ordinary citizens, whilst it is necessary to hear their views at some point, are not in a position to 'grasp the whole picture' or know what is 'best for them in the complex modern world'.²²⁹ With their parochial concerns, they may 'delay and muddle progress', and may 'subvert national cohesion' by asserting a diversity of

²²¹ D. Dalal-Clayton & D Dent *Rural planning in the developing world with a special focus on natural resources* (2000)

²²² CIVICUS Civil Society Index Report for Uganda (n 12 above) 42

²²³ DENIVA 'Participation in Uganda's Development Processes. What mechanisms are in place?' (n 12 above) 3

²²⁴ Dalal-Clayton & Dent (n 221 above)

²²⁵ Ireland & Tumushabe (n 81 above); L Wily and S Mbaya *Land, people, and forests in eastern and southern Africa at the beginning of the 21st century: The Impact of Land Relations on the Role of Communities in Forest Future* (2001) 215; CIVICUS Civil Society Index Report for Uganda (n 12 above) 84

²²⁶ Ireland & Tumushabe (n 81 above) 118

²²⁷ CIVICUS Civil Society Index Report for Uganda (n 12 above) 84

²²⁸ Wily & Mbaya (n 225 above) 215

²²⁹ As above

locally-based and therefore untidy solutions.²³⁰ According to Wily and Mbaya because of this perception of participation, participation has been mainly in the mould of consultation which is generally belated and almost always distant from the generally participatory approaches that the government espouses. They refer to a tendency to present people with plans which do not resonate with their own experience or wishes and therefore lack social legitimacy and resulting in frequently unimplementable law.²³¹

5.5 Recommendations for the way forward

The institutional framework for environmental governance needs to be sufficiently addressed to provide more adequately for CSO participation. In Uganda the public policy process is far less institutionalised than in other countries, for example, South Africa because parliamentary democracy and the practice of public consultation has yet to take firm root.²³² Enough time and resources should be allocated to provide adequate information and preparation for the process and getting feedback.²³³ In order to address the needs and interests of stakeholders effectively there should be enough time to respond to and adapt policies. The magnitude of the policy needs to reflect the time spent in preparing it or vice versa.²³⁴ However, for now policy engagement mainly consists of contacting government officials on a sporadic and selective basis,²³⁵ and as one of the informants rightly stated, CSOs need not and should not wait space to be given to them, they should take it.²³⁶ CSOs should inform themselves of the policy and law making process and what matters are currently being addressed by the state. Once they have this information they should approach the relevant offices, without waiting for invitation or reacting to an already bad policy or law created or about to be adopted. The problem of access to information is acknowledged, however it is up to CSOs to find alternative means for acquiring information, for example by forming reliable contacts within state departments and parliament. This is better than waiting and hoping that one day the state will become more forthcoming with information.

²³⁰ Wily & Mbaya (n 225 above) 100

²³¹ Wily & Mbaya (n 225 above) 102

²³² Robinson and Friedman (n 27 above) 17

²³³ Bagnoli (n 79 above) 152

²³⁴ Bagnoli (n 79 above) 153

²³⁵ Robinson and Friedman (n 27 above) 17

²³⁶ Interview with ACODE researcher 30 September 2008

Concerning the nature of state-CSO relations, civil society recommends that the state not confuse the work of civil society with that of the opposition. Voices of civil society similar to those of government or opposition are not necessarily bad or indicative of partisanship.²³⁷ 'Being political does not being partisan'²³⁸ At the same time CSOs should not operate with an antagonistic approach and should not create unnecessary enemies.²³⁹ Rather than attacking state ideas and proposals they are opposed to, they could focus on finding a champion and work to persuade neutrals rather than attacking opponents.²⁴⁰

CSOs should strive for strong partnership with government without losing accountability to constituencies. Both the state and civil society need to understand the importance of developing an environment that promotes better cooperation, closer alliances, increased commitment and solidarity. Differences should be seen as opportunities for positive policy change.²⁴¹ Civil society should strive to form relationships with parliamentarians. Understanding the electoral process and what motivates members of parliament can go a long way in getting them a foot in the door and an audience at the very least.²⁴² They should present parliamentarians and committee members with information analysed and gathered in a non-partisan way, to show their seriousness and commitment to a cause.²⁴³

In order to be more representative CSOs must devise means of being more substantive and participatory and relate more directly to the target groups they are designed to support by involving them in all stages of the planning and execution of their projects.²⁴⁴ In addition working closely with the media and hosting media events will serve not only to validate their events or reveal scandals but increase knowledge and awareness and ensure coverage of the issues they advocate for.²⁴⁵ Many CSOs recognize the importance of decentralizing

²³⁷ Uganda NGO Forum 'Governance Monitoring Report 2006: The promises and challenges of good governance' (2006) 16

²³⁸ V Ayer 'Engaging with parliamentarians: Advice to civil society' (2008) 3 SAIIA Occasional paper series

²³⁹ Ayer (n 238 above) 7

²⁴⁰ Ayer (n 238 above) 8

²⁴¹ T Bainomugisha et al 'Towards strategic engagement' (2000) ACODE Policy Research Series No. 1

²⁴² Ayer (n 238 above) 9

²⁴³ Ayer (n238 above) 10

²⁴⁴ Katusiimeh (n 24 above) 112

²⁴⁵ Ayer (n 238 above) 7

their work so that they are closer to the grassroots. However, they lack capacity to decentralize due to low financial resources, staff, transport and other operational costs plus the technical and managerial expertise to manage from a distance.²⁴⁶ Nevertheless, CSOs can adopt other methods of reaching out to the grassroots, for example they can establish legitimacy by having a membership base that participates in setting the advocacy agenda, or undertaking adequate research and consultation with constituency or directly involving representatives from group/interests in the advocacy process.²⁴⁷

Regarding concerns on the lack of CSO capacity to attend to technical issues, the fact is participation is not equal, and the power is mostly balanced in favour of the state with its technocrats. It is not necessary that CSOs know everything and be experts on technical issues in order for their views to be heard. However they do to ensure they have at least background knowledge and sufficiently inform themselves so that when they speak they are not dismissed as being merely sentimental. Also, if CSOs work together like in the Land Alliance example they can influence policy process by fact of their number and support they amass without needing to be experts on the issues. The alliance compelled the government to recognize it because it is widely representative.²⁴⁸ Ultimately the viability of policy and law depends on acceptance by the people. This is enough pressure to not exclude interested groups on basis of lack of expertise.

5.6 Conclusion

There are many challenges to CSO participation in environmental governance, however, these are not insurmountable. Many can be overcome with a little bit of strategising on the part of CSOs and a lot of will on the part of the state.

Civil society has managed to play a role in environmental governance through the influencing of environmental policy and legislation. However in many cases the extent of their influence has been limited due to lack of capacity and skills, lack of information and lack of access to decision making processes. Often the nature of the relationship between the

²⁴⁶ Mukasa (n 12 above) 73

²⁴⁷ Mukasa (n 12 above) 68

²⁴⁸ O Okech & H Busingye "Getting the process right: The experience of the Uganda Land Alliance in Uganda 1

state and civil society, characterised by mistrust and hostility obstructs meaningful dialogue and results in wasted energy and time on accusations and finger pointing rather than working towards common goals. Furthermore the inadequate institutional mechanisms and will of the state to properly give effect to the provisions guaranteeing participation and access to information make it difficult for CSOs to contribute to decision making processes.

Civil society in Uganda still has much to do in order to improve its capacity and strength and become a force for democratic governance and accountability. Certainly there needs to be a shift in the power relations between civil society and the state. This will happen only when civil society ceases to be controlled by the state through either fear or cooption. As they gain experience and maintain their autonomy so will these power dynamics shift. This will not happen overnight and it is admittedly easier said than done. Nonetheless if civil society continues to play its role as non-partisan political actors engaging the state professionally, maintaining accountability to its members and promoting their interests in an active and vibrant manner, their role as partakers in environmental governance may be considerably increased and they may contribute significantly in the strive to ensure the protection and promotion of environmental rights of all Ugandans.

17557 words

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Annexure: Interview schedule and persons met

Organisation/Institution	Date	Person met
<i>Civil society organisations</i>		
1. The Environmental Action Network	26/09/08	Phillip Karugaba, Attorney
2. Advocates Coalition for Development and Environment	29/09/08	Bashir Twesigye, Researcher
3. Greenwatch Uganda	29/09/08	Irene Sekyana, Researcher
4. Haggai Institute Uganda	15/10/08	Betty Byanyima Executive Director
<i>State</i>		
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2. Parliament of Uganda	15/10/08	Gideon Akangasira Senor Planning Officer -Planning And Development Coordination Office
3. National Environment Management Authority	16/10/08	Eugene Munamira, Director Policy Planning and Information