

## Chapter 6 From the procedural approach to access rights

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In this concluding chapter, the researcher revisits the existing legal perspectives and instruments on environmental issues, as described in chapter 3 and 4, and builds upon the procedural approach bearing in mind its limitations described in detail in Chapter 5 with case studies from Panama. The aim of this chapter is to conclude the research by moving towards a holistic understanding of the RHE that include existing contributions from non-rights based regulatory and rights based approaches but adds substantive depth and scope to the right. It does this by returning RBA to healthy environment to the sustainable development framework and recovering the indivisibility of human rights via the right to development.

Considering the limits of the procedural approach to issues of environmental contestation, this chapter aims to elaborate on the substantive component of the RHE and substantive rights claims that are insufficiently addressed. These include the difficulty that states face in mediating between competing interests, overlapping legislation, the overly narrow focus of environmental rights as minority rights, issues surrounding the responsibilities of non-state actors, and trying to more fully understand the significance of meaningful participation. This chapter expands the current RBA to the environment through the Right to Development as a vector of rights, benefits sharing, non-discrimination and self-determination. This discussion concludes by making a claim for the RHE as a way to redress the failures of the procedural approach and to recognize an expansive developmental vision of the RBA to the environment promoting a more rigorous form of environmental governance.

The cases described in the previous chapter have shown the constrained nature of public participation in environmental decision making. They show how the procedural approach fails in different ways to render the participation process meaningful. Public participation often does not succeed in producing different outcomes and diverse limitations within access rights' procedures undermine the legitimacy of the participation process. The procedural approach is inadequate to channel substantial interdependent rights' claims and this tends to escalate, rather than resolve, environmental conflicts. Public participation has the task of mediating claims of developmental rights, resources distribution and accountability (Newell and Wheeler, 2006), but it falls short of bridging these demands.

The literature often labels access to information, public participation and access to justice, interchangeably as 'procedural rights' or 'access rights'. As discussed in chapter 4, procedural rights are civil and political rights that promote accountability as well as transparent, inclusive and democratic decision making. Procedural rights are instrumental to the achievement of substantive rights, but their value lies in the process rather than the outcome. As Black (2001: 46) suggests, procedural rights cannot remove the distorting effects of power, unequal resources and capacities which are problematic for deliberation. Access rights have a wider reach, ensuring compliance with inclusive and democratic procedures in order to ensure fair

outcomes. Access rights are not only about the enforcement of procedural guarantees but also of substantive ones. Drawing from the features of ESC rights, access rights provide expansive positive obligations, and serve the dual function of freedom and equality with and through participation (Andreassen and Marks, 2010; Eide et al., 2001; Eide, 2007: 21). Access rights offer a more comprehensive legal framework that aims ultimately at the promotion of good governance. They aim to enhance institutional accountability and offer a method to balance public and private interests, thereby contributing to the development and legitimization of public policies. The enforcement of procedural guarantees is meaningless unless substantive goals are achieved: for this reason access rights are presented as expansive in order to provide fairer and more equitable solutions that are acceptable within the human rights framework. At the same time, they challenge the current human rights regime to find innovative ways to deal with new threats. Access to information is then about the information itself, the quality, the usability and the timing of access. Participation is public in the widest sense of 'concerned public' rather than an exogenously and narrowly defined 'public concerned'. It needs also to be meaningful, influencing and legitimizing decisions. Access to justice takes on more functions: remediation and compensation of violations are to be accompanied by a precautionary approach. Access to justice could benefit the legitimization of the political process by contributing to the identification of duty bearers and rights holders.

Bearing this differentiation in mind, the shift from procedural to access rights can contribute to the elaboration of a substantive RHE. One of the most promising developments on Rio Principle 10 and environmental access rights is being led by the Economic Commission for Latin America and the Caribbean (ECLAC process). Despite advancements in the definition of access rights, it seems that the participation aspect remains the most underdeveloped. The lack of established benchmarks for early participation impedes the RHE to be fully established and enjoyed. Similarly, the lack of substantive parameters for environmental justice and the lack of application of the precautionary principle in environmental procedures weakens the RHE and limits its reach.

The right to a healthy environment, with its multiple dimensions could be considered as an expression of the right to development. In this view, public participation is a mechanism through which one could channel different claims - access to resources, benefit sharing, adequate representation, obligating non-state actors as duty bearers. These claims which we associate with the Right to Development, are deeply intertwined with, environmental protection, environmental quality and other intrinsic values linked with the environment such as cultural worth and aesthetic value. Thus, access rights that guarantee early participation and a precautionary approach set in motion a radical change in how decision making is carried out, questioning development decisions and, therefore, bringing in the wider claims to the right to development.

The description of the case-studies contributed to identify several issues of the relation between human rights and the environment. The Cobre Panama mine and

Barro Blanco hydropower cases question the validity of the procedural approach. Each access right presents limitations in its application and might contribute to human rights violations, discriminating against sections of the population. The case of Cerro Colorado questions the substantive nature of public participation and its role in the wider policy making for development. The Chan 75 dam case shows the failure of the minority protection framework and the discrepancies between the international and the national human rights standards. In addition, it points towards the unresolved issue of benefits sharing as an outcome of access rights and the public participation process. A common denominator of these cases is the attitude of the state which uses environmental law and management as a disguise to deny human rights claims or justify their violations. The cases also show the problem within environmental legislation of identifying who is responsible in environmental decision making process and to what extent. Even when forced displacement occurs as seen in Cobre Panama, Barro Blanco and Chan 75 cases, the state relinquishes its human rights duties, leaving private actors in total control of the EIA process, consultations and negotiations for relocation or compensation.

All four cases indicate a difficulty of the state to mediate different types of claims – tensions between individual and collective claims, environmental protection and peoples' self-determination, exogenous development priorities and endogenous development choices. These cases inevitably lead to challenge the assumptions that the state acts in the public interest and that civil society and individuals have adequate capacity to hold the state accountable for human rights violations (Randeria, 2003a). Randeria (2003a) questions how the 'cunning state' capitalizes on its perceived weakness, in order to render itself unaccountable both to its own citizens and to international institutions. She also questions how might a state fulfill its role as duty bearer in a credible manner and enable citizens to successfully claim their rights and hold accountable the state and other non-state actors.

In focusing narrowly on the procedural approach, these cases serve to illustrate the failure of the right to participate to deliver meaningful public participation. The cases show that participation as a procedural right may still fail to impact in a substantive way on the decision-making process. In particular, matters of access to resources and benefits sharing are not dealt with. It remains unclear what public participation means within access rights, what it entails and what might be its reach. Access to resources and benefits sharing from development are critical grey areas of interconnectedness between human rights, sustainable development and environmental protection. A broader understanding of 'meaningful participation', and consequently of the RHE, can help to substantiate matters of fairness, substantive equality and indivisibility of human rights in order to enable instances of sustainable development.

## **6.1 Human rights, environment and development: new meanings within the Latin American regional framework**

Access rights in their whole contribute to a fair, equitable public participation process. The procedural approach as it currently is, it does not consider the interconnectedness of the rights and the need for substantive rights to be exercised through the procedures. In addition, the focus on indigenous rights has narrowed the scope of environmental rights. The RHE, understood as a collective right with multiple determinants, has in effect only a limited reach, recognizing the claim for a healthy environment only to restricted minorities and considering social environmental determinants related to indigenusness. The fragmentation and minimization of the scope of RHE follows the general trend for progressive underestimation of peoples' rights and the contestation of the right of self-determination (Alston, 2001). Communities that cannot claim a transcendental connection with nature are discriminated. On the other hand, this focus of environmental rights within the minority rights framework does not grant substantive environmental protection (Yang, 2002) to minorities and ignores non-indigenous demands for environmental justice. Protections afforded by procedural rights are very limited and do not protect nor advance broader rights' claims, social justice, demands for substantive equality and greater community control over resources. The potential of the procedural approach to promote sustainable development through the promotion of transparency and accountability is challenged by its ineffectiveness in counterbalancing presumptions in favor of development and economic interests (Hayward, 2005: 180).

Knox (2012) noted how environmental concerns stem from efforts to pursue economic and social development. The increasing emphasis on economic growth and sustainable development contributed to the rise of environmental consciousness which in turn spurred calls for the RHE, due to the established relationship (Knox, 2013b: 17) and recognized mutual interdependence of environment and human rights. It is especially the Latin American and the African regional systems which actively link environmental protection and environmental concerns to Sustainable development and economic growth, consistently recognizing a right to a healthy environment conducive to sustainable development. The country providing the context for this research is particularly relevant because of its position within the Latin American region that has been particularly vocal about the connection between environmental rights and sustainable development, demanding substantive equality especially in the international sphere. The experiences of the Latin American region and its engagement with environmental rights are particularly useful to frame the sphere of interests of the RHE. It also tries to illuminate how claims of the RHE are being negotiated, protecting first and foremost vulnerable groups but also expanding the perception of who is entitled to the RHE, viewed as a wider solidarity right.

In chapter 3 this researcher turned to regional instruments to understand the tendency of RHE recognition and its judicial implications of addressing

environmental issues through human rights. This concluding discussion returns to the regional perspective in order to challenge the relation between issues of environmental contestation and human rights within the sustainable development framework. In fact, the environmental jurisprudence in the American regional system results from the view that human rights are instrumental to better environmental protection (Shelton, 2009b). IACHR jurisprudence demonstrates that there is a willingness to guarantee environmental rights in defined terms of environmental degradation affecting the enjoyment of economic, social and cultural rights (Sands, 1995). The RHE is enshrined in the San Salvador Protocol (art. 11) which adds the protection of economic, social and cultural rights to the existing human rights system of the Organization of American States (OAS). It indicates an emerging consensus in relation to the collective character of environmental rights. Inter-american jurisprudence has promoted collective rights applying the principle of non-discrimination and equality. However, this recognition is limited to indigenous peoples and it is not extended to other type of collective.

Existing human rights are designed to engage with well-defined problems, requiring definite categories: ‘proof of violation’, individual impacts and state responsibility. Environmental matters transcend these categories. Environmental issues might have a global or transboundary dimension, interest a wide range of actors and affect inter and intragenerational equity (Atapattu, 2006). In accepting that RHE requires mechanisms to access political and social justice, which affects groups and communities rather than individuals, the regional framework may provide a more expansive platform so that the collective character of the RHE might be vindicated.

The regional perspective acts as a sort of bottom up approach to human rights conceptualization: it might be a more appropriate instrument to detect specific needs of the most vulnerable and discriminated sectors of population, ensuring standards adequate to the regional realities are formulated.

The regional perspective supports the call for social and political justice, for inclusiveness and equity as well as transparency and accountability. Particular relevance has been granted to the judgment of the *Saramaka* case which most importantly indicates benefits sharing as a duty of the state: this duty implies the need for an inclusive and democratic political reform of the status quo.

The regional approach to the RHE makes it inescapably tied to sustainable development. The obverse is also true. For development to be sustainable, it needs to pursue equality in access and distribution (UN, 1987), echoing and reinforcing the RHE and its goals of transparency and accountability as well as equal benefits and burdens negotiated through participatory process.

The sustainable development discourse has been criticized for being monopolized by top down planning and decision making. The changes needed to overcome the stand-off between economic growth, poverty eradication and environmental limits should be rather found in governance strategies that facilitate bottom up ‘variety and selection’ type of participation (Tukker, 2013). Similarly, the human rights framework is constantly challenged for its failure to comply with the expectations of universalism. The regional perspective can reduce the ‘distance’ between bottom up

participation and top down policy making, mediating in both human rights and sustainable development, becoming a potential middle ground for innovative approaches. The regional framework can benefit in turn of the promotion of the RHE, since it might contribute to the active implementation of a right based approach to sustainable development. In this interaction between environment and development, the RHE might facilitate the mediation between bottom up interpretations and contents of environmental rights with the need to enforce the principle of indivisibility, universality, non-discrimination and equity of human rights.

Two new regional developments are worth noting in the Latin American context: first, the ECLAC process aiming to draft and sign a regional agreement on access rights; second, the EIA guidelines for mining projects led by an international organization which provides a practical solution to counteract states' failures. A brief description of these developments shows that even if beneficial and expansive, they fall short of providing the procedural approach a substantive meaning. Since this research has criticized the EIA as an adequate means to exercise access rights, an overview of developments in impact assessment is provided. Specifically, an overview of the Strategic Environmental Assessment (SEA) is provided and its potential to exercise access rights and to mainstream the RHE.

#### **a. The Latin American process for the implementation of Rio Principle**

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Since November 2012, the Economic Commission for Latin America and the Caribbean (ECLAC) has been leading a regional political process for the application of Principle 10 of the Rio Declaration on Environment and Development in Latin America and the Caribbean. This process, set for conclusion by December 2016, is at the negotiation stage of a Regional Agreement on access to information, public participation and access to justice in environmental matters in Latin America and the Caribbean. Its ultimate objective is to strengthen environmental governance and the right to a healthy environment through the application of access rights (ECLAC, 2015: art.1).

ECLAC has led an inclusive participatory process establishing the “Regional Public Mechanism” which engaged with the public through interactive webinars, web meetings and comment submissions on documents and statements.

The ECLAC preliminary document for negotiation (2015) affirms that the RHE is “essential for the dignity and full development of human beings and for the achievement of sustainable development, poverty eradication, equality, and the preservation and stewardship of the environment for the benefit of present and future generations”. It further states that the right to a healthy environment is considered a precondition for, or at least a key right to be enjoyed to contribute to, sustainable development (Article 5; para 1). Within this view, access rights are “prerequisites for building a citizenry that is committed to sustainable development in line with a rights-based approach” (ECLAC, 2015). As pointed out by Foti and de Silva (2008:

22), access rights are largely procedural in nature, but their purpose is to empower people to advance fulfillment of substantive rights (see also Brisman, 2013). Even if they are rooted in civil and political rights which provide the building blocks for access, their aim is to advance economic, social and cultural rights. Therefore access rights are a means to overcome human rights division.

This regional agreement, although still in negotiation, fills some gaps left open by the Aarhus Convention, the only international agreement currently existing on access rights implementation as discussed in Chapter 3. The ECLAC regional process redresses some implementation limitations providing more specific obligations and provisions aimed to protect vulnerable peoples on the base of the principle of non-discrimination. These additional provisions are tailored to the regional experience and aim to bridge the disadvantageous gap that indigenous peoples, ethnic minorities and rural communities face when trying to exercise access rights. For instance, states are called to take positive actions towards disadvantaged groups providing technical assistance to exercise access rights (article 5, para 3). The state is thus called to be responsible to adopt inclusive measures, a role that is usually filled by civil society organizations.

While these measures expand environmental rights, especially in access to information and access to justice, aspects of public participation remain unclear. As discussed in Chapter 4, public participation is divided in two types: a general right to participation to environmental decision making and public participation mechanisms related to environmental assessment.

Even though mechanisms of participation are left to be devised by the Conference of Parties (article 8, para 10), some specific obligations are outlined. States should “adopt measures to ensure public participation when all options and solutions are still possible and when the public is able to exercise real influence” (article 8, para 2). Differentiated participation processes should be implemented to accommodate social, economic, cultural, geographical and gender characteristics of communities (article 8, para 6). Language barriers should also be taken into consideration and positive action taken (article 8, para 6). Participation should also be promoted at international level on environmental matters (article 8, para 11). The establishment of permanent formal spaces for consultation with representatives of various sectors is encouraged as well as the interaction of different views and knowledge (article 8, para 12).

The preliminary document does contain something new in terms of public participation in relation with environmental assessment. Considering that public participation mechanisms are tied to EIA process which is led by developers, paragraph 15-18 might mark a shift in terms of who bears the responsibilities of guaranteeing that public participation procedures are carried out without discrimination and in an inclusive manner.

These paragraphs would require the state to bear the responsibilities of identifying the affected public, providing technical and financial assistance to facilitate their participation in situation of vulnerability (article 8 para 15-16). The public should

have timely access not only to EIA documents, but also to non-technical summaries with the description of proposed project, major effects on the environment and mitigation measures to be adopted (article 8, para 17).

The ECLAC process is a valuable regional approach providing a space to challenge, consolidate and expand the procedural RBA to the healthy environment. It falls short, in two areas. First, even if it affirms the RHE and its role in achieving SD, it does so by treating the ‘environment’ mainly as a determinant of public health. Second, it calls for a new type of democracy and it stresses the importance of ‘early participation’, but it does not further elaborate how the mechanisms for early participation should be or what benchmarks or indicators should be taken into consideration to evaluate ‘early participation’.

#### **b. NGO Guidelines to improve Environmental Impact Assessment of Mining Projects**

In 2014, the Inter-American Association for Environmental Defense (AIDA), a prominent environmental organization active in the Americas, elaborated recommendations for basic guidelines to draft Environmental Impact Assessment for mining projects. These guidelines constitute the base for any government to analyze the implications of any mining project according to possible impacts and to take an informed decision on the viability and convenience of such project (AIDA, 2014: 8). This document promotes an assessment that facilitate participation of communities not only to identify which negative impacts the mining project might generate, but which positive impacts can bring compared to a situation where no mining project is carried out (see Box 1).

This guideline is a laudable effort as it affirms, among others, that any project should be designed according to the principle of sustainability, precaution and prevention (AIDA, 2014: 16). A few issues can be pointed out, though, which are consequence of the lack of a RBA as stated in the introduction (AIDA, 2014: 8-9). The guidelines do not consider the implications of collecting, analyzing and interpreting social information by the project developer. It takes for granted that the state has up-to-date information on demographics, land tenure, economic activities, to be considered in the social baseline study. Moreover, it limits itself to list contents, while it lacks reference to a scientific method and minimum benchmarks for social impacts analysis, which could be established through the application of a Rights Based Approach.

The guidelines do not suggest a way to solve the biggest impediment inherent to EIA, being that EIA is not carried out by an independent agency but the project developer. How can we expect the project developers to conduct a thorough and dependable analysis of social values or social dynamics if that might suggest the project is not viable? Two possible solutions could be adopted: the social impact analysis could be carried out by the state, reclaiming its central role as a human rights duty bearer. Another solution would be to request project developers, mainly non-state actors, to adopt public human rights commitments and compliance with



public implementation guidelines, as suggested by Oxfam (2015) on the issue of free, prior and informed consent, with stricter rules for EIA especially on the social impact analysis. It is to be acknowledged the increasing reference to the UN Guiding Principles for Business and Human Rights (2011c), which provide recommendations for the implementation of the UN “Protect, Respect and Remedy” Framework to tackle the adverse impacts on human rights caused by business activity. Despite these principles being comprehensive and highlighting that the duty to protect human rights remain on states, they remain a soft law approach to a critical grey area of human rights which could be more stringently regulated.

The regional process currently taking place in Latin America and the publication of the EIA guideline for high impact projects show that there is a deep understanding that procedural rights are critical to improve environmental democracy but the current state of the procedural approach leaves some gaps which might allow human rights violations to take place. An expansive view is being elaborated to redress the current failures, with a special attention to regional realities, and to ensure that the immediate duty bearer is the state or the competent authority (ie. ANAM) rather than the project developer, often a private non-state actor, so that redress mechanisms can be more effective. Both the ECLAC process and the publication of the EIA guideline build an opportunity to not only reshape the process of participation, but also in rethinking the procedural RBA to environment in a more progressive way, incorporating the concept of environmental democracy. However, both documents fall short to elaborate what ‘early participation’ entails and to impose positive duties on non-state actors to respect human rights so that they can be held accountable.

**Box 1. Basic Guidelines for the Environmental Impact Assessment of Mining Projects**

The innovative elements of this EIA guideline are: the incorporation of an executive, non-technical, summary of the project; a more structured social baseline study; and an analysis of the situation with and without the project (AIDA, 2014).

The executive summary should outline the most important elements of the project, without complex terminology, to be publicly available, especially for the local communities, in a free, accessible and easy (digital) format in the official languages as well as native languages (AIDA, 2014: 12).

For what concerns the possibility to analyze the alternatives to the project, the guidelines indicate that the identification and the evaluation of project conditions, social and environmental impacts, should be carried out through an analysis of alternatives. At least two scenarios should be analyzed: one with the project and one without, referring to the current state of things prior to project development (AIDA, 2014: 10). The objective analysis of a scenario without the project could be questionable as it might be portrayed negatively in comparison to the scenario with the project, considering the EIA is led by the project developer.

For what concerns the social baseline study, there is a list of information that should be included and which constitutes a full and comprehensive guideline. Among others, the social study should include a cost benefits analysis indicating rates for employment increase, income redistribution, local investment. Under the heading of cost, elements to be considered are: severe environmental impact, migration, social welfare, displacement, public health (AIDA, 2014: 16). Information of social baseline study should be presented in quantitative and qualitative manner. For instance, under the employment section, the EIA should provide numerical data to define employment rate increase and which profiles will be needed. It should include relation with local and national development plans, with special attention in case of indigenous communities (AIDA, 2014: 49). A detailed description of land property, actual land use, and land titles, with special attention to land used by farmers and indigenous peoples should be also produced.

### c. Innovations in environmental assessment to align RHE and SD

One of the key arguments advanced in this dissertation concerns the limitations of the EIA process. It argues that the EIA is a very inadequate mechanism for the full exercise of access rights that have substantive outcomes and for pursuing environmental, social and economic objectives in a holistic manner. The reconciliation of these SD objectives should be the purpose of meaningful, public participation, alongside providing the legitimacy of the whole decision-making process through deliberation (Zhao, 2010: 90). The case of Cerro Colorado, a potential mining exploitation site, and the struggle of indigenous peoples to participate in the legislative process suggest that there is a gap to fill to allow public participation in the wider political decision making. The RHE and its procedural components offer greater opportunities for participation, compared to the national EIA process that is not fit for the purpose. An alternative instrument, developed in the late 80s within the European context (Partidário, 2012), could be used to exercise access rights. The Strategic Environmental Assessment (SEA) “as a strategic framework instrument that helps to create a development context towards sustainability, by integrating environment and sustainability issues in decision-making, assessing strategic development options and issuing guidelines to assist implementation” (Partidário, 2012: 11).

SEA is an instrument present since the 90s in legislations across the Latin American region, but has not been used in practice. Panama for instance lists it in the Environmental Framework Law (Law 41/1998) and added a dedicated article<sup>36</sup> in the recent Law 8/2015 that establishes the Ministry of the Environment. However, it failed before to approve relevant regulations for implementation and it is to be seen whether the new administration will redress it in the next two years.

The scope of the SEA is to advance integral evaluation and development of environmental policies from the point of inception. It provides a framework of action that determines acceptable environmental impacts and sustainability in short and long term (Herrera and Bonilla, 2009: 12; see also Thérivel and Partidário, 1996). It incorporates environmental and sustainability criteria at the earliest phase of decision making process. The narrowest understanding of SEA makes it potentially more progressive than the EIA since it evaluates strategic planning and is not limited to individual projects, it involves an appraisal of alternatives based on environmental objectives and criteria and it influences decision making. While EIA processes are only set in train after a project is initiated and after the decision has been made - addressing only mitigating measures, limiting consultation and limiting contribution to the eventual decision (CEC, 1993; DoE, 1991; Glasson et al., 1995; Lee and Brown, 1992; Thérivel et al., 1992, cited in Thérivel and Partidário, 1996: 8) – SEA

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<sup>36</sup>Article 21-A. the Ministry of Environment shall carry out strategic environmental assessments for policies, plans and programmes which foresee potential strategic opportunities and risks for environmental conservation and the sustainable use of natural resources. The Ministry of Environment shall draft relevant regulations within two years from this law entry into force. Law 8/2015.

considers additive effects, induced and synergistic impacts as well as global impacts of small and big projects that are carried out within the same area (Thérivel and Partidário, 1996: 8-9).

SEA aims to inform decision making on alternative planning and development options which might result in sounder environmental outcomes (Thérivel and Partidário, 1996: 4) and it has a more proactive character (Goodland, 2005). Because it is a proactive, ex-ante, formal and systematic process (Goodland, 2005: 2), SEA is more conducive for the RHE to be exercised respecting a precautionary approach.

SEA understanding has evolved and even more distant from the EIA instrument. Partidário (2012: 20-21, citing Council for Scientific and Industrial Research, 1996) notes that “while EIA focus on the effects of development on the environment, SEA focus on assessing the effects of the environment on development”. In this way, SEA integrates environmental issues in the development process by making the environment to set the conditions for development (Partidário, 2012). This more progressive understanding of SEA, which is known also as Integrated Environmental Assessment (IEA) (UNEP, 2009b), might provide a framework compatible with the RHE as it implies multidisciplinary and policy relevance.

This section has showed that certain regional innovations in the Latin American regime of environmental regulation may provide a platform to vindicate the collective character of the RHE and to locate it within the sustainable development paradigm. This potentially, but not explicitly, supports calls for social and political justice, for inclusiveness and equity as well as transparency and accountability. The emerging regional approach seems to be moving towards participatory processes that could lead to a fairer distribution of benefits and burdens. The recent developments in regional legislation – the negotiation for a regional agreement to further the implementation of Rio Principle 10 (ECLAC process) –, the products of regional public interest activism – mining EIA basic guidelines (AIDA) – and the existing but not applied SEA tool for development policy making demonstrate a trend towards the expansion of the procedural approach from just procedures to just outcomes. Negotiation of outcomes, thus meaningful participation, becomes the central concern for the possible interpretation of the RHE as a substantive right.

## **6.2 Meaningful Participation. The substantive quality of participation**

Access rights, understood as procedural rights aiming to substantive fair and equitable outcomes in environmental decision making, have been studied and analysed since their official inception in Principle 10 of Rio Declaration in 1992. Especially in this last decade, international and local civil society organizations first, followed by the UN system, have really pushed the boundaries of access rights and dedicated effort in detailing the practical meaning of each one of the access rights. The goal has been to widen the space for democratic decision making in environmental issues as much as possible applying the principle of non-discrimination and equality. The right to access to information has been deepened to

recognise and accommodate the needs of vulnerable peoples that suffer the most and are effectively excluded from top-down environmental and developmental decisions. Recognition of native languages, illiteracy, and other barriers to access and participation are essential for people not to be discriminated and giving due consideration to their cultural and social contexts. Additional positive actions are being required from the state to provide technical assistance to cater to these needs and promote equitable opportunities to access information. Similarly, the right to access to justice has been widened on the base of courts' experiences, calling for broader legal standing, more expeditious proceedings and lower court fees, and, ideally, specifically trained environmental officials.

Despite this advancement in the understanding of access rights and their implementation in the context of environmental democracy, the right that calls for public participation has been left behind. Aside from tiny procedural tweaks to enforce the principle of non-discrimination, mainly indigenous related, public participation seems to be too much of a contentious topic to be dwelled upon. As discussed earlier, public participation has been contested for failing to fulfil the purpose of a deliberative process, to address a broader range of issues (Barton, 2002: 98), to influence the decision making process and for the impossibility to seek redress for the violation of public participation (González, 2002: 645).

The following section expands on the concept of public participation. First, participation is briefly explored in general terms which show the ambivalence of this concept which can be rooted in the procedural approach. Second, a more specific understanding of participation as key process of environmental decision making is provided. The aim is to characterize 'meaningful participation' and possibly shed light on the substantive character of the RHE through participation as access right.

There are two main perspectives of public participation: one that favours participation as an end in itself for more legitimate decisions (process based goals perspective) and one (substantive based goals perspective) that considers participation as contributing to further, potentially better and locally reflective, outcomes (Pring and Noé, 2002: 22). This view correlates with the description of proceduralization by Black (2000). Proceduralization is seen as the means for achieving substantive ends, since it recognizes a non-hierarchical relationship between politics, law, and other social systems (Black, 2000: 603). It is a particular mode of decision making that implies a shift in regulation where substantive ends are induced through indirect strategies instead of being commanded through the imposition of laws. Proceduralization is closely associated to participation and deliberation which are both frequently understood as techniques of proceduralization (Black, 2000: 599). However, calls for procedures that will facilitate participation or deliberation often do not consider the form that participation should have (Black, 2000: 599). This arguably undermines the capacity of procedures to contribute to substantive outcomes.

Black (2000: 607) distinguishes a ‘thin’ proceduralization from ‘thick’ proceduralization, based on two competing theories of democracy, which influences which form of participation is adopted. ‘Thin’ proceduralization (or liberal proceduralization) refers to procedures that aim only at bargains and compromises, based on liberalism’s concept of democracy as a mechanism for the expression and aggregation of preferences. ‘Thin’ proceduralization therefore foresees a mode of participation in which preferences remain exogenous, unchanged and discourse-less. ‘Thick’ proceduralization, on the contrary, aims to orient participation towards the mutuality, consensus and inter-subjective understanding of deliberative democracy. This concept of democracy suggests that law and the exercise of political power is legitimate to the extent that it has been agreed upon by citizens in a process of deliberative opinion and will formation. Procedural law has double meaning as it expresses normative requirements and at the same time it is the legal technique to secure those requirements (Black, 2000: 607). Elaborating on Black’s analysis, the environmental rights field is currently dominated by a thin type of proceduralization, aiming for the benefit of the majority while leaving the minority in a situation of injustice. Could thick proceduralization provide an understanding of meaningful participation? Could meaningful participation as access right be the mechanism to unveil and secure normative requirements that would advance RHE? In order to answer these questions and to back any statement for a substantive RHE, it is necessary to understand public participation as an access right.

Public participation in environmental decision making refers to an organized process adopted by either a public or private-sector organization to engage the public in environmental assessment, planning, decision making, management, monitoring and evaluation (Dietz and Stern, 2008: 1). The case studies have showed that any participatory process in the EIA merely acts to fulfil a legal public comment/consultation requirement (condition of the legality of decision, Steele, 2011), when public influence on the decision is insignificant (Dietz and Stern, 2008: 17) and only the goal of providing information is fulfilled (Lee and Abbot, 2003). The question is how a participation process should look like if the aim is to fulfil an explicit requirement for deliberative consensus (Arnstein, 1969; Lee and Abbot, 2003; Fung, 2006, cited in Dietz and Stern, 2008: 17; McLaverty, 2011). There could be multiple definitions of public participation and multiple forms, depending on the values of the participants and the individuals, sector, or institutions promoting the participation process. A lot can be said on what constitutes a good process of participation in form and substance. Webler et al. (2001), after identifying five different perspectives of participation, opts for the following definition: meaningful participation is a participation that can influence the outcome within a legitimate decision making process (Webler *et al.* 2001; see also Foti and de Silva, 2010: 13).

Two perspectives are particularly relevant in environmental decision making: one that realizes the democratic principles of fairness and equality, which focuses on the process and quality of interactions; a second perspective promotes equal power

among all participants (Webler et al., 2001). From a rights based perspective, these two perspectives complements each other as they are both based on the principle of non-discrimination and equity. The focus on fairness and equality aims to guarantee a participatory process that allows for fair opportunities to speak and be heard. It also promotes the idea that the participatory process' goal is to achieve informed and free consensus rather than absolute agreement. The necessity to promote equal power comes from the understanding that participants of a decision making process have different power to influence the process itself. The aim of this perspective is to limit the influence of rhetoric and political power to reach, instead, a decision that potentially results in a more equitable distribution of benefits and burdens. Accordingly, Lee and Abbot (2003) identify the benefits of public participation and its potential to improve substantive outcomes while attempting to improve the procedural legitimacy of the decision making procedures.

Participation, to improve the quality, legitimacy and capacity of environmental decision making, should be designed following the principles of inclusiveness of participation, collaborative problem formulation and process design, transparency of the process and good faith communication (Dietz and Stern, 2008: 1 - 3). There are several understandings of the dimensions of public participation (Arnstein, 1969; Fung, 2006; Barton, 2002). Dietz and Stern (2008) identify five dimensions: (1) who is involved; (2) when, and at what point, they are involved; (3) the intensity of involvement of participants; (4) the extent of power or influence the participants have; and (5) the goals for the process (Dietz and Stern, 2008: 14).

1. 'Who is involved' in a public participation process, as it was previously described with the 'public concerned', is a matter of non-discrimination, inclusiveness of the process, but also a matter of understanding what are the stakes, the competing interests and the values. Participants in environmental decision making, though, are very varied. They could be stakeholders understood as an organized group that is affected or has a strong interest in the outcome; but they could be identified as directly affected public, an observing or a general public (Dietz and Stern, 2008: 15). A fundamental but often overlooked matter is who is in charge of identifying 'who is involved', which influence the substantive quality and the goals of participation. For instance, Steele (2001) differentiates between 'affected parties' and 'interested parties'. These two potential subjects of participation intervene in two distinct manners, providing participatory process with two types of knowledge: the former provides situated knowledge born by the proximity of the issue while the latter offers breadth of reflection.

If we consider that a meaningful right to a healthy environment has to address the environment as a public good (Boyle, 2012: 628) as well as environmental governance, we might consider new theories of public goods that focus on the way public goods generate, stimulate, and contribute to the continued existence of, the public made by Kallhoff (2011). Because of their inherent quality of equal accessibility and availability, public goods contribute to the making of the public

through the facilitation of spheres of interaction that provoke mutual awareness, reliability and experienced equality. Kallhoff suggests that public goods create mutual awareness by constituting a public realm where one encounters the other. Public goods are considered to be ‘reliable’ as they are more complex and stable than other goods, and where one experiences equality. Following this new public goods theory, environment and environmental regulation fail to constitute public goods when these conditions are not met.

Elaborating on Kallhoff’s approach, this researcher argues that the environment or the environmental governance system can still facilitate the creation of the ‘public’ through mutual awareness. In turn, the combination of wider concerned public and narrower public concerned might contribute to build up the qualities of reliability and equality in access and availability that all duty bearers have the obligations to provide for the healthy environment and the environmental governance system to be public goods.

The right to a healthy environment, rallying the public around environment as a public good, contributes to the creation and strengthening of a new ‘concerned public’. This new ‘concerned public’ becomes aware of itself as a collective, recognizes the need for a collective effort for the public good to remain reliable and stable over time through participation, and recognizes the need of the public good to be equally accessible and available through the exercise of human rights.

The right to a healthy environment can spur the creation of a ‘concerned public’ with both a collective and diffuse interest over the environment. This might be a network of public interest activism (Boyle, 2010: 7; Boyle, 2012: 614) that expand individual’s demands in a collective view, bringing more depth and breadth to human rights claims through the principle of solidarity. The RHE can also provide public interest activism with the substantive claims as well as procedures to strengthen the public good and redress inequalities in access and availability.

Public participation serves the purpose of deciding the characteristics of access and availability of the public good and demand for transparent and accountable mechanisms to ensure that the public good remains reliable and stable over time. First, a consensus on basic universal values and content should be reached for the objects of the RHE to have the quality of reliability and stability. Second, reliability and stability should also be qualities of the environmental governance system to embody a public interest model of accountability (Boyle, 2012: 616). Through a RBA perspective reliability and stability could be derived from non-discrimination and participation from below.

A public good is a good that meets the conditions of open access and ‘basic availability’ (Kallhoff, 2011: 43): neither the environment nor the environmental governance system meets these criteria. The idea of benefits distribution is associated with the publicness of benefit and equity aspect of public goods. Equal access and availability are also matters of social justice, which requires that basic needs are met, at a level that is appropriate for the community and at a level which relates to the standards, or to the benefits, enjoyed by others (Ewing, 1999: 105-106, cited in O’Connell, 2012: 5). A network of public interest advocates might mobilize

participation, formulating claims for social justice through the exercise of human rights and the realization of human rights as public goods. In this view, the RHE reinforces itself as a complex vector of procedural mechanisms and substantive claims that culminates into the full realization of rights indivisibility.

2. The latest development in access rights calls for early participation, making the temporal dimension of participation central. The concept of ‘early participation’ is correlated to the capacity of the concerned public to influence the outcome of the process. Early participation gives the power to the public to intervene in public policies and challenge them.

The idea of ‘early participation’ is in practice incompatible with the EIA process, as currently conceived once concessions have already been granted. Within the current EIA framework, a better designed public participation process should include first and foremost a reasonable period of consultation as well as multiple opportunities for participation which design should take into consideration participants’ variety and capacity as well as the impact on economic, social and environmental level of the project in question.

The terminology of ‘early participation’ is nevertheless problematic as it suggests the need to give a specific temporal dimension to participation that clashes with the understanding of participation being a continuous, permanent and responsible process (UNEP, 1997b). In the context of environmental democracy, participation in decision making contains educational and awareness raising elements (Lee and Abbot, 2003: 83) as well as public generating features (Kallhoff, 2011) that do not materialize in a one off consultation even if carried out at the earliest convenience.

3. The intensity of involvement from both participants and the state and non-state agencies promoting the participation process refers to the degree of interaction between participants, which does greatly depend on the goal of the participation process and the mechanism of participation itself. Consultative mechanisms do not pursue a high degree of involvement since they rarely influence the outcomes of decision making process. Similarly, expert based decision making processes discourage general public participation. This is said to de-politicise decisions (Lee and Abbot, 2003). The intensity of involvement is related to the capacity of the participants to communicate values and knowledges, and to persuade and being persuaded so that common views are defined (Steele, 2001). Active deliberation by citizens implies the possibility for views to change over time. Indeed such changes might be considered a good index for involvement. In addition, clear mechanisms to follow up on how the public inputs have been taken into consideration should be established. Implementation of multiple deliberative mechanisms in environmental decision making would benefit the capacity for the public to interact, moving beyond simple aggregation of preferences towards an active engagement in reasoned argumentation (Steele, 2001; Lee and Abbot, 2003; McLaverty, 2011).

4. Public participation calls for transparency, accountability and equal distribution of benefits and burdens aiming to counteract inequality and to promote



bottom-up approaches to decision making. The extent of influence the participants might have is therefore an important matter when considering the quality and legitimacy of a participatory process. Procedural law alone cannot “cleanse the distorting effects of power, unequal resources and capacities” which are problematic in the deliberation process (Black, 2001: 46). In order to fulfil and achieve meaningful participation, a ‘thicker’ procedural approach should contemplate an analysis of the issues and the mapping of the differences and conflicts that it might generate and the deployment of a mediation strategy to overcome such differences and conflicts between participants (Black, 2001: 47; see also Lucas, 2002: 316 calling for a process for mediated negotiation of project approval applications). In her view of thick proceduralization, Black offers a scheme of mediation of deliberation that usefully defines the role of the regulators in the participation process. Regulators should be able to act as mediators, mediating between deliberants, mapping the discourse positions, regulating and facilitating their decision making process (Black, 2001: 34). Rooting this role in human rights, regulators should have the duty to perform a translator/facilitator role that is required in a participation process.

In contrast with Black’s scheme of mediated deliberation, the work of Steele (2001) points out that a plurality in perspectives within decision making processes have a problem solving potential in itself. Applying deliberative theory as elaborated by Sagoff (1988), Steele argues that participation in environmental decision making concentrates on the communication of values, not interests. Therefore, a deliberative model of participation intended as a collective process of reflection, discussion, communication and attempted persuasion, aims “to encourage elaboration of values and gain a fruitful diversity of reasons” (Steele, 2001: 429), rather than to narrow down disagreement. Variety of values, knowledge and interests are viewed as resources of deliberative decision making, not obstacles (see also Lee and Abbot, 2003; McLaverty, 2011).

5. Currently, the goal of participatory process in EIA is purely informative, which is the first dimension of participation as a spectrum of processes culminating in empowerment (Arnstein, 1969; Barton, 2002: 80; IAP2, 2006; cited in Dietz and Stern, 2008: 14). The goal of participatory process within the RHE should be to bring about consensus on development options for equal benefits. Taking inspiration from Fuller’s concept of polycentric disputes, which are cases that “involve many affected parties and a somewhat fluid state of affairs” (Fuller, 1978: 397, cited in O’Connell, 2012: 13), participation should aim to find a common ground within the polycentric dispute. This common ground is occupied by the concept of sustainable development. The development context renders participation polycentric: therefore a participatory process should be able to mobilize participation around the indivisibility principle of rights so that competing but interconnected centers of interests and instances of participation can recognize the common denominator of their claims and build a unified strategy for substantive change. The RBA to RHE serves two substantive functions for participation. RBA can inform participation

using it as a tool for claiming rights so that it can achieve meaningful substantive purposes. In turn, rights can “provide a tool for mobilization of societies and social movements” (Cottrell and Ghai, 2004: 59) to address the structural causes of poverty and exclusion (O’Connell, 2012: 203), expanding the reach of meaningful participation from narrow environmental procedural rights to wider substantive economic, social and cultural claims.

Allowing the wider ‘concerned public’ opportunities for continued participation and creating multiple mechanisms for deliberation and follow up, might enable the establishment of a participatory process that aims to build a consensus on substantive policy matters. In this dimension, a rights based approach could contribute to define who is to be held responsible for the process and the rights of the participants. Having better defined duties and obligations of the participatory process is beneficial for the legitimacy of the process as it increases transparency and accountability.

Nevertheless, meaningful participation in decision making does not have the obvious outcome of increased environmental protection. As Shelton pointed out years ago, “some proponents of procedural rights also may have held an overly optimistic view that a fully informed public with rights of participation in environmental decision-making, and access to remedies for environmental harm, would ensure a high level of environmental protection. Such a beneficial outcome may result, but it cannot always be assured [...] In the environmental field, well-known problems of achieving environmental protection in the face of short-term economic costs, as well as scientific uncertainty or the perception thereof, make reliance on procedures insufficient to ensure a safe, healthy or ecologically sound environment” (Shelton, 2010a: 91). This view can be related to the conceptualization that adverse consequences might occur even if a meaningful decision making process has taken place and that there is always going to be a burden of uncertainty and potential costs. Any decision making process therefore will need to identify a threshold of risk, or the degree of risk aversion of a society (Ellis and FitzGerald, 2004: 796), which is a matter of specific context and not a general rule, and it should be the result of combining scientific knowledge available, the likelihood of a risk happening or negative consequences foreseen. Since risk aversion depends on the education, economic level, information accessibility of a determinate society, a decision making process that challenges social values and scientific knowledge is needed. Integrating the precautionary principle into participation as an access right could add value as it would contribute to define the public interest in relation to scientific analysis and to social as well as economic priorities.

Any decision making process when facing uncertainty “is a matter of policy and political considerations” (Tickner et al., 1999: 4; see also Ellis and FitzGerald, 2004: 794), because it requires the analysis of scientific knowledge available, of social and economic priorities (cost-benefit analysis), as well as public interest and response (risk aversion). A good decision making process should be carried out in an open and transparent manner in order to “maximize legitimacy and reliability” (Ellis and FitzGerald, 2004: 795). A decision making process based on the precautionary

principle is a process that is even more attentive of public interests and priorities, that should provide well-reasoned justifications, should be addressed to the broadest audience possible (Ellis and FitzGerald, 2004: 795). Such process should also be able to envisage positive and negative outcomes and anticipate certain types of unintended consequences.

An open, public and equal participation in the decision making process is vital for the application of the precautionary principle since it questions indeterminacy (Hunt, 1994), which refers to the acknowledgement of the production of science as a socio cultural process of negotiation between social actors and subject to change in social attitudes and understanding. Scientific uncertainty as indeterminacy might be overcome by a democratization of risk assessment: widened participation in groups providing scientific advices, equal status of participants, and open and publicly accessible procedures and debates are the mechanisms that would enhance the application of the precautionary principle while exercising the RHE.

The precautionary principle, recognizing the indeterminacy of scientific knowledge, questions not only science capacity to accurately quantify possible harm, but also the social benefit that a determinate substance or activity might generate (Hunt, 1994). According to Hunt (1994), the possibility to ask so many different questions about the risks we are willing to accept and “ultimately what kind of society we want (and how much choice we have in creating it)” is the innovative element of the precautionary principle. The precautionary principle can benefit from its application in a RBA framework serving as a vehicle to serve justice, welfare and rights.

The precautionary principle, favoring preemptive and proactive actions, might assume a democratic and constitutional significance, serving as a legitimate means for public intervention to defend, pursue, and reassert collective non-economic interests (Feintuck, 2005). Nevertheless, the precautionary principle should not be viewed as a free standing concept, rather as a part of a package of environmental measures in a broader regulatory system that aims to “contribute to broader civic, democratic and collective values in protecting the commonwealth against private interests”, and also as serving “the goal of transparency and democracy in making decisions about technologies” (Myers, March 2000) encouraging public participation and contributing to the debate of “democratizing scientific expertise” (Harramoës, 2001: 4, cited in Feintuck, 2005: 377). Even if the precautionary principle is in itself worth for providing a framework to take authoritative and legitimate decisions, it ultimately depends upon the value system within which the precautionary principle is used, which social values are given precedence to as well as which democratic system and political objectives are pursued (Feintuck, 2005). For this reason, the precautionary principle should be incorporated into a RBA framework and worked into the substantive components of the RHE in order to be subjected to, and to guarantee, substantive universal standards based on the principle of non-discrimination and equity.

Fulfilling the conditions of ‘meaningful participation’ is for this researcher critical to maximise the transformative potential of the procedural approach to address substantive issues social justice and environmental protection. Meaningful participation is highly problematic as it questions its corollary conditions of access to resources, benefit sharing, and levelling power imbalances. If these issues are not addressed through participation, there would be no substantive meaning added to the process. Participatory process should not aim merely to inform people, but to challenge knowledge, values and benefits. Providing a framework for meaningful participation contributes to the reduction of marginalization of vulnerable groups that tend to be excluded from political and democratic processes and lack a political voice (Michelman, 2003, cited in O’Connell, 2012: 5).

### **6. 2. 1 Content of the RHE through participation**

One of the problems of public participation is that it is considered non-measurable and not based on substantive criteria. The objective of this section is to help identifying criteria or indicators to establish benchmarks of the minimum level of enjoyment of public participation. Of course, it is more complex, as meaningful participation includes both a well-designed, legitimate and fair process and a process that produces the best outcomes (Webler et al., 2001).

As it was indicated in the first two chapters, the RHE is considered being of the same nature of the Economic, Social and Cultural (ESC) rights. ESC rights are deemed to be poorly justiciable due to the lack of quantitative, definable indicators would make it easier to distinguish full, or degrees of, enjoyment versus instances of violation. But as Jaichand (2010) points out, it is not a matter of whether ESC rights are justiciable but how they can be enforced. For this reason, criteria to assess the degree of enjoyment of ESC rights have been formulated and this researcher uses them as a guide to specify the content of public participation of the RHE.

### **6. 2. 2 Four A’s criteria of ESC rights applied to Public Participation**

Alston’s view on human rights indicators and benchmarks suggests that the indispensable elements of the human rights framework are: normative specificity, an accepted legal obligation, a commitment to the use of all appropriate means, the provision of forms of redress in response to violations and the establishment of mechanisms of accountability at the national and international levels (Alston, 1998, cited in Green, 2001: 1095). Therefore, economic, social and cultural rights requires these essential elements, while surrogate terms such as poverty reduction, social exclusion, basic needs, and human security may serve to confuse rather than clarify (Alston, 1998, cited in Green, 2001: 1095). The rights based approach, however, aims to provide mechanisms to redress matters of poverty, social exclusion and discrimination, basic needs and security through the application of ESC rights.

Elaborating on Alston’s view, the RHE cannot therefore be given effect by general terms unless concrete elements of the human rights framework are present.

From an ESC rights perspective, problems related to environmental contestation - discrimination in decision making, human security, food security, livelihoods, access to resources, benefit sharing – should be addressed by a rights based approach to the RHE. A great deal of effort has been done to give procedural rights the required normative specificity and to define them as the accepted legal obligations of the state. For instance, the recent developments in the Latin American region demonstrate a commitment to further specify procedural rights, reinforcing the procedural approach as appropriate and relevant to a RBA to the environment. However, not a lot has been done to benchmark the commitment to the use of all appropriate means, nor the sufficient forms of redress, and to establish accountability mechanisms.

Many scholars argue that RHE is not useful as it does not set quantitative standards to measure the quality of an environment that needs to be reached in order for it to be classified as “healthy”, favouring environmental law as a more complete instrument to deal with the issues. The formulation of the RHE does not, and may not need to set more quantitative environmental standards. Knox (2013a, 2015) identifies the value of human rights in the environmental field in terms of support for effective environmental policy making. Expanding this view, this researcher believes that the RHE should concern the political process of environmental decision making in a preventive manner, dealing with rights and obligations of individuals, collective, state and non-state actors. This treatment has both a reactive and preventive character. The RHE should be addressing root causes of environmental degradation rather than environmental degradation itself; in addition, it could have the capacity to address environmental violations that directly or indirectly cause violations of certain individual and collective human rights. In this sense the RHE distances itself from the prescriptive character of human rights, towards a more operational quality.

Benchmarks in economic, social and cultural rights can be explored and established through the four A's criteria – availability, accessibility, acceptability (quality) and adaptability. Along with cross cutting human rights principles (non-discrimination, access to information, participation, accountability and sustainability), human rights criteria illustrate the content and scope of the right and guide its implementation process. Such guidance can help define the action to be taken by states and offer generic examples of measures arising from a broad definition of the right (UN/CESCR 2000: para. 13).

Knox (2012: 38) points out that the multitude of relevant forums and statements on the environment are dispersed, fragmented and fail to constitute a coherent set of norms. Despite this fragmentation, areas of convergence exist, especially in closing the circle between substantive rights likely to be impacted by environmental harm and procedural rights to ensure environmental protection (Knox, 2012: 40; Knox 2013b: 27).

It is proposed here that RHE would be considerably strengthened by taking a 4 A's approach together with human rights principles of universality, non-discrimination and environmental law principles of precaution and common but

differentiated responsibility. Thus, future approaches to RHE should encompass: (1) human rights principles, (2) environmental law principles of precaution and common but differentiated responsibility, and (3) 4 A's criteria.

The criteria for the RHE should function to embrace the complex relationship between human rights, environment and development, reflecting also the principles of equality (entailing the recognition of diversity and protection of the vulnerable/disadvantaged), participation and access according to culture and development (UNESCO, working document (wd) 5). The 4 A's criteria contribute to the realization and legal enforcement of ESC rights and the RHE, since they are to be respected, protected and fulfilled by the government, as the primary duty-bearer, and "include obligations to act and react to pursue specific conduct or to achieve a particular result" (Tomasevski, 1999: para 42). Also, they impose duties on other actors (Right to Education Project, 2008; Schutter, 2010).

The 4 A's scheme is not a definitive guide: it is a way of explaining tangible factors (Right to Education Project, 2008) while portraying the complexity of states' obligations (Tomasevski, 1999: para 50). Although derived from the General Comment on the Right to Adequate Housing (1991), the elaboration of the 4 A's criteria appears to be developed by the former UN Special Rapporteur on the Right to Education, Katarina Tomasevski in 1999 (Right to Education Project, 2008; Schutter, 2010), which outlined explicit guarantees of the right to education (Tomasevski, 1999: para 42). Subsequently, 4 A's criteria have been developed for the right to food (General Comment 12, 1999) and for the right to health in the General Comment 14 to the ICESCRs (2000a). The right to health is used throughout this section as a guideline to interpret the substantive nature of the RHE. This researcher has chosen the right to health since: the RHE sees its inception in the right to health; the right to health is one of the most affected rights by environmental degradation as indicated by many commentators and jurisprudence; it is one of the main rights to provide for substantive obligations for the RBA to the environment; and, last, focusing on health system and states' responsibilities in the realm of health, it provides an adequate frame for environmental governance system and relative states' duties.

4 A's criteria for the RHE has not been so far explicitly elaborated. However, the Draft Declaration of Human Rights and the Environment included in the final report of the Special Rapporteur Ms. Ksentini (1994), gives some indications as to the content of duties created by the application of certain human rights principles to the issue of the environment. The draft declaration predates the first publication of the 4 A's schema but it clearly follows a similar path, and duties are elaborated respecting human rights principle of non-discrimination, rights' indivisibility, interdependency and universality, participation in decision making, and accountability.

The principles of indivisibility, interdependency and universality of human rights bind the RHE to sustainable development and peace (Ksentini, 1994: para. 1) as well as to civil, cultural, economic, political and social rights (Ksentini, 1994: para. 2).

The principle of non-discrimination is applied “in regard to actions and decisions that affect the environment” (Ksentini, 1994: para. 3). The principle of participation enables any person to be an active player in decision making processes related to environment and development (Ksentini, 1994: para. 18). Accountability requires the state to adopt the administrative, legislative and other measures to prevent environmental harm, aiming at the provision of adequate remedies, and at the sustainable use of natural resources (Ksentini, 1994: para. 22). The preamble specifies that duties apply to individuals, governments, international organizations and transnational corporations.

Within the criteria of the right to development - conditions of life; conditions of work; equality of access to resources; and participation -, the forms, quality, democratic nature and effectiveness of participatory process, mechanisms and institutions are considered key indicators of progress in realizing the right to development (UN, 2013: 62). Therefore, factors to be assessed include the representativeness and accountability of decision-making bodies, the decentralization of decision-making, public access to information and responsiveness of decision makers to public opinion. The substantive quality of a participatory process should also take into consideration the opinions and attitudes of the participants, including the confidence in their leaders, feeling of empowerment and perception of having influenced the decision (UN, 2013: 62).

The UN Special Rapporteur John Knox does not see substantive obligations as directly derived from the RHE. Avoiding recognition of RHE as a novel right in itself, he takes a softer approach that tries to make existing RBA more adequate. In fact, he reiterates that established human rights provide substantive obligations to protect against environmental harm that interfere with human rights enjoyment (Knox, 2012: para. 17, 2013b: para. 44, 2015: para. 72-73). These obligations depend directly on what rights have been violated and states have the obligations to assess environmental impact on the enjoyment of human rights (Knox, 2013b: para. 44, 2014a). There is also a consensus that substantive obligations also refer to the adoption and implementation of an adequate legal framework as well as regulation of private actors to prevent environmental induced interferences with human rights enjoyment (Knox, 2013b: 44). Despite the agreement on procedural obligations (Knox, 2013b: 29, 36-40), the Special Rapporteur fails to address the issue of how participation can influence decisions. With the aim of identifying, promoting and exchanging views on practices relating to the use of human rights obligations to support environmental policy making, the Special Rapporteur has mapped good practices (2015). This report makes the point of highlighting how the, sometimes innovative, practices of human rights inform rights content and implementation, in a bottom-up fashion. This position follows the argument that universal recognition of the RHE is not necessary for the adoption of human rights friendly environmental policies. There are some key points where this researcher disagrees with Knox’s confidence in human rights obligations serving environmental purposes well, especially in the sector of participation and access to justice. These good practices add to this research in two ways: first, they could be a test for the definition and

implementation of the 4 A's criteria to follow; second, they can prove the disconnection between human rights theory and practice is the main barrier for RHE acceptance. Section 6. 2. 4 is dedicated to the comparison of Knox's procedural good practices with 4 A's criteria of the RHE.

### 6. 2. 3 Defining a 4As approach to make RHE meaningful

What needs to be available, accessible, acceptable and adaptable for the RHE to be meaningful and actionable? The 4 A's criteria facilitate the elucidation on what it means to reach "the highest attainable standard" in the context of ESC rights. From the examples outlined for the right to education and to health, a more general significance could be extrapolated and applied to the RHE.

In the case of the right to health, *the highest attainable standard of physical and mental health [...] acknowledge that the right to health embraces a wide range of socio-economic factors that promote conditions in which people can lead a healthy life, and extends to the underlying determinants of health* (UN/CESCR, 2000: para. 4). It could be argued that the "highest attainable standard" demands a specific ESC right to be inclusive so that both entitlements and duties embrace a wider range of socio economic factors that promote conditions in which people can lead a life enjoying this right. This could mean also to embrace the enjoyment of other rights as a precondition or as a complement to a specific right. The 4 A's criteria, therefore, identify benchmarks within these socio economic factors that enable a certain enjoyment of the right. In addition, the 4 A's criteria indicate which are the freedoms and entitlements, specifying the content of the right and the "interrelated and essential elements, the precise application of which will depend on the conditions prevailing in a particular State party" (UN/CESCR, 2000: para. 12) and providing elucidation on duty bearer obligations and right holders entitlements.

Elaborating on the effects that the environment has on the enjoyment of other human rights, Ksentini (1994: para. 163-234) begins to define the scope of RHE by identifying the fourteen underlying determinants of a healthy environment could be: natural environment – 1) safe and potable drinking water (right to water), 2) clear air, 3) clean soil -, human environment – 4) adequate housing, 5) safe and hygienic working conditions, 6) an adequate supply of food and proper nutrition (as stated in art. 12.2 (b) ICESCR, UN/CESCR, 2000: para.15), 7) risk and disaster prevention management (bearing in mind climate change issues) -, 8) governmental institutions involved in environmental decision making, 9) access to information, 10) public participation, 11) environmental education, 12) access to resources, 13) sustainable development, 14) public health - reduction of exposure to harmful substances or other detrimental environmental conditions (art. 12.2 (b) ICESCR, UN/CESCR, 2000: para. 15).

As it is evident, the RHE has two major interactive components, which are 'environment' and 'health'. The notion of environment includes several elements that are conceptually close to the normative concept of adequate standard of living,



while the notion of health, which is expansive in its normativity, might be underspecified in relation to whose and what 'health' is in question. It is to be noted that Special Rapporteur Knox emphasizes consequences of environmental harm, binding substantive obligations for environmental standards mainly to the right to life, health and property (Knox, 2012: para. 17; Knox, 2015: para. 72).

Because of this overlap with other rights and because the underlying determinants of a healthy environment are so varied in nature, the criteria should be modelled on each of the determinants. As this would be a task beyond this thesis reach, this researcher will confine the application of the 4As criteria to those aspects that directly correlate with participatory processes and access rights (see Table 1).

Availability refers to the object of the right, a good or a service, to be available in sufficient quantity and sufficient operational means should be in place. The object of the RHE is multiple - information, participation, justice, natural environment, human made environment, public health – but it could be generally encompassed by the environmental governance system. Functions could be related to how the environment is defined: land use, water, pollution. If we consider only the procedural aspect of the RHE, availability could be translated in functioning environmental institutions to be available in sufficient quantity within the state party to allow for monitoring and control of environmental determinants as well as disseminating information, consulting the public in environmental decision making and providing redress mechanisms. The state should have an adequate organizational infrastructure and capacity to comply with both positive and negative obligations, actively disseminating information and responding to requests of access (Petkova et al., 2002: 18), facilitating participatory processes and providing avenues for judicial claims to be heard.

Accessibility is a multi-faceted criterion with four overlapping dimensions based on non-discrimination, an overriding principle of international human rights law that has to be secured immediately and fully (Tomasevski, 1999: para. 57), meaning it is not subject to the progressive realization condition. Accessibility means that the object of the right has to be accessible to everyone, including the absence of discrimination, geographical accessibility, economic accessibility (affordability) and access to information (UNESCO, wd5: 2).

Accessibility without discrimination of the RHE would read that any good or service related to the environment and the healthy environment itself must be accessible to all, especially to the most vulnerable and marginalized. Information, participation and justice must be accessible to all. For instance, information that is distributed on the web might be considered accessible to everyone. But vulnerable groups such as rural or indigenous communities in Panama do not have access to basic electricity services, let alone access to computing technology or requisite skills. The information of Cobre Panama mine EIA was supposedly available on the website or could be sent on a digital format upon request (Mitchell, 2015). This would discriminate against anyone that did not have the capacity, and the

knowledge, to surf the web. Another barrier to accessibility, as all the cases demonstrated, is the choice of language. Positive actions should be taken to avoid discrimination of language (see Chapter 5).

Physical accessibility in a more general view would include that a healthy environment, or an environment that does not cause any harm, should be accessible to everyone, especially most vulnerable and marginalized sections of the population with a clear reference to standards of living and cultural attachment to the environment. For the RHE procedural aspect, it would mean that environmental institutions or any governmental institutions involved in environmental decision making, information access, public participation events, and judicial and non-judicial redress mechanisms should be within safe physical reach for all sections of the population, especially vulnerable or marginalized groups. The location for the public consultation of the Barro Blanco dam EIA was removed from the indigenous communities, where road infrastructure is either poor or non-existent. Therefore, participation in environmental decision making was not physically accessible to them.

Economic accessibility (affordability) refers to the capacity of everyone to afford to participate in environmental decision making, a process that should not make the already poor poorer, and being able to afford access to information and eventually to afford judicial redress mechanisms. As stated in General Comment 14 on the Right to Health, “[...] equity demands that poorer households should not be disproportionately burdened with health expenses as compared to richer households” (UN/CESCR, 2000: para. 12 (b)). Therefore, any access to information, participation or access to justice should not disproportionately burden poorer households. Considering that environmental issues affect poorer households the most, positive actions should be taken to ameliorate the burden of vulnerable sections of population. Considering also that environmental decision making is time consuming often more so because of the bureaucratic elements involved in dealing with government institutions and courts, economic accessibility is also related to time. Poorer households might have to trade-off between time that might be spent for generating income and time to participate in decision making. In the Panamanian case, it is indicative that all claims for access to information and administrative review filed before any judicial body see environmental NGOs at the forefront, as time and costs are too much of a burden for vulnerable groups affected by development projects. For instance, Lucas (2002: 322) suggests the establishment of a ‘participant funding’ scheme for citizen participation to redress the financial imbalances among stakeholders and support full and effective participation, increase transparency and accountability as well as enhance public acceptability of decisions. The dimension of information accessibility - the right to seek, receive and impart information and ideas (UN/CESCR, 2000: para. 12, comma b, iv) - would be superfluous as information accessibility is an integral part of the RHE that concerns both passive and active – state’s dissemination and citizen access - information as well as all data generated by governments or private actors on environmental quality,

on public health related to the environment and on development induced environmental impacts.

Relevant to both the criteria of availability and accessibility is the notion of decentralization of decision-making, which is also promoted by the right to development as a factor to be assessed. Decentralization is the process through which central governments transfer various forms of authority to subnational government for timely adaptation to locally specific conditions. A nuanced understanding of decentralization refers to a process of joint decision making by central and subnational governments in deciding important public policies (Saito, 2011: 490-491). Decentralization is a means towards a range of broader objective from democratic deepening and economic progress (Saito, 2011: 494). Decentralization of decision making as an alternative mode of problem solving widening opportunities for citizen participation (Saito, 2011: 484-486) could be a criterion to assess the availability and accessibility of the institutions responsible for access to information, public participation and access to justice.

Acceptability or ‘quality’, interpreting the right to health, refers to the object of the right to be flexible enough to adapt to the needs of changing communities and respond to the needs of persons considering their diverse social and cultural settings (UNESCO, wd5: 2), in this case, recalling the right to education, the form and the substance of environmental governance system. While acceptability refers mostly to the good or service to be culturally appropriate and with certain minimum standards, the quality criterion refers either to the competencies of governmental personnel dealing with the environment, being a bureaucrat, a politician or a judge and the quality of the environment itself. In the light of the input of the Special Rapporteur on Education Tomasevski, ‘acceptability’ also includes identifying an acceptable regulatory role for the state with regard to the enjoyment of a particular right, to set and enforce rights standards (Tomasevski, 1999: para 62). Therefore the state is obliged to ensure that minimum criteria are developed and complied with by relevant actors, as well as to ensure that these standards are acceptable.

The EIA procedures fail to meet criteria of acceptability and quality as seen in the cases of Cobre Panama mine and Barro Blanco dam. In fact, EIA processes are not acceptable as they do not consider the social and cultural specificity of communities, in these cases the indigenous dimension.

The adaptability criterion is similar to the acceptability and quality ones, as it refers to the object of the right being flexible enough. However, it stems from a progressive view of human rights that see rights adapting to new threats and needs (Donnelly, 1989; cited in Freeman, 1994: 505). The right to health for example, does not mention adaptability within its criteria, but it refers to ‘acceptability’ within medical and professional ethics, culturally appropriate and gender sensitive, as well as to ‘quality’ in terms of scientifically robust, appropriate and dignified treatment (UN/CESCR, 2000a). Though, the right to education does, recalling the needs of changing societies and communities and the diverse social and cultural settings

(UN/CESCR, 1999: para. 6, d). Adaptability could refer to the need to adapt laws and regulations to facilitate public participation in a wider range of regulatory activities, such as permitting, enforcement, and development of regulations and policy guidelines (Lucas, 2002: 316). Considering all the men induced changes in environmental patterns, the adaptability of the RHE refers to the need of making the environmental governance system responsive to the local and global rapidly changing realities, as already pointed out by Ksentini (Tomasevski, 1999: para.71). Adaptability would also refer to the knowledge, skills and values that the generation of future adults will need to perform successfully in both a local and global environmental governance regime (Tomasevski, 1999: para 72).

The adaptability criterion is a measure for right implementation with a forward looking character. In contrast with acceptability and quality criteria, adaptability is a practice driven, rather than content driven, criterion susceptible also to the evolving paradigms of governance and human rights. Adaptability is a relevant criterion for the notion of participation as a permanent and responsible process. In fact, it contributes to the identification and evaluation of categories of involvement and awareness-raising in participatory processes which have multiplying effects on the exercise and enjoyment of human rights (see Table 3).

|  | <b>AVAILABILITY</b>  | <b>ACCESSIBILITY</b>  | <b>ACEPTABILITY</b>  | <b>ADAPTABILITY</b>  |
|--|--|---|--|--|
| Evaluation of environmental governance (environmental democracy) |  |   |  |  |
| <b>Access to information</b>                                     | Recognizable environmental institutions with a clear mandate | Accessible to all and timely  | Flexibility in content appropriate to social, cultural and economic context  | Flexibility in practice.<br>Timing according to needs.<br>Positive actions for expanding knowledge and provide means for future skills             |
| <b>Public participation</b>                                      |  | Physically accessible: location and decentralization  | Confidence in representatives capacity   | Environmental governance system responsive to changes in goals, values and interests.<br>Supporting mechanisms (expertise) for vulnerable peoples. |
| <b>Access to justice</b>   |  | Economically accessible: free service and allocated resources to unburden the most vulnerable | Establishment of standards of practice and rights standards for regulatory roles.<br>Technical, social science and human rights competencies | Forward looking character: future skills needed  |

**Table 3** Identification of 4A's criteria for procedural rights.

The 4 A's criteria might contribute to the participatory effort of civil society in a twofold manner. First, they provide benchmarks to seek redress for public participation violations or to formulate adequate redress mechanisms. Second, the 4 A's criteria fill a gap in the procedural approach as they expand the limited interpretation of participation (as merely providing 'information') to broader forms of consultation with substantive aims. In fact, these criteria provide the platform for public participation to move beyond consultation to continuous, informed and free consensus. The process to reach consensus unlocks potential for channelling substantive human rights claims that culminate in meaningful participation. Public participation informed by 4 A's criteria can be understood as influencing the generation of the public. Also the criteria underpin the idea of reliability as well as awareness, privileging a non-discrimination and equality perspective and ensuring basic standards are met, can advance social justice claims for equal access.

Rowe and Frewer (2004) analyse universal measures to evaluate whether a participatory process, understood as an initiative in which sponsors requires some sort of public input, has been successful or not. Analysing a number of case studies of participation mechanisms' evaluation, they list general criteria in reference to the effectiveness of the process and/or outcome. They admit that measuring participation effectiveness is difficult as it is a multidimensional process and prone to values bias and subjective interpretation. However, the four A's criteria can function as the comprehensive framework to present evaluation criteria of public participation while guaranteeing an objective perspective based on human rights principles of universality, transparency and equality.

Evaluation of public participation processes, regardless of the mechanisms chosen, can be carried out through the application of the 4 A's scheme, translating human rights duties and entitlements in categories of evaluation (see Table 4). Availability and accessibility criteria can evaluate processes of participation. Acceptability and adaptability measures can provide evaluation measures for outcomes. Availability criteria of participation can evaluate whether there have been, or have been provided, sufficient opportunities for participation. Non-discrimination and equality in process can be evaluated by accessibility (equal access, physical, economic) criteria. Acceptability criteria can provide a way to evaluate whether participation is context appropriate, but it can also provide a quality check for outcomes. Adaptability criteria measure the capacity of the participatory processes to have public generating and empowering effect.

**Table 4** Identification of 4 A's criteria for evaluation of 'meaningful participation'.

| View-point of participation | Quality of participation        | Availability             | Accessibility   | Acceptability  | Adaptability   | Cross-evaluating criteria |
|-----------------------------|---------------------------------|--------------------------|---|--|--|---------------------------|
|                             |                                 |                          |   |  |  |                           |
| Outcome                     | Transparency                    |                          | Disclosure of intended role of participants   | Influence or feeling of empowerment                                      | Awareness raising impacts: generation of the 'public'  | Adaptability              |
|                             | Fairness                        |                          | Interaction between participants and sponsor and among participants   | Perceptions (participants, sponsors)                                     | Involvement in value and interests   | Adaptability              |
| Process                     | Equality and non-discrimination | Sufficient opportunities | Representativeness of the 'public'  | Flexibility of participation: appropriate to social and cultural context | Degree to which policy outcomes match the goals of the people affected (Parkinson, 2006: 23, cited in McLaverty 2011: 412) | Adaptability              |
|                             |                                 |                          | Allocated resources   |  |  | Economic accessibility    |
|                             |                                 |                          | Positive actions to redress vulnerability: language (translator); education (support with expertise, attention in communication methods and means); gender/racial/power bias (mechanisms for inclusion) |  |  | Acceptability             |
|                             |                                 |                          | Decentralization of decisions   |  |  |                           |
|                             |                                 |                          | Timing and timeframe (when and how long)  | Confidence in process legitimacy   | Degree to which outcomes achieve normatively justifiable or desirable ends (Parkinson, 2006: 23, in McLaverty 2011: 412)   | Physical accessibility    |
|                             |                                 |                          |   | Social science methods application                                       |  | Quality                   |

The 4 A's criteria of RBA can provide guidance for defining 'meaningful participation' and provide access rights the political space to challenge power. The next section evaluates UN special Rapporteur Knox 'good practices' applying the 4 A's criteria formulated.

#### **6.2.4 Comparing procedural good practices in environmental policy making and 4 A's criteria for the RHE**

Knox (2015) mapped instances of 'good practices' of human rights obligations in environmental policy making, which are those practices that "integrate human rights and environmental standards, including the application of human rights norms to environmental decision-making and implementation or the use of environmental measures to define, implement and (preferably) exceed minimum standards set by human rights norms. The practice should be exemplary from the perspectives of human rights and of environmental protection, and there should be evidence that the practice is achieving or working towards achieving its desired objectives and outcomes" (2015: para. 13). The assumption behind this mapping exercise is that human rights obligations are adequate to fulfill environmental purposes, especially in the sector of participation and access to justice. This researcher use these good practices as benchmarks for the definition and implementation of the 4 A's criteria elaborated above. Lessons learned from the case studies are also briefly reflected upon. Basic argument is human rights based approaches alone cannot address all the issues of environmental contestation. It also finds overall, that it requires a more complex and progressive practice of rights that is reflected in the RHE.

Concerning the obligation to facilitate participation, Knox (2015) lists four types of good practices: EIA procedures (para. 44), platforms for e-participation (para. 43), interactive maps (para. 45) and consultative councils (para. 46).

The first type, or set of good practices are EIA procedures which provide very limited opportunities for participation participation. They are not an instrument to facilitate participation, but one that reduces participation to minimal information and consultation. If a 4 A's approach to RHE (ie. RBA to RHE) was to be applied, the EIA procedures in Panama would not meet minimum requirements of accessibility, availability, acceptability and adaptability.

For what concerns the second and third set of good practices, online platforms and interactive maps can act as useful tools that enable information access and participation. However, vulnerable groups who are most affected, such as indigenous people, are least able to use such tools to exercise access rights. Online platforms and mapping tools might have the counter effect to increase marginalization and exclusion from the participation process.

The fourth set of good participation practices are consultative councils or committees. In Panama, even though prior relevant law existed, consultative committees were not established till recently (2014-2015) with the new government. In fact, these committees depend highly on the government willingness to ask for



opinions and might suffer from conflict of interests, independence and legitimization issues if they lack transparency and accountability mechanisms (see Webler et al., 2001 on responsible leadership).

Mexico has made recent efforts to formulate an index for assessing participation which should evaluate: public participation, transparency, inclusion, equality and citizens' complaints (Knox, 2015: para. 49; SEMARNAT, 2014). The index is purely of quantitative nature. It does not consider the 4 As' criteria of a human rights based approaches, limiting itself to the number of people that participate differentiating between men and women to make sure a gender perspective is applied. Indigenous peoples and youth are 'complementary data', which point to a tokenistic status for these groups. They are an afterthought and do not imply special procedures for inclusion and equality. Finally, the index falls short to assess the influence of public participation in the decision making process.

Knox's 'good practices' for environmental participation therefore appear problematic as it is questionable which are the "desired objectives and outcomes" (Knox, 2015: para. 13). The four types of good practices listed are undoubtedly forward looking and modern tools to feed the procedures and participation as an end in itself. However, they are not sufficient in assessing whether the outcomes of procedures are fair and equal. The application of 4 A's criteria would complement these good practice giving due importance to the negotiation of outcomes and equality and non-discrimination in the process.

For what concerns access to justice, good practices listed by Knox (2015) recommends four types: establishment of environmental tribunals (para. 57), judicial facilitators (para. 64), ombudsperson for future generation (para. 69), investigation and reporting mechanism in regional environmental agreements (para. 71). All these good practices are thought with the aim to ensure access to courts and availability of redress mechanisms. However these mechanisms can only deliver criminal justice. According to Mamdani (2014), the dominant tendency in the human rights movement is to narrow the meaning of justice to criminal justice, applying an individualizing notion of justice in neoliberal fashion. The complex character of environmental disputes and RHE in the context of Sustainable Development push human rights towards wider questions of political and social justice which are qualitative different in comparison with criminal justice. Political justice aims to reform the political system, affecting groups rather than individuals. At the same time, political justice aims for change, not limiting itself to redressing past wrongdoings or to the categories of perpetrators and victims, but it broadens its reach to the future and the groups that needs to coexist and build a common future. Mamdani uses the term 'survivors' justice' to speak about the desired social and political change in the context of post-apartheid reconciliation process in South Africa. Social justice aims at equality and non-discrimination in the economic and social sphere which deeply influence the notion of political justice. Political reforms should aim to break the cycle of poverty and exclusion that constitute issues that drive violence. Judicial mechanisms that strive towards political and social justice

therefore focus on the link between creating an inclusive political order and an inclusive rule of law order, reflecting on the relationship between politics and law (Mamdani, 2014: 22).

Access to justice practices should strive to adopt a precautionary approach to fit the expansive demands for social and political justice within the limitations of the biophysical environment. The judicial good practices presented by Knox, instead, appear to prefer a violations-centred and criminal oriented approach which might not be able to redress the shortcomings in access rights or the requirements of social and political justice.

The role of judicial facilitators could provide a softer access to justice approach, preferring mediation. In fact, they are intended to provide technical assistance to individuals in the preparation of claims, mediation between parties, and assisting in the assessment of damages. This good practice has been implemented across Central America by the Organization of American States. However, the aim of the 'judicial facilitators' programme is to facilitate access to justice in general and are not dedicated to environmental justice. In addition, judicial facilitators are supposed to be leaders of their communities, which might not redress that power imbalance that are typical of environmental issues.

A promising good practice in Hungary is the establishment of ombudsperson for future generations, which has the authority to initiate or participate in investigations and submit petitions for cases regarding environmental protection (Knox, 2015: para. 69). This future-orientedness brings back in the solidary character of the RHE, highlighting it as an element of human rights obligations (Wellman, 2000).

Having defined evaluation criteria for public participation as well as benchmarks for duties of the RHE, this researcher ventures in a tentative interpretation of the substantive component of the RHE.

### **6. 2. 5 Substantive interpretation of RHE**

Drawing from the interpretation of the right to health, the right to a healthy environment, could contain both freedoms and entitlements. The notion of healthy environment is changing and widened in scope (compare para. 10 of UN/CESCR, 2000) and it does not refer to the realm of environmental protection. Resource distribution, gender differences, access to resources are all elements to be taken into consideration as well as participation and democratic decision making. Economic and social factors, changing lifestyles, dictate a new sense of the environment we live in. The substantive RHE could refer to the right for all individuals to be protected from environmental degradation, which is one of the notions of environmental justice (Pedersen, 2010). Though, the greatest advantage of the concept of environmental justice is that it facilitates debates beyond environmental issues, encompassing also laws and decisions (Pedersen, 2010). Therefore, as a superficial understanding of the RHE might indicate that everyone should be free to be in a non-contaminated environment, the RHE is more importantly affirming that

everyone is entitled to equal and non-discriminating opportunity to participate to environmental decision making.

The RHE as an inclusive right extends from the environment per se or the human environment to the mechanisms through which underlying determinants of the natural and human environment are affected. These mechanisms refer to the stages of decision making process that define needs, resources and risks. Thus, the RHE includes entitlements and freedoms in deciding development.

Participation is the core of the RHE as it underpins the notion of human and resources mobilization to overcome inequalities, discrimination and exclusion. Through participation peoples can collectively define their needs and protect, exercise and enjoy their rights, but it must involve “genuine ownership or control of productive resources such as land, financial capital and technology” (UN, 2013: 60). Thus, the RHE spills over to encompass other rights and ultimately, questioning resource distribution and access, to the right to development (compare para. 11 of UN/CESCR, 2000). Under the RHE, entitlements include the right to a system of environmental governance which provides equality of opportunity for people to enjoy the highest attainable standard of sustainable development. The right to a healthy environment is a right to a system of environmental governance to advance sustainable development based on the principle of precaution, CBDR and equal inter and intra generational access to resources. A healthy environment is achieved when it balances the competing goals of sustainable development, reclaiming the importance of social development as substantive equality in the context of access to resources, benefits and burdens, wealth redistribution and improvement of social conditions (see eg. Ishay, 2008).

For what concerns the obligations that impose on the state, human rights impose substantive obligations on the states to establish an adequate legal and institutional framework for environmental protection (Knox, 2013a; Knox, 2013b; Knox, 2014a, 2014b).

Mirroring the right to health (UN/CESCR, 2000: para 37), *The obligation to fulfil (promote) the right to a healthy environment requires States to undertake actions that create, maintain and restore the health of the environment. Such obligations include: (i) fostering recognition of factors favouring positive environmental results, e.g. research and provision of information; (ii) ensuring that environmental procedures are culturally appropriate and that environmental institutional personnel are trained to recognize and respond to the specific needs of vulnerable or marginalized groups; (iii) ensuring that the State meets its obligations in the dissemination of appropriate information relating to environmentally friendly lifestyles, harmful traditional and modern practices and the availability of services; (iv) supporting people in making informed choices about their environment.* As violations of the RHE can occur through the direct action of States or other entities insufficiently regulated by States (UN/CESCR, 2000: para. 48), states should have

the obligation to monitor and control non-state entities that are in charge of participatory process, for instance the EIA.

In the next section, the RHE is explored as a vector of human rights and sustainable development, which recovers human rights indivisibility in an innovative form: challenging the assumption that human rights are individual, apolitical and they are justiciable only upon violation.

### **6.3 Recovering human rights indivisibility: the Right to a Healthy Environment as a vector of development and solidarity rights**

A substantive interpretation focused on a 4 As' RBA points to the following elements that are missing or underspecified in the RHE: benefits sharing, access and use of resources, non-discrimination and equality, precaution and CBDR. The sustainable development context contains all these elements and suggests that the RHE, challenging traditional conceptualization of human rights, might find within the sustainable development paradigm the means to be operational and to convey in an innovative manner universal and indivisible human rights content.

The UN Special Rapporteur on Human Rights and the Environment Ms Fatma Ksentini observed in 1994 that without participatory democracy in environmental matters, the concept of sustainable development (SD) is without substance. This brings into the frame the Right to Development claim that all citizens should meaningfully participate in processes of development, but they must also benefit substantively, without discrimination or exclusion (Sengupta, 2001).

In the following section, the RBA to RHE is described as a vector of human rights complementary to the right to development, as it focuses on the process of deliberation and legitimization as well as the outcomes. The RBA to the RHE demonstrates that the notion of indivisibility of rights can be operationalized through the exercise of the RHE and access rights. The substantive base of the RHE becomes more evident in the light of the negotiation process of the SDGs, which shows an attention to the process of collective legitimization of fair and realistic outcomes. Finally, a brief overview of the new human rights/development/governance indicators that are being elaborated is described to highlight the central role of the environmental dimension which calls for a shift towards a more comprehensive policy making.

#### **6.3.1 Indivisibility and futurity of rights: drawing complementarities between the RHE, the Right to Development and Sustainable Development**

The principle of indivisibility of rights indicates that there should be a co-realization of human rights and that no right can be implemented in violation of another. The right to development has been the first attempt to vindicate the indivisibility of rights to the point of constituting its substantive nature. The right to development has been defined an umbrella (Malhotra, 2013: 388; Rosas, 2001: 129) or 'vector' (Sengupta,

2000) right because of its nature of integrated framework of human rights. As Ksentini pointed out (1994: para. 49), the RHE and the right to development share the notion of the indivisibility and interdependence of all human rights as underlying links. Ksentini (1994: para. 49) also ventures affirming that it is *impossible to separate the claim to the right to a healthy and balanced environment from the claim to the right to “sustainable” development, which implies a concentration of efforts to combat poverty and underdevelopment*. The progressive and forward looking understanding of Ksentini in analyzing the state of the relation between the environment and human rights is further reinforced by the application of RBA to the RHE. In fact, because of its strong normative base and its non-discriminatory character, RBA underwrites a meaningful participatory process vindicating the indivisibility of rights, equal distribution of resources, transparency and accountability.

The RHE also embraces the characteristics of solidarity rights, taking into consideration the Right to Development of future generations (Draft Declaration, 1994: art. 4) and their right to a healthy environment, to sustainable development and peace.

Ksentini's report, linking the RHE to the right to development, raised questions on the relationship between these two rights and what their interaction might be. Atapattu (2002: 125-126) addresses this relation by suggesting that both rights are mutually reinforcing and a unique right to sustainable development would be more appropriate to reconcile environmental protection, economic development and rights of future generations.

In the context of the interaction of human rights and development explored by Fukuda-Parr (2009), this researcher believes the RHE is an expression of the RBA to development which refers to the struggle of peoples for development to realize their human rights. In this view, several differences between the right to development and the right to a healthy environment can be identified on both the substantive as well as the procedural level. Despite these two rights sharing the application of the human rights principles of indivisibility and interdependence, participation as well as equality and non-discrimination, different understandings of the substantive components of human rights makes the RHE more practical than, but complementary to, the aspirational Right to Development: a different and more expansive conceptualization of the categories of collective right holder and duty bearer which affects the conceptualization of justice and equity, and a reconfiguration of the multiple development discourses.

The Right to Development might be viewed as a right of less developed states for a more favorable international economic order for development. The duty bearers are those developed states that have benefited, and continue to benefit, from other states' resources through colonization and its legacy. The Right to Development, emphasizing the struggle for control over natural resources and self-determination, give rise to international obligations of states to formulate appropriate policies – to enable the favorable economic order - and provide international cooperation

(Beetham, 2010). Claims to the Right to Development belong in the international negotiations on human rights treaties, to exert ‘pressure’ on the richer countries to comply with the obligation of financial aid.

The RHE is configured as both an individual and collective right, which includes more or less defined types of collective from indigenous peoples to non-homogenous public interest driven local and regional communities as well as the global civil society (peoples as distinctive groups separate from state or the territorial entity in question, Alston, 2001: 292). While the co-realization of the constituent rights of the Right to Development requires international cooperation and support, the RHE promotes and engages mainly with national and regional dimensions of citizenry as it emphasizes bottom up approaches to participation. Answering to both traditional and progressive perspectives of human rights, the duty bearer is the state but also a plurality of states within an international order: could it increase the capacity to trace accountability and remediate injustice amid the transnational nature of the environment and the distorting effects of scattered sovereignty, transnationalization of law and plural legal orders (Randeria, 2003a; ICHRP, 2009)? The state and state law retain the centrality of their role as guarantors of human rights (ICHRP, 2009), therefore they have the duty to monitor, manage and equitably share natural resources (art. 22, Draft Declaration, 1994). Access rights challenge the assumption that the state acts in the public interest and provide multiple avenues to hold the state accountable for human rights violations, as Randeria (2003a) explains that states may act as ‘cunning states’, in favour of neoliberal deregulation rather than the protection of citizens or the vindication of their rights. Similar to the Right to Development, the RHE’s duties apply also to individuals, international organizations and transnational corporations (Draft Declaration, 1994). While access rights’ duties are imposed on the state, further obligations on other actors can be identified through the exercise of access rights.

The RHE, complementarily to the Right to Development, might expand claims for equality within and among countries through the application of the Common But Differentiated Responsibility (CBDR) principle, as already described in Chapter 4, section 4. 7. Considering that increased income inequality and poverty are obstacles for the realization of ESC rights (Eide, 2001b: 555-558), full vindication of these rights “would require a redistribution of power and resources, both within countries and between them” (Beetham, 1995: 43, cited in O’Connell, 2012: 207). Socio economic rights call for disruption of balances of power and resources. By the same token, as many of the constitutive elements of the RHE belong to the ESC rights, the RHE calls for redistribution of power and resources in a more equitable manner. The differentiated obligations of CBDR tackle the issue of substantive equality acknowledging the historical and political nature of states’ relations as well as existing inequalities (Cullet, 2010). The CBDR principle therefore can contribute to the RHE as a solidarity right to recognize and act on this globalized inequality looking both backwards into historical reparation and forward into intergenerational solidarity by virtue of the object of the right, the global environment, viewed as a physical common (Brown Weiss, 2002).

The realization of the finiteness of environmental resources contributes to distinguish the RHE from the right to development and justifies the more expansive and interconnecting conceptualizations of human rights and environmental law principles used by the RHE. The conceptualization of the Right to Development required a bridging between human rights and development discourses, than becoming itself functional to close the gap between the two. The RHE, instead, is the result of the bridging of several discourses - human rights, democracy, development and environmentalism. These discourses form part of its conceptualization and each one of them contributes to the realization of human rights in different realms of social interactions.

The RHE is rooted in the finite nature of the environment, described by those frameworks determining environmental limits the planetary boundaries approach and the notion of environmental space (Rockström et al., 2009). This leads to two recognition: first, the RHE can be embraced by the sustainability framework which is normally removed from the human rights discourse; second, the RHE can contribute to adopt a radical understanding that human rights violations need to be addressed before rather than after they occurred.

The core difference between the RHE and the right to development is to be found in the critical understanding of the finiteness of environmental resource base (Arrow et al., 1996: 14) and of human actions being the main driver for environmental changes which might be irreversible and abrupt to the extent of leading to a state of the environment less conducive to human development (Rockström et al., 2009: 472). There are different cognitive frameworks to measure environmental limits - carrying capacity, ecological footprint, planetary boundaries and environmental space (Khoo, 2013b). The importance of these frameworks for this research is to provide a sustainability policy platform to include human rights through the application of the RHE and to provide these platforms with the necessary tools for participatory decision making and substantive equality which they lack.

The concept of carrying capacity is traditionally defined in terms of the size of population that could be sustained within a particular ecosystem or region or more generally the capacity of the planet to generate material production in the future (Arrow et al., 1996). Similarly, the ecological footprint concept compares human demand in resource consumption against the earth biocapacity, which is the availability of productive land areas to regenerate (absorbing pollution and waste) and provide useful raw materials (Wackernagel and Rees, 1996; Bührs, 2009; Smith et al., 2014). Despite criticisms of various shortcomings of these measures (Arrow et al., 1996; Bührs, 2009; Smith et al., 2014), these conceptualizations of ecological footprinting bring the precautionary and CBD principle to policy and practice. The planetary boundaries framework “define the safe operating space for humanity with respect to the Earth system and are associated with the planet’s biophysical subsystems or processes” (Rockström et al., 2009: 472), which are sensitive around threshold levels of key variables. Normative judgement and societies’ risk aversion are involved in determining a ‘safe distance’ from the thresholds (Rockström et al., 2009: 473).

A wider outlook is presented by the environmental space notion which offers a two pronged framework - respect for ecological limits and equal access to resources - to enhance legitimacy of global environmental governance and contribute to implementation of sustainability policies (Bührs, 2009). Similar to the above mentioned measures for environmental limits, the environmental space notion aims to determine the level of pollution and waste absorption is ecologically sustainable to calculate the allowable amount of resource consumption on a geographical basis. Though, it widens the reach of the framework promoting equal share of available resources' consumption on a per capita basis. The environmental space notion falls short of, or does not see the benefit in, extending the equity principle to resource ownership.

The environmental space framework operationalizes the precautionary principle by determining thresholds of irreversible damage as well as the equality principle, by advocating for equal sharing of available resources. These characteristics mark a strong complementarity with the RHE. The environmental space notion, as well as the other conceptualizations above mentioned, fall short to consider the complex social, cultural and economic variables that might undermine the capacity to enact equal sharing of both responsibilities for environmental degradation and rights to access to resources. This critical issue of equality is best addressed by a RBA to the RHE, which can enhance the environmental space approach redressing equity over resource ownership to enable equal consumption through democratic choices. Bührs (2009: 130) affirms that the notion of environmental space, formulated in a right within the international law framework, can be used as a basis for processes that enhance democracy and community control over the use of resources. The existing human rights framework and in particular the access rights provided by the RHE have already the required tools for the implementation of participatory processes for enhanced democratic decision making and fairer outcomes over matters of resources use and access. In sum, this thesis argues that the RHE can contribute to introduce human rights in sustainability policy making and add value by combining the necessary insights on values and interests as well as benchmarks for fair outcomes of sustainability policies.

The RHE provides a platform unifying and operationalizing human rights and environmental principles in a rights based way. A RBA to the RHE can complement any of these technical framework described above as it applies a precautionary approach in virtue of environmental limits and the principle of equality and non-discrimination for the ownership and consumption of resources. The solidarity principle and the CBDR principle can contribute to enhance the global dimension of the environmental space notion (as well as the carrying capacity and ecological footprint). Considering resources as global, the RHE provides the normative platform for both equal access and respect of ecological limits to identify duties and responsibilities and to redress intra and inter-generational inequality within and among countries. On the other hand, local democratization and community control over access to and use of resources is already embodied in the RHE through the application of access rights.



The definition of limits on exploitation and consumption of resources aims to ensure that quality of life is enhanced or maintained (Bühns, 2009: 113). Therefore, these frameworks on environmental limits impose a new approach in evaluating human conduct in order to protect Earth's carrying capacity. If it incorporates the principle of environmental limits, the RHE has the potential to create a shift in how violations should be perceived. As Fallon (2006, cited in O'Connell, 2012: 12) suggests, it is difficult for courts to uphold a substantive right if there are no adequate remedial actions to be taken. Courts that only provide criminal and individual justice fail to characterize substantively the RHE. A notion of justice that redress drivers of violence within existing political, social and economic structures – discrimination in access to, and decision over, resources – to avoid further events of violation might be a more appropriate framework for the RHE. Because environmental wrongdoings have repercussions on the global sphere and future generations, the RHE might be more suitably claimed in a precautionary, rather than in violation-based, manner. It might be argued that the RHE is a vector of human rights that are exercised in the political and social realms in order to prevent violations.

The highly charged political nature of participation transfer to the human rights exercised and enjoyed through the RHE. Participation has its economic, social and political dimensions. It is political because it presupposes a choice and is social as it relates to the process of decision making (*ex ante* participation). Participation also relates to material outcomes, as it calls for participation in benefits (*ex post* participation) which in turn presupposes a change in the use and allocation of resources in society which renders participation inescapably political (Cohen and Uphoff, 1980: 228). In the same fashion, precautionary principle and CBDR interact with participation and human rights as they support calls for political and social justice.

The position this thesis has advanced so far on RHE is in line with the attempts to define a post 2015 development agenda, since it applies a rights based approach to development with the aim to achieve sustainable development through the realization of all human rights, with a particular emphasis on the principles of indivisibility, non-discrimination, transparency and accountability, intergenerational and intragenerational equity.

### **6.3.2 RHE and SDGs: relevant implications on the process of participation**

The arguments made so far about RHE should be both timely and relevant in the light of the negotiation of the new Sustainable Development Goals (SDGs), which should be an important avenue for human rights to be taken into account in a pervasive, meaningful manner (Knox, 2014a). A description of the process, content and early critique of the SDGs suggest that they could be located within the RHE narrative that this research has elaborated as a convergence of human rights

principles – indivisibility, equality and non-discrimination, environmental law principles – precautionary principle and CBDR -, and 4 A's criteria of access rights.

The SDGs process is one of the outcomes of the Rio+20 Conference (2012f). Building on the Millennium Development Goals (MDGs) and converging with the post 2015 agenda, it was established an unprecedented, broad and inclusive global development process (UN/GA, 2014: para. 19) "open to all stakeholders, with a view to developing global sustainable development goals" (UN/GA, 2012b: para. 248). The most progressive element of the SDGs lies in that broad consultations have been carried out to include opinions on what they should look like from as many stakeholders as possible. The UN conducted global conversations, international and national consultations, a world survey through a web portal, in order to craft a development agenda that builds on the successes of the MDGs and yet addresses broader challenges related to sustainability.

The universal agenda for Sustainable Development is a roadmap composed by 17 goals to achieve peaceful, just and inclusive societies based on the respect of human rights (Zero Draft, 2015). This agenda for global action is a new "charter for people and the planet", with the potential to redefine the development discourse, focusing on the implementation of realistic standards, bridging the local, regional and global actions, and emphasizing the common but differentiated responsibilities principle. The proposed Sustainable Development Goals framework, addressing more systematic barriers to SD –inequality, weak institutional capacity and environmental degradation – and carrying out an inclusive consultation process, has positively distanced itself from the MDGs which failed both these tasks. However, early analysis argues that SDGs would benefit from an overall narrative articulating how the goals will lead to broader outcomes for people and the planet (ICSU and ISSC, 2015). Several authors argue that SDGs' problematic points are the excessive emphasis on resource-intensive economic growth (Bhattacharya et al., 2014; Kumi et al., 2014; Muchhala and Sengupta, 2014; Death and Gabay, 2015), climate change and private sector development funding (Muchhala and Sengupta, 2014; Death and Gabay, 2015). Its global scope also raises some questions on the opportunities and shortcomings SDGs might encounter (Kumi et al., 2014; Death and Gabay, 2015). However, the most evident of these problems is the absence of human rights. Aside from an explicit mention in paragraph 10 of the Declaration, the SDGs themselves are as distant as ever from human rights. However, Ramcharan (2015: 2) notes that human rights are not mentioned but "fully amenable to the adoption of specific language". This researcher notes that the wording describing SDGs as being integrated, indivisible and global evokes the human rights law principles of indivisibility, interdependence and universality. Goal 16, promoting peaceful and inclusive societies for sustainable development, embodies the concepts of governance and access rights. Its targets recall the RHE and its procedural components as it promotes: access to justice (16.3); accountable and transparent institutions (16.6); responsive, inclusive, participatory and representative decision-making at all levels (16.7); broader participation in global governance institutions

(16.8); access to information and protect fundamental freedoms (16.10); promotion of non-discriminatory laws and policies (16.b). Solidarity rights might belong to Goal 10, which reaffirms the principle of intergenerational and intragenerational equity and Goal 15 (target 15.6) which calls for equitable share of benefits and access to resources (Goal 15, target 15.6).

Applying a RHE based approach to SDGs might be beneficial and might contribute to redress imbalances towards ‘green’ economic growth and privatization. As SDGs’ standards are nationally-owned and each country needs to translate and implement them according to financial and cultural context, mainstreaming a RBA to SDGs might impulse a shift from idealistic notions towards a more practical interpretation of rights. Despite the already identified shortcomings of SDGs, the use of participation as empowerment (Arnstein, 1969; Lucas, 2002) for collective identification and legitimization of the SDGs might support the change towards a new era of human rights in practice. Human rights based SDGs might be a much more usable political currency and might provide a ‘global’ framework to balance universality of human rights and the relativity of rights in practice through the application of solidarity, the right to development and the CBDR principle.

For the effective exercise of access rights and the integration of the RHE into the sustainability discourse, structural changes might need to take place. For instance, it is fundamental to build the capacity of the public to be able to access, understand and use relevant information to engage in meaningful participation.

Principle 17 of the Draft Declaration proposed by Ksentini in 1994 affirms that right to environmental and human rights education, which is not usually listed with procedural rights, is a *conditio sine qua non* for the meaningful exercise of access rights. Since the role of the state is “to set educational strategy, determine and enforce educational standards, monitor the implementation of the strategy and put in place corrective action” (Tomasevski, 1999: para. 42), states should promptly consider reviewing curricula and providing new instruments for young generations to exercise access rights. In addition, in order to promote participation by all sectors states should promote environmental awareness and education among the general public for the purpose of contributing to the effective application of access rights, providing people with knowledge, capacity and understanding so they can participate in environmental decision-making (ECLAC, 2015: article 5; para. 4).

An important indication of more comprehensive policy orientation is provided by the development of new methodologies and indicators of how the environmental dimension matters in human life. Two indicators are promising for the RHE and the SDGs. First, the Environmental Democracy Index (EDI), built on the work of The Access Initiative, is the first comprehensive index designed specifically to measure procedural rights in an environmental context (see Box 2).

The International Union for the Conservation of Nature (IUCN) is developing the index of Human Dependency on Nature (HDN) to provide policy makers from the development, environment and other sectors with an independent assessment of the degree to which natural ecosystems and wild resources contribute to the needs of

rural and coastal communities as a proportion of total household income and their role for food and nutrition security (IUCN, 2012: 67; see Box 3). The Access Initiative provided a standardized format for contextual description and documentation. EDI with its scoring system, is a step further in classifying and monitoring possible violations of environmental rights, and has already provided insights in regional patterns of rights promotion and violations (see Landman, 2009 on human rights measures). The HDN, recognizing the role of natural resources in livelihoods of vulnerable communities, could contribute to a wider application of access rights, as well as to widen the constituencies of rights holders in practice, and provide new avenues for human rights exercise in policy making.

This chapter attempted to further the understanding of the RHE applying a hybrid rights based approach. In particular, this chapter attempted to elaborate on the substantive component of the RHE detailing 4 As' criteria tailored to the RHE and to 'meaningful participation'. Complementing the RHE with the development framework, the RBA to RHE is expanded through the right to development and the environmental principles of precaution and common but differentiated responsibility, and may contribute to recover the indivisibility of human rights. Lastly, RHE relevance in the current discourses on sustainability and sustainable development is clarified, especially in connection with the recently agreed SDGs and newly designed indicators.

The following chapter concludes the thesis and highlights the critical elements that have been researched and understanding reached.

**Box 2 The Environmental Democracy Index (EDI).**

EDI establishes a centralized hub of legal analysis and implementation data on procedural rights assessed against the international standards set by UNEP P10 Bali Guidelines (2010). The index is featured on an interactive web-based platform allowing users to compare and assess countries' performances at aggregated and disaggregated levels. The index provides a comprehensive evaluation of environmental democracy pinpointing the strengths and weaknesses of states' environmental legislation through guidelines and indicators that are scored individually and supported by legal evidence. The future of EDI is to score on the implementation of access rights and to carry out evaluation every two years to ensure that the scores remain relevant and useful.

At the time of its official launch in May 2015, EDI scores showed that:

- information laws are widely present;
- environmental cases have been heard before judicial courts;
- the access right to participation still lags behind;
- EIA process is improving but not to a sufficient point for the realization of access rights;
- high EDI scoring often corresponds with high GNP but there are exceptions which suggest

that lack of resources is no excuse to limit access rights' realization.

Overall, countries parties to the Aarhus Convention do score higher than others, suggesting that international legislation on access rights is functional to raise the standards of rights protection and promotion at national level (EDI Webinar, 2015).

Practical limitations of EDI website and analysis are that it does not show in any manner the effect of international environmental legislation on states' score and it does not aggregate regional results. On a substantive level, EDI, as it is stated, does not score implementation of access rights. In addition, the index evaluates only national legislation and does not include subnational laws and regulations, which might hide some legal inconsistencies and overlaps. It will be certainly interesting to see future scoring of EDI on the matter of implementation and how it will affect the advancement and expansion of access rights within environmental context.

**Box 3 The Human Dependency on Nature (HDN).**

The index aims to improve the sustainable management of natural resources to better meet local needs and help target national development and conservation policies (IUCN, 2012: 67). Since the Index will encompass human, socio-economic and cultural dimensions, it might have a positive effect on EIA processes and the social impact assessment. In fact, it fills a gap in the mechanisms for decision-makers to systematically consider use of biological resources flowing from a spectrum of habitats vital to local livelihoods prior to any interventions (IUCN, 2015).

The HDN gives added meaning to the ecosystem services approach, considering the human benefits of natural habitats in terms of food and nutrition, health and medicine, energy, materials and fibres, and clean, safe and available water, but also considering cultural norms, values, identities, and beliefs often underpin this material utility (IUCN, 2015). Measuring the use and reliance on ecosystem services and their contribution to improving local livelihoods and well-being in a more integrated manner might result in a critical change in development policies.

The HDN, focusing on safeguarding sustainable, nature-based solutions embedded in local human-ecosystem relationships, has broad potential for application, with implications for food systems and food and nutrition security, poverty alleviation, climate change adaptation, large-scale infrastructure development and land use planning, and policy relevance for SDGs (IUCN, 2015).

## Chapter 7 Why the RHE matters. Concluding Remarks

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This research has analysed the contribution of the procedural approach – access to information, public participation, and access to justice - to address issues of environmental contestation within a human rights framework. Drawing on elements from different disciplines, it has examined international provisions for a Right to a Healthy Environment (RHE) and the modalities through which procedural rights negotiate competing claims of Sustainable Development (SD). The main research question is whether public participation can deliver meaningful access to decision making process and inclusiveness.

There is a wide consensus in considering environmental protection as a pre-requisite to the enjoyment of internationally established human rights, especially the right to life, right to an adequate standard of living, right to health and right to privacy (IACommHR, 1997; ICJ, 1997b; UN/ECE, 1998; Atapattu, 2002; Shelton, 2010b; Knox, 2013a). The procedural approach, or environmental due process (Hunter et al., 2002: 1312), represents the rights-based approach (RBA) that is better suited to address environmental concerns within a human rights framework. Since it promotes a culture of participation in decision-making process that can challenge power (Gready and Phillips, 2009) and widen the political space (Jones and Stokke, 2005), the procedural approach enhances transparency and accountability towards environmental equity. A fair, inclusive and informed participatory decision making process can be seen as the more viable solution to the protection of human rights and the environment.

Environmental procedural rights, while advancing environmental protection and environmental due process, fall short of achieving substantive protection of vulnerable groups and the substantive realization of the right to a healthy environment even where such rights exist and are enshrined in the constitution, as seen in the case studies of Panama.

There are several problematic points in this type of RBA that makes it not entirely adequate. The inherent limitation of human rights stemming from their narrow focus on individuality, criminal liability and apolitical discourse, contribute to view the environment as a factor or a variable in human rights, but not a critical vector of human development. The anthropocentric approach that identifies the role of the environment as an instrumental means to attain the right to life and health misses the social, economic and political claims that drive issues of environmental contestation. In addition, the environment with its finite planetary boundaries urges us to adopt a precautionary approach which is in stark contradiction with the human rights framework where justiciability depends on defined and specific violations.

The adoption of access rights as the preferred RBA to the environment indicates that the human rights framework can deal with environmental issues but it needs a more complex set of instruments and standards as it has to promote negative as well

as positive obligations, which encompass the notion of progressive realization, non-discrimination and special procedures. The rights to access information and justice are part of well-established civil and political rights and are perceived to be more quantifiable and factual. The procedural right to public participation is the most unclear as the procedural approach fails in providing any substantive goals, making it difficult to define ‘meaningful’ participation.

This research therefore elaborates on this unease about how the human rights framework treats environmental issues and if the RHE can provide substantive directions for the advancement of both human rights and environmental protection. Describing the RHE as a legal standard and the RBAs applied to environmental issues with particular attention to the procedural approach as the preferred RBA to the environment, it becomes clear that there are gaps in the discourse of human rights and the environment: the matter of public participation and the social and economic value of the environment within the sustainable development paradigm. The RHE should provide the substantive goal of procedural rights, in terms of empowering communities to decide on their environment respecting planetary boundaries treating the environment as a global common, while sharing the benefits of access and use of natural resources. Therefore, this research explores the RHE as a fundamental human right which advancement and realization contribute to sustainable development. It explores its potential to mediate between competing interests within the sustainable development framework through meaningful participation.

The case studies from Panama suggest that issues of environmental contestation transcend the right to life and health encompassing claims of social justice and participation in decision making. Environmental contestation channel claims fundamentally related to economic, social and cultural rights. The Cobre Panama mine case questions the role of communities within development. The Barro Blanco dam case indicates the need for redistribution of wealth, benefits and burdens. The Cerro Colorado mine case showed that environmental contestation channels claims for inclusive political participation. The Chan 75 dam case questions the capacity of the minority rights framework to deliver human rights protection.

Environmental procedural rights –access to information, public participation, access to justice - constitute an alternative, though still instrumentalist, rights-based approach that views the exercise of certain human rights as an essential means to achieve the goal of environmental protection (Shelton, 2009b). This procedural RBA to matters of environmental contestation is thought to reduce vulnerability and discrimination, promoting transparent processes for fairer outcomes, thus enhancing the political role of human rights. Being access rights at the crossroads between the environmental, democratic and human rights movement (Foti et al., 2008: 14), it is commonly assumed that their promotion automatically leads to a transparent and accountable environmental decision making that improves environmental policies (UNITAR, 2008: 1; Shelton, 2010b) while it strengthens the role of the public and its

inclusion in the decision making process towards social cohesion and environmental equity (ECLAC, 2013). The procedural approach is therefore very promising in statement, but it does not reflect the same optimism in reality. The Panamanian cases shows that procedural rights framed within the EIA regulatory process can be downgraded to mere procedural requirements without a substantive influence on decision making. In particular, the vague understanding of ‘meaningful participation’ impedes access rights to be a vector of transparency, accountability and human rights.

The UN Special Rapporteur Knox has continued to portray environmental rights as instrumental to avoid negative impacts on the enjoyment of human rights due to environmental harm (Knox, 2012; Knox, 2013b; Knox, 2014a). His main contribution lies in the advancement of understanding of human rights as a support to environmental policy making through access rights (Knox, 2013a). Yet, the human rights framework falls short of addressing substantive matters of sustainable development, self-determination, justiciability of ESC rights. In sum, procedural rights do not address claims for substantive equality and participation in sustainable development.

So far, it is the former UN Special Rapporteur on Human Rights and the Environment Ksentini (1990-1994), who has applied the most progressive approach to the analysis of human rights and the environment, reflecting on the link between the RHE and the Right to Development as well as the general environmental and development realms. Ksentini (1994: para. 244) came to the conclusion that the whole debate on environment and human rights rests on the notions of indivisibility and interdependence of all human rights. The Panamanian case studies demonstrate the deficiency in assuming a basic commensurability between environmental claims and developmental claims where the latter may exacerbates social conflict and polarize public opinion. Ksentini (1994: para. 49) builds a strong case for the relation between environment, human rights, development and democracy based on the common effort to combat poverty and underdevelopment. Recalling article 28 of the Universal Declaration of Human Rights, which reads “everyone is entitled to a social and international order in which the rights and freedoms set forth in this declaration can be fully realized” (1994: para. 5, 48), Ksentini indicates the need for a structural political and social change to allow for the reconciliation of rights and the effective realization of human rights’ interdependence and indivisibility.

This leads this researcher to understand Ksentini’s contribution in the light of calls for political and social justice rather than criminal retribution. In fact, the application of human rights to environmental issues aims to facilitate the achievement of a “coalescence of the common objectives of development and environmental protection” beyond anthropocentric/ecocentric reductionist approaches (Ksentini, 1994: para. 5) and aims to tackle the environment “from a universal angle, involving a global economic, social and cultural approach to which it adds the human dimension” (Ksentini, 1994: para. 7). In this view, human rights are a means for



political and social justice. Special attention is to be granted to minority groups which are most vulnerable to environmental degradation and face dire prospects if human rights fail to reintegrate them in a social and international order where all human rights can be realized. Critical in this view is also the concept of meaningful participation: the process and the outcome of the process has to be determined by peoples themselves and has to achieve a consensus among social strata of population. This consensus, or adherence as she calls it, cannot be gained on the basis of denying basic rights (Ksentini, 1994: para. 68-69).

The difference between the Ksentini and Knox approaches is symptomatic of a renewed focus on procedural rights, contextually facilitated by the Rio +20 outcomes and the efforts to negotiate the Latin American agreement on Rio Principle 10 implementation. However, cases in Panama show how proceduralism cannot be an end in itself. There is still the risk of the environmental and human rights debate falling back on the assumption that civil and political rights have precedence over economic and social rights. Procedural rights have to achieve substantive goals to be meaningful.

Acknowledging both Ksentini (1994) and Atapattu's (2002) promotion of a right to Sustainable Development, this research concludes that the human rights regime is coherent in promoting the Right to Development and the RHE separately, but could promote them in tandem. The Right to Development and the RHE are not mutually exclusive and both represent an evolving understanding of human rights that advances the principle of solidarity. This research contributes a wider view that synthesises the RHE with the Right to Development. A synergy between the human rights and environmental law principles contributes to recovery of the indivisibility of rights through the RHE within the paradigm of sustainable development. Recalling Ksentini and her citation of Alexander Kiss, "international law must be based on values, the fundamental values of this century being human rights and the environment [...] these values are intrinsically bound up with development seen as a worldwide phenomenon resting on various pillars such as peace, equity, progress, social justice and participatory democracy at all levels" (Ksentini, 1994: para. 257). This research clearly is inclined towards a constructivist approach, viewing human rights as social interventions and the product of the balance of power of political interests at a particular point in history and in particular social context (Short, 2009: 95).

The RHE, not fitting in the traditional conception of human rights, embodies the challenge of human rights in practice at this point in history, and embodies the obvious, but difficult, practice of the indivisibility of human rights. It is an evolution from the aspirations and claims of the right to development to the realization and exercise of human rights to actively contribute to a situation of development respecting intra and intergenerational equity, respecting and advancing environmental sustainability, and realizing economic, social and cultural rights through the exercise of civil and political rights. The RHE promotes a participatory

practice of accountability and transparency, imposing obligations on governments, but also urging the development of a more conscious and multilevel citizenry that uses human rights to engage in both local and global political realms. While the Right to Development has been largely retrospective and overly focused on international responsibility and the consequences of historical wrongs between states, the RHE can be focused on the current situations of actually existing unsustainability (Barry, 2012) as well the immediate and long term future. A hybrid RBA to the RHE (see Chapter 2) ensures that both retrospective and forward looking approaches are taken into consideration and that minimum standards are established, vindicating the interdependence, interrelation and indivisibility of human rights and the systemic causes of human rights violations.

The core of the RHE is public participation understood as a participation that can influence the outcome within a legitimate, transparent and inclusive decision making process (Webler et al., 2001; Dietz and Stern, 2008; Foti and Silva, 2010) with an explicit requirement for informed and free consensus (Webler et al., 2001; Arnstein, 1969; Fung, 2006, cited in Dietz and Stern, 2008: 17) gained through the exercise of basic rights (Ksentini, 1994). Meaningful participation is participation that fuels public interest activism to challenge knowledge and social values. The substantive aim of meaningful participation is to secure opportunities for different outcomes in decision making, redefining the notions of benefit and burden-sharing through a rights based approach. Meaningful participation ultimately aims to achieve socially and politically just outcomes, addressing the concerns of political and social contestation at their source.

This research further elaborates hybrid RBA to the RHE debates formulating 4 A's criteria for access rights to contribute to the definition of minimum standards for access rights in general and public participation in particular. Evaluation criteria for public participation are also presented under 4 A's format, providing a much needed RBA to support the evaluation of meaningful participation. The exercise of a continued (permanent), informed and deliberative participation contributes in the long term in creating and strengthening public interest activism through awareness raising, increased involvement, sharing and building common values.

The RHE poses a challenge to the legal positivist approach which neglects the inherently political character of human rights, affecting both agreement and application of human rights norms (Freeman, 2002). The frameworks of environmental limits - planetary boundaries and environmental space - and the duty to preserve environmental conditions conducive to human development for future generations force the RHE to be a right based on precaution. Comprising the application of the precautionary principle and the CBDR principle, the RHE pushes the boundaries of legalism and opens new trails for enhanced human rights protection towards effective and timely redress instead of limited compensation. This researcher believes that RHE contributes to ensure natural resources use and access to be governed by the respect, promotion and protection of equally enjoyed

economic social and cultural rights without discrimination. The RHE might provide guidance to define in practice ‘sustainable development’, what kind of development is acceptable and what is not, balancing competing interests and values, benefits and burdens, short and long consequences.

The importance of this research at this moment in time can be related with the formulation of the new Sustainable Development Goals. Since the environmental discourse has evolved into a space of contestation over alternative visions of development (Peet and Watts, 2004, cited in Woodhouse and Chimhowu, 2005: 194-195) and environmental degradation problems are rooted in development processes (Escobar, 1995: 195), a broader understanding of the RHE might be instrumental to a new conceptualization of development. The SDGs will provide a new platform to test and reinforce environmental rights and the RHE, since through participatory process they might contribute to reshape the vision of the global environment from a more collective and democratic perspective, rather than reflecting the perception of those who rule (Escobar, 1995: 194). However, the focus that SDGs have put on economic growth might lead to contradictory positions. Mainstreaming an RBA to the RHE in sustainability policies and the SDGs could contribute to moderate economic growth policies and re-orient them towards just outcomes. RHE might contribute to prevent the SD discourse from continuing to reinforce colonizing approaches that impose exogenous and discriminating forms of environmental management (Escobar, 1995: 196-198; see also Goldman, 2001).

The RBA to RHE that emphasizes the centrality of meaningful participation re-contextualize environmental degradation and contestation in relation to human rights and development. First, it frames the issue of environmental degradation as a choice rather than a side effect of development, stressing the importance of precaution as “environmental harm can hardly be redeemed” (Kiss and Cançado Trindade, 1995: 289). Second, even if it might not always guarantee the highest standards of environmental protection, RBA to RHE will support the idea that environmental degradation is not acceptable unless benefits and burdens are equally and globally shared (Baxi, 2010). Inequalities in conditions of life among human beings and countries bind human rights and the environment together (Kiss and Cançado Trindade, 1995: 289). A constant affirmation of the principle of equality and non-discrimination constitute an approximation between human rights and environmental protection (Kiss and Cançado Trindade, 1995: 289). Third, RBA to RHE frames environmental contestation as complex multidimensional disputes on equality of benefits and burdens, pressing for forms of participatory democracy engaging with individual and collective responsibility for human rights and environmental promotion and protection as well as building paths of sustainable development. The means is provided by meaningful participation amounting to permanent, informed and deliberative consensus on matters of public policies, where the wider ‘concerned public’ can extend its awareness on issues of public interest, engage its values in a

continued process of deliberative consensus to form public interest values to secure fair outcomes that share equally benefits and burdens.

The RHE narrative elaborated in this thesis suggests that the RHE matters and should not be underestimated within the human rights framework or substituted by other rights. The RHE matters because it channels human rights and environmental law principles in an experimental manner to deliver long awaited human rights objectives of justice, fairness and equality within environmental limits.