

TABLE OF CONTENTS

Declaration	v
Acknowledgement	vi
Dedication	vii
List of abbreviations	viii
1.0 Chapter One: Introduction	1
1.1 Introduction to the study	1
1.2 The problem	1
1.3 The importance of the study	2
1.4 Limitation to the study	2
1.5 Methodology	2
1.6 Literature review	3
1.7 Organisation of the work	4
2.0: Chapter Two: Conceptual framework	4
2.1 Introduction	4
2.2 What are environmental rights?	5
2.3 Development of environmental rights	8
2.4 Problematic areas of environmental rights	12
2.4.1 Relationship between human rights and the environment	12
2.4.2 Anthropocentrism	13
2.4.3 Redundancy	14
2.5 Interim conclusion	15

3.0	Chapter Three: Enforcement of environmental rights: Global trends	16
3.1	Introduction	16
3.2	Environmental rights in national constitutions	16
3.3	Enforcement of environmental rights and duties	18
3.3.1	Right to a healthy environment	18
3.3.2	Environmental duties	20
3.3.3	Procedural environmental rights	21
3.3.3.1	Freedom of association	21
3.3.3.2	Access to information	22
3.3.3.3	Public participation in decision-making	22
3.3.3.4	Access to justice	23
(a)	Judicial review	24
(b)	<i>Locus standi</i>	24
3.4	Environmental rights and other rights	25
3.4.1	The right to life	25
3.4.2	The right to development	27
3.4.3	The right to privacy	28
3.4.4	The right to property	28
3.5	Interim conclusion	29
4.0	Chapter Four: The new South African Constitution	
	and the enforcement of Environmental rights	29
4.1	Introduction	29
4.2	An overview of the South African constitutional structure	30
4.2.1	Human rights in the old South Africa	30
4.2.2	Fundamental principles of the new order	31
4.3	Structure of Bill of Rights litigation	32

4.3.1	The procedural stage	32
4.3.1.1	Justiciability	33
4.3.1.2	Jurisdiction	34
4.3.2	The substantive stage	34
4.3.2.1	Interpretation	34
4.3.2.2	Limitation	35
4.3.2.3	Remedies	36
4.4	Environmental rights	36
4.4.1	The Common law position	36
4.4.2	The environmental clause in the Constitution	38
4.4.3	Analysis of the environmental clause in the Constitution	39
4.4.3.1	The phraseology	39
4.4.3.2	Operation of the environmental clause	39
4.4.3.3	Sustainable development	40
4.4.3.4	Duties of the State	40
4.4.3.5	Intangible qualities of the environment	41
4.5	Procedural rights	41
4.5.1	<i>Locus standi</i>	41
4.5.2	Administrative justice	42
4.5.3	Access to information	43
4.6	Environmental rights and other rights	44
4.6.1	Right to housing and health	44
4.6.2	Property rights	45
4.6.3	Right to development	45
4.7	Environmental rights in Acts of Parliament	45
4.7.1	The National Environmental Management Act	46

4.7.1.1 National environmental management principles	47
4.7.1.2 Access to environmental information	47
4.7.1.3 Legal standing to enforce environmental laws	48
4.7.1.4 Private prosecution	48
4.7.1.5 Protection of workers in environmentally hazardous work	49
4.7.2 The National Water Act	49
4.8 Interim conclusion	49
5.0 Chapter Five: Conclusive remarks and recommendations	50
Bibliography	53

DECLARATION

I, **WILLIAM TATE OLENASHA**, do hereby declare that the work submitted in this dissertation is the result of my own efforts and that to the best of my knowledge, has not been submitted and is not currently being submitted either in whole or in part for Masters of Law Degree or any other degree or award in any other University. Where any secondary information is included, it has been duly acknowledged.

Signed this ____ day ____ 2001

William Tate Olenasha
(Candidate)

I, George Agyeman Sarpong, supervisor have read this dissertation and approve it for examination.

Signed this ____ day ____ 2001

George Agyeman Sarpong
(Supervisor)

ACKNOWLEDGEMENT

This work would not have been possible had it not been for the innumerable amount of help I got from different people and institutions.

First and foremost, I am grateful to the administration and staff of the Centre for Human Rights, University of Pretoria, who organised the bursary for me to pursue the masters programme.

I will however remiss in this humble duty if I do not thank my supervisor and friend Mr. George Sarpong of the University of Ghana, who dedicated his time and expertise in environmental law to give me the guidance that made the completion of this work possible. In the same vein, I would like to thank Mr Dominic Ayine of the University of Ghana, whose practical knowledge in environmental rights litigation proved to be a ready made treasure for my dissertation. I thank him for his criticisms and guidance. I also thank my friend Ms Stephanie Santos whose valuable comments made this work a success.

I am particularly indebted to Ms Ngaitila Z Phiri, my best friend in the programme, whose unceasing goodness and humanity made my year on the programme a treasured and memorable experience. My colleague from Tanzania Fahamu H Mtulya made my stay in Ghana a home away from home. I am also thankful to Doctor Mashabane ("comrade"), Ibrahim Yillah and Yvonne Dousab, who all in their own particular ways, made my stay in Ghana short and well lived.

Lastly but by no means least, I would like thank the whole class of 2001 for the moments and intellectual experiences we shared while in Pretoria.

While thanking the above, the mistakes in this work are solely mine. Controversial assertions of law and inconsistencies of facts, if any, are made without their help or concurrence.

DEDICATION

This work is dedicated to my late father Nariko Olenasha. May his soul rest in eternal peace.

LIST OF ABBREVIATIONS

Art	article
Arts	articles
D&R	Decisions and Reports of the European Commission on Human Rights
ed	editor
eds	editors
<i>Ibid</i>	<i>Ibidem</i>
ICCPR	International Covenant on Civil and Political Rights
CESCR	International Covenant of Economic, Social and Cultural Rights
NCA	National Conservation Act
NEMA	National Environmental Management Act
NWA	National Water Act
SCGLR	Supreme Court of Ghana Law Reports
sec	section
secs	sections
UDHR	Universal Declaration of Human Rights
WSA	Water Services Act

THE ENFORCEMENT OF ENVIRONMENTAL RIGHTS: A CASE STUDY OF THE NEW SOUTH AFRICAN CONSTITUTIONAL DISPENSATION

1.0 CHAPTER ONE: INTRODUCTION

1.1 Introduction to the study

The second half of the twentieth century saw vast developments in human rights jurisprudence. This trend started with the adoption of the Universal Declaration of Human Rights (UDHR) in 1948 and the subsequent 1966 Covenants¹ which divided human rights into political and civil rights on one hand and social, economic and cultural rights on the other. Over the last few years however a new category of rights-third generation rights- has developed. This last category suffers much uncertainty when it comes to its exact nature and scope, especially when it comes to its enforcement. Environmental rights, which are the subject of this study, belong to this last category².

The study aims at exposing the uncertainties that surround the meaning and enforcement of environmental rights. The new South African constitutional dispensation and how it relates to the enforcement of environmental rights has been chosen as a case study. The South African situation is believed to be exemplary when it comes to the enforcement of fundamental freedoms. The South African Constitution provides for environmental rights along with mechanisms for their enforcement. The Constitution also requires that legislative and policy measures are put in place to give effect to the rights in the Constitution. South Africa also has an independent and rights oriented Constitutional Court that is capable of handing down decisions that can inspire the development of environmental rights jurisprudence.

1.2 The problem

In a world of severe and increasingly widespread environmental degradation, there must be corresponding tools to respond to environmental harm. International environmental,

¹ The International Covenant on Civil and Political Rights (ICCPR) and the International Covenant of Economic, Social and Cultural Rights (ICESCR).

² CM Peter 'The right to a clean and satisfactory environment: A note on the export of toxic wastes to Africa' (1990) 6 *Lesotho Law Journal* 24.

which regulates rights and obligations between States, has little to offer individuals harmed by environmental damage. This is why a human rights approach to the environment is inevitable. A clean and safe environment is now recognised as a fundamental human right in international and domestic legal instruments. The problem however is on the enforcement of these rights. Enforcement is constrained *inter alia* by lack of agreed scope of the right, stringent requirements of *locus standi*, lack of enforceable provisions and collision with other already established and secured rights. The situation is, however, changing in some jurisdictions like South Africa where requirements of legal standing have been relaxed and legislative changes taken to provide for enforceable environmental rights.

1.3 Importance of the study

The jurisprudence of environmental rights is quite young. It is expected that the discussion will contribute something to this novel jurisprudence. Specifically, however, the research is expected to bring new insights to bear on the enforcement of environmental rights under municipal constitutions.

1.4 Methodology

This work is primarily based on information gathered from books, journals, the Internet, law reports, constitutions, statutes and international conventions, among others. The study is expository, analytical and critical. The position of the law will often be exposed before it is analysed and, if need be, criticised.

1.5 Limitation of the study

The study deals with an area of law that has just emerged and is thus limited in terms of judicial precedent and literature. This is especially so when it comes to the new South Africa Constitutional dispensation that is less than ten years old. Few cases if any have gone to court on the enforcement of environmental rights since the coming into force of the new Constitution.

1.6 Literature review

Much has been written about environmental law generally. Little has, however, been written on the enforcement of environmental rights.

PD Okonmah³ argues that the enforcement of environmental rights through the human rights regime is potentially munificent in a situation where to enforce the same under common law is constrained by burden of proof on the part of the victims. Willemien du Plesis⁴ discusses the need to equip workers with information on the environmental risks at their work place.

BT Makete and JB Ojwang⁵ argue that it is debatable whether the right to a clean environment exists in reality as a human right, and, if it does, there is need to supply it with a juristic foundation for its full recognition. Kader Asmal⁶ discusses the role of the constitution in the promotion of environmental rights.

GM Ferreira⁷ discusses the enforceability of environmental rights under the new South African Constitution. A Boyle and MR Anderson (eds)⁸ compile different approaches to the enforcement of environmental rights in the human rights regime. This collection of essays explores links between the environment and human rights, and responds to the growing debate among activists, lawyers, academics and policy-makers on the legal status of environmental rights in both international and domestic law.

M Kidd⁹ evaluates the legislative changes that have been adopted to give effect to the environmental rights in the South African Constitution.

³ 'Right to a clean environment: the case for the people of oil-producing communities in the Niger delta' (1997) *Journal of African Law*.

⁴ 'Right to environment information in the USA' (1997) 5 *South African Journal of Environmental Law and Policy (SAJELP)* 116-158.

⁵ 'The right to a healthy environment: possible juridical bases' (1996) 3 *SAJELP*.

⁶ 'Environment and the constitution' (1996) 3 *SAJELP*.

⁷ 'Constitutional values and the application of the fundamental right to a clean and healthy environment' (1999) 6 *SAJELP*.

⁸ *Human rights approaches to environmental protection* (1996).

⁹ 'Environmental rights' in *South African human rights yearbook* (1997) available at <<http://www.csls.oj.za>>(accessed 8 November 2001).

1.7 Organisation of the work

The work is divided into five chapters. Chapter one introduces the work. Chapter two is a conceptual framework that attempts to summarise different concepts surrounding the idea of environmental rights. Chapter three is on comparative jurisprudence, aimed at exposing existing global trends on the enforcement of environmental rights. Chapter four deals with the enforcement of environmental rights under the South African Constitution. Concluding remarks and recommendations are made in Chapter five.

2.0 CHAPTER TWO: ENVIRONMENTAL RIGHTS: A CONCEPTUAL FRAMEWORK

2.1 Introduction

This chapter deals with conceptions that surround the notion of environmental rights. The meaning, nature and scope of environmental rights will first be explored. Environmental rights will also be discussed in relation to other human rights, significant in this being the debate on the different generations of rights. Issues of redundancy, anthropocentrism, and the exact relationship between human rights and the environment will also be explored. The chapter will also show how environmental rights have themselves surfaced in international, regional and domestic human rights instruments. All these are done in an effort to show how the different conceptions impact on the enforcement of environmental rights.

2.2 What are environmental rights?

The exact domain of environmental rights is not ascertainable to date. The meaning of the term “environment” is itself multifarious. According to one view it includes:

The natural environment (ie renewable and non-renewable natural resources such as air, water, soil plants and animals); spatial environment (ie man-made and natural areas such as towns, cities mountains, wetlands, and forests); sociological or social environment (ie economic, cultural historic, built, political and labour environment-in other words all the factors relating to human existence¹⁰.

Expressions like decent, viable, healthy, sustainable environment among others are commonly used when referring to environmental rights¹¹. Environmental rights have been defined to mean broadly:

The right, whether of individuals or a group, to a decent environment; and more specifically, such rights as the right to be free from excessive pollution of the land,

¹⁰ Fuggle & Rabbie *Environmental management in South Africa* (1992) 84 in Y Burns ‘Green rights: theory and development’ in Verloren van Themaat Centre South Africa in transition: *green rights and an environment management system* (1993) 7.

¹¹ A Boyle ‘The role of international human rights law in the protection of the environment’ in A Boyle & M R Anderson (n 8 above) 50.

water or air, or pollution, from noise, the right to enjoy an unspoilt nature, and the right to enjoy biological diversity¹².

The Draft Principles of the UN-Sub Commission on Human Rights and the Environment¹³ enumerate these rights. They include freedom from pollution and other related activities that threaten health, life and well being; protection and preservation of air, soil, water, flora and fauna necessary for maintaining biological diversity; safe food, water and working environment; preservation of unique sites; and enjoyment of traditional life and subsistence for indigenous people.

Despite the above enumerations, the exact meaning of what constitutes a satisfactory, decent, viable or healthy environment is bound to suffer from uncertainty and ambiguity¹⁴. Principle 1 of the Stockholm Declaration talks of an 'environment of a quality that permits a life of dignity and well being', while article 24 of the African Charter on Human and Peoples' Rights (the African Charter) refers to a 'general satisfactory environment favourable for their development'. What these expressions mean is not certain and may suffer from value judgment and is capable of inviting cultural relativism¹⁵.

Lack of an agreed meaning and scope of the right make enforcement of environmental rights difficult. The right would be difficult to implement and enforce because there is not yet a social consensus on the proper ambit of substantive environmental rights¹⁶. But, as will become evident in Chapter three, courts have been able to come with interpretations to give effect to environmental rights.

Apart from substantive environmental rights, there is also the other equally important limb: that of procedural rights. These do not have a specific formulation themselves but

¹² RR Churchill 'Environmental rights in existing human rights treaties' in Anderson & Boyle (n 8 above) 89. See also K Solo 'keeping a clean environment-the case of Botswana (1999) 6 *SAJELP* 237 where he says that protecting the environment is fundamental for the conservation of nature, natural resources (air, water, agricultural resources, vegetation and wildlife) for present and future generations.

¹³ *Report of the UN Special Rapporteur on human rights and the environment (the Ksentini Report)* available at <<http://www.unhchr.ch>> (accessed on 25 August 2001).

¹⁴ Boyle (n 11 above) 50.

¹⁵ *Ibid.*

¹⁶ P Mouldon & R Linger *The Environmental bill of rights: a practical guide* 7.

they are more specific in focus than substantive rights. The Declaration of the UN Conference on Environment and Development (the Rio Declaration)¹⁷ puts emphasis on this:

“... each individual shall have ... access to information concerning the environment ... held by public authorities...and ... to participate in decision-making. States shall facilitateand encourage public awareness and participation by making information... available. Effective access to judicial and administrative proceedings ... be provided¹⁸”.

Pertinent too is the place of environmental rights in the categorisation of human rights. The categorisation of human rights into generations¹⁹ has direct implications for the enforcement of environmental rights. Human rights are divided into first, second and third generations rights. The first two are the outcome of the then prevailing Cold War between the West and East with²⁰ the west favouring civil and political rights while the east preferred socio-economic rights²¹. First generations rights appeared to be capable of immediate implementation by states, while second generation rights required only progressive compliance as permitted by the strength of the state's economy²². A rigid classification of the two is not easy to sustain in practice, as they are interrelated and interdependent²³.

Third generation rights including the right to self-determination, the right to development, the rights of indigenous people and the right to a protected environment, are more

¹⁷ Rio de Janeiro, 3-14 June 1992. Available in P W Birnie & A Boyle *Basic documents on international law and the environment* (1995) 9.

¹⁸ *Ibid* Principle 10. These elements are also found in Principle 23 of the World Charter for Nature, 22 ILM (1983) 455; in the 1991 Economic Commission Convention on Environmental Impact Assessment, 30 ILM, (1991), 802, art 2(6) and 3(8); in the 1993 Council of Europe Convention on Damage Resulting from Activities Dangerous to the Environment, 150 European Treaty Series (1993); and in the Draft Principles on Human Rights and the Environment, 1994.

¹⁹ The division of human rights into generations has been criticised as it may give the impression that each generation has validity only up to a certain point and then replaced by another generation-see for example C Flinterman 'Three generations of rights' in J Berting et al (eds) *Human rights in a pluralist world: individuals and collectivities* (1990) 75.

²⁰ A Hegarthy & S Leonard (eds) *Human rights: an agenda for the 21st Century* (1999) 6.

²¹ This difference is what led to the adoption of two different covenants the ICCPR and ICESCR.

²² See the wording of art 2 of the ICESCR.

²³ Human rights are now seen as indivisible and interdependent-see Vienna Declaration and Programme of Action, 1993, UN Doc A/49/668, p1, Para 5.

problematic. Some human rights lawyers argue against the recognition of third generation rights as they argue that it will devalue the concept of human rights and divert attention from the already recognised first and second-generation rights²⁴.

Environmental rights are also taken to be solidarity rights for two reasons. First, environmental issues and concerns cut across boundaries calling governments and international organisations to cooperate for environmental concerns. This cooperation includes technical assistance to poor countries, sharing of information dealing with the environment and transfer of technology for environmental protection. Principle 7 of the Rio Declaration, is clear on this:

States shall co-operate ... to conserve, protect and restore the health and integrity of the earth's ecosystem... developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development...

Secondly, environmental rights are solidarity in the sense that unlike the first and second-generation rights, which are basically centred upon the individual, these are accessible to both the individual and the collective group²⁵.

2.3 Development of environmental rights

The strict domain of environmental rights is far younger than many traditionally known human rights. However, when linked conceptually to the right to life, then the right to life provisions of the UDHR and ICCPR can imply environmental rights²⁶. These instruments prohibit states from taking life intentionally or negligently²⁷. A more difficult question is whether the right to life provisions oblige states to take positive measures to give effect to the right. The Human Rights Committee (HRC) has taken the view that the right to life

²⁴ See for example P Alston 'A third generation of solidarity rights: progressive development or obfuscation?' (1982) 29 *Netherlands International Law Review* 307.

²⁵ Flinterman (n 19 above) 76. See also A Boyle (n 11 above) 46.

²⁶ Art 3 of the UDHR, art 6(1) of the ICCPR. The ICESCR also provides for the right to adequate standard of living and the enjoyment of the highest standards of physical and mental health Arts 11(1) and 12(1). The same are also provided in art 25 of the UDHR.

²⁷ Churchill (n 12) 90.

in the ICCPR does require states to take positive measures to reduce infant mortality and to raise life expectancy²⁸.

There is thus a potential of environmental rights being implied by the right to life provisions of the treaties. Despite this, only few cases have been brought under the complaints machinery of the treaties²⁹. In *EHP v Canada*³⁰ where a group of Canadian citizens alleged that the storage of radioactive waste near their homes threatened their right to life, the HRC while acknowledged that the case raised serious issues on state responsibility, dismissed the application for non-exhaustion of local remedies.

The right to a clean environment became openly an international concern first in 1968 when the UN General Assembly passed a resolution identifying the relationship between the quality of the environment and the enjoyment of basic rights³¹. This was followed in 1972 by the landmark Stockholm Declaration that stated *inter alia* that:

Man has the fundamental right to freedom, equality, and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being.³²

In comparison, the more recent Rio Declaration was not explicit in its language about environmental rights. All it said was that “human beings are the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature”³³.

The 1994 Draft Principles on Human Rights and the Environment provides for the interdependence between human rights, peace, environment and development. It also provides for the right to a secure, healthy and ecologically sound environment.

²⁸ The European Commission on Human Rights has on different occasions held that the right to life obliges states not only to refrain from taking life intentionally but also to take appropriate steps to protect life. See for instance *Association X v United Kingdom* application 7154/75 14 Decisions and Reports of the European Commission on Human Rights (D &R) (1979), 31,32; *Stewart v United Kingdom* D & R (1984), 162 at 170.

²⁹ Churchill (n 12 above) 91.

³⁰ Communication No 67/1980, 2 Selected decisions of the Human Rights Committee (1990) 20.

³¹ UNGA Res 2398(XXII) 3 December 1968.

³² Declaration of the United Nations on the Human Environment (1972) 11 ILM 1416, Preamble and Principle I.

³³ *Ibid* Principle 1.

At the regional level, the African Charter on Human and Peoples Rights³⁴ is the first regional human rights instrument to include environmental rights in its *corpus juris*. Article 24 of the Charter provides that “all people shall have the right to a general satisfactory environment favourable to their development”. The Lagos Plan of Action³⁵, which is OAU’s policy and plan document contains a chapter on development and the environment and gives recommendations on the improvement of the environment. Significant too is the first African Ministerial Conference on the Environment (AMCEN)³⁶, which adopted the Cairo Resolution on Environmental Co-operation in Africa³⁷. The Bamako Convention on the Ban of the Import of Hazardous Wastes into Africa and on the Control of their Transboundary Movements Within Africa³⁸ bans and criminalizes the import of hazardous wastes into Africa. Significant too is the Abuja Treaty establishing the African Economic Community where members of the Community agreed, “to take necessary measures to accelerate the reform and innovation process leading to ecologically sound and socially acceptable development policies and programmes³⁹”.

The Organisation of American States (OAS) has also recognised the right to a healthy environment. Article 11 of the Additional Protocol to the American Convention on Human Rights in the Areas of Economic, Social and Cultural Rights⁴⁰ provides that “everyone shall have the right to live in a healthy environment and have access to basic services⁴¹”. More recently the OAS General Assembly has passed a resolution emphasizing the need to study the link that may be there between the environment and human rights⁴².

³⁴ 1981.

³⁵ AOU (1981) *The Lagos Plan for the Economic Development of Africa* 1980-2000 Chpt IX para 266(a).

³⁶ The meeting took place in Cairo from 16-18 December 1985.

³⁷ UNEP/ AEC ½ (1985) *First African Ministerial Conference on the Environment: Report of the Conference*.

³⁸ Adopted in Mali, Bamako 1991.

³⁹ 1991 Abuja Treaty Establishing the African Economic Community art (58(2) in B M Makete & J B Ojwang (n 5 above) 162.

⁴⁰ 1988.

⁴¹ The OAS formulation is different from that of the African Charter in that the former is concerned with individual rights while the latter is concerned with people’s rights.

⁴² AG/RES.1819 (XXX1-O/01 of 5th June 2001 available at <<http://www.cedha.org.ar>> and <<http://www.oas.org>> (accessed on 4 October 2001). This recent development is strange in a situation where the OAS has already recognised the right to a healthy environment in the 1988 Protocol Additional to the American Convention on Human Rights in the Areas of Economic, Social and Cultural Rights.

Similar developments have taken place in Europe. The first treaty to recognise environmental rights was the Convention on the Protection of the Environment between Denmark, Finland, Norway and Sweden⁴³. The Convention gives citizens of the member countries the right to seek damages against environmental nuisance and rights to appeal against decision on such complains⁴⁴.

The Organisation for Economic Cooperation and Development (OECD) recognised the need for fundamental human rights to include a right to a decent environment⁴⁵. The more recent Charter on Rights and Obligations drafted by the United Nations Economic Commission for Europe (UNECE) affirms the right to an environment, which is adequate for health and well being⁴⁶. There have been proposals to change the European Social Charter to accommodate environmental concerns, but they are yet to succeed⁴⁷.

Environmental concerns have also featured themselves in international humanitarian law. The 1977 Protocol I additional to the 1949 Geneva Conventions Related to the Protection of International Armed Conflicts prohibits the use of weapons and means that can damage the environment⁴⁸. The 1977 Additional Protocol II prohibits attacks against dangerous installations potentially capable of having adverse environmental repercussions⁴⁹.

⁴³ Commonly referred as the Nordic Environmental Convention of 1974, which entered into force on 5th October 1976.

⁴⁴ Art 3 of the Convention.

⁴⁵ Organisation for Economic Cooperation and Development, Responsibility and Liability of States in Relation to Transfrontier Pollution (1984) 13 *Environmental Policy and Law* 122 in K Bosselmann 'Human rights and the environment: redefining fundamental principles?' available at <<http://www.arbld.unimelb.edu.au/envjust>> (accessed on 25 August 2001).

⁴⁶ Draft UNECE Charter on Environmental Rights and Obligations, adopted 29-31 October 1990, quoted in D Shelton 'Human rights, environmental rights, and the right to the environment', (1991) 28 *Stanford Journal of International Law* 103 at footnote 84.

⁴⁷ Bosselmann (n 45 above). See for example art 36 of the Draft Charter of the Fundamental Rights of the European Union, which deals with environmental protection. Recently the European Council on Environmental Law adopted a resolution on the right to a decent environment whose aim was to express concerns that the draft Charter does not impose any duties on the protection of the environment.

⁴⁸ Art 35(3) of the Protocol.

⁴⁹ Art 15 of the 1977 Protocol II Additional to the Geneva Conventions (on the Protection of Victims of Armed Conflicts).

The UN Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques (ENMOD)⁵⁰ also provides that

Each state party... undertakes not to engage in military or other hostile use of environmental modification techniques having widespread, long lasting or severe effects as a means of destruction, damage or injury to any other state party⁵¹.

The most significant development is in the domestic arena. Environmental rights are now incorporated in many municipal constitutions⁵². This is significant for the enforcement of environmental rights, as human rights are more easily enforceable when they are translated into binding domestic legal instruments than when they are just mere agreements between states.

2.4 Problematic areas of environmental rights

There are a few contentious areas of environmental rights that are yet to be settled between jurists.

2.4.1 Relationship between human rights and the environment

The relationship between environment and human rights is far from clear. According to MR Anderson⁵³, the relationship can be approached in two ways. First, the protection of the environment may be used as a means of achieving human rights like the right to life and health. Industrial pollution, deforestation or any destruction of any plant cover will deny man clear air, food which are necessary requirements of the right to life.

Secondly, the protection of human rights is an effective means of achieving the ends of conservation and environmental protection. The full realization of first and second-

⁵⁰ U.N. General Assembly Resolution 31/72 of 10 December 1976.

⁵¹ Art 1(1) of the ENMOD Convention.

⁵² See for example China, art 9; Cuba, art 27; Czechoslovakia, art 15; Yemen, art 16; Ecuador, art 19; Greece, art 24; Guyana, art 36; Honduras, art 145; India, art 48A; Iran, art 50; Korea, art 35(1); The Netherlands, art 21; Peru, art 123; Portugal, art 66; Spain, art 45; Thailand, art 65; Turkey, art 56; Yugoslavia, art 87; South Africa, art 24; Tanzania, art 27; Sudan, art 13; Benin, arts 29 and 29; Congo, arts 47 and 48; Nigeria, art 81; Togo, art 83; Uganda, arts 21 and 27, etc.

⁵³ MR Anderson' Human rights approaches to environment protection: an overview in A Boyle & MR Anderson (note 8 above) 3.

generation rights would constitute a society and a political order in which claims of environmental protection are likely to be protected⁵⁴. Many of the worst cases of ecological damage occur in countries under the control of authoritarian, rights-repressive regimes, where affected communities have no way of holding governments accountable for their actions⁵⁵.

It is also important to note that the environment is the base for other human rights to flourish. Nature is what gives us food, clothing and shelter. The right to a decent environment should be taken to be the most fundamental of all rights- including the right to life, which is often taken to be the foundation of other rights. Life is not possible without the environment. The “environment” wrote the late Ken Saro Wiwa in a letter smuggled from his Nigerian cell, “is man’s first right”⁵⁶.

2.4.2 Anthropocentrism

Defining environmental rights is also constrained by a protracted debate on anthropocentrism. The issue is whether the protection of environment is there for the benefit of human beings alone or it is there for a broader goal⁵⁷.

There are two ways of looking at this problem. First, does the environment possess an intrinsic value of its own? Is it possible to talk of the environment qua environment? Does the protection of the environment exist for its own sake? Secondly can one talk of the environment in isolation of the human person? Is it realistic to conserve the environment at all costs even when it does not benefit human beings or even when it may be against the interests of human beings? Strict environmentalists argue that preserving the environment for the benefit of man is inconsistent with ecological reality

⁵⁴ *Ibid.*

⁵⁵ A Sachs ‘what do human rights have to with the environmental protection? Everything’ available at http://www.globallearning.org/global_ata/Human_Rights_and_Environmental_Protection >(accessed on 25 August 2001). An example in mind is the then military dictator of Nigeria Sani Abacha who had sacrificed the health of entire villages to accommodate Royal/Dutch Shell exploration of oil. Abacha provoked international outrage by having a leading environmental activist Ken Saro Wiwa and 8 others executed.

⁵⁶ Sachs (n 55above).

⁵⁷ Boyle (n 11 above) 51.

and biological diversity and may ignore the interests of other species⁵⁸. It may also encourage over-exploitation of natural resources to the overall detriment of the environment. It is even argued that:

Environmental protection should not be included in the human rights category because the goal of environmental protection to promote quality for human life is inherently defective since its emphasis is on human beings, whereas the protection of our global ecosystem extends beyond that of humanity⁵⁹.

The best approach is to seek the middle position that calls for an environmental understanding that is mutually beneficial for human beings and other species. The addition of a human rights argument could be seen as complimentary to the wider protection of the biosphere, reflecting the impossibility of separating the interests of mankind from the environment as a whole, or from claims of future generations⁶⁰. Dinah Shelton sums up this position:

The view that mankind is part of a global system may reconcile the aims of human rights and environmental protection, since both ultimately seek to achieve the highest quality of sustainable life for humanity within the existing global ecosystem⁶¹.

2.4.3 Redundancy

Environmental rights are also objected to because it is thought that they are already sufficiently provided for by international environmental law. It is argued that there is nothing on the substantive human right to a decent environment that is not already provided by international environmental law⁶².

⁵⁸ See R Eckersley 'Environmental and political theory' in A Boyle & MR Anderson (n 8 above) 50.

⁵⁹ Y 'Burns Green rights: theory and development' in Verloren van Thematic Centre South Africa in transition: Green rights and an environmental management system (1993) 13.

⁶⁰ Eckersley (n 58 above)

⁶¹ Shelton (n 46 above) 105.

⁶² Boyle (n 11 above) 56.

It is true that environmental law is extensively legislated upon, both at international and domestic level⁶³. It is also true that the human being is the ultimate beneficiary of successful implementation of international environmental law. Yet human rights approaches to the environment still have their own role to play. This is because of three basic reasons. First, international environmental law does not have an effective mechanism to ensure compliance by state parties at the international level. International environmental law can only be enforced through sanctions, withholding of benefits and positive encouragement through capacity building and funding assistance. Many human rights instruments have specific enforcement mechanisms to forge compliance⁶⁴.

Secondly, there is the issue of enforcement of environmental concerns at domestic level. In domestic law, environmental concerns can be enforced as tort actions or in a wide range of options in criminal penal systems. These apply mostly to private relationships. They are weak in the public interest domain. The human rights approach in the form of environmental constitutional law has comparable advantages. Putting environmental rights in the constitutions gives them recognition that is not easy to tamper with, especially when they are put as entrenched rights. It also gives environmental rights the force of constitutional status that can easily be enforced through constitutional litigation and judicial review.

Thirdly, human rights approaches to the environment are not redundant given the fact that not all human rights violations can necessarily be linked to the environment. It is difficult, for example, to link the environment to atrocities like the genocide in Rwanda or the violation of political and civil rights in China. Environmental issues themselves cannot always be addressed effectively in the human rights framework. It is not obvious, for example, how human rights could help in the preservation of the outer space or how a human rights approach to the environment could help prevent natural catastrophes like floods and earthquakes.

⁶³ International environmental law is legislated in over 350 multilateral treaties, 1000 bilateral treaties and instruments of many inter-governmental- see the Ksentini Report.

⁶⁴ The ICCPR for example has the Human Rights Committee, which monitors compliance of state parties to it. The same is true of the Convention against Torture, Convention on the Rights of the Child etc. All have committees to ensure that state parties to them respect the rights provided.

The redundancy rhetoric is thus bound to fail, as it does not take into account particular advantages that are accrued by having an area of international law that merges environmental concerns and human rights and the fact one approach cannot always solve the problems of the other.

2.5 Interim conclusion

A few things became obvious in this chapter. First, the meaning of environmental rights lacks precision thus making it difficult for the right to be enforced and implemented. Secondly, human rights approaches to the environment have been criticised for being anthropocentric and redundant. In spite of these, a human rights approach to the environment is worthwhile in view of the fact that environmental law does not have an effective mechanism to forge compliance. Besides the domain of environmental rights is not the same as that environmental law.

3.0 CHAPTER THREE: ENFORCEMENT OF ENVIRONMENTAL RIGHTS: GLOBAL TRENDS

3.1 Introduction

Before discussing the enforcement of environmental rights within the new South African constitutional dispensation, it is prudent to expose albeit in a nutshell what the experience has been like in other parts of the world. To be able to achieve the said objective, it becomes vital to approach environmental rights from three different angles: enforcement of substantive environmental rights; enforcement of environmental procedural rights and finally the enforcement of environmental rights as they are derived from other rights.

3.2 Environmental rights in national constitutions

The right to a healthy environment is provided in many constitutions of the world⁶⁵. In Africa alone, at least 32 countries (approximately two thirds) have constitutional provisions that provide for the right to a healthy environment⁶⁶. The tendency is for countries to select parts of environmental concerns that are relevant to their particular situations⁶⁷.

The nature of substantive environmental rights provided in the constitutions can be divided into four categories according to their degree of enforceability.

⁶⁵ According to the Ksentini report over 60 national constitutions contain specific provisions relating to the protection of the environment and an increasing number explicitly recognised the right to a satisfactory environment and prescribed a state duty to protect the environment. In J Cameron & R Mackenzie 'Access to environmental justice and procedural rights in international institutions' MR Anderson & A Boyle (n 8 above) 129.

⁶⁶ Environmental law Institute (ELI) (200) 'Report on constitutional environmental law: giving force to fundamental principles in Africa' <<http://www.eli.org>> (accessed on 17 September 2001). The Constitution of Sudan for example requires the state "to promote public health, encourage sports and protect the natural environment, its purity and its natural balance, to ensure safe, sustainable development.

⁶⁷ For example arts 28 and 29 of the Constitution of Benin deals with toxic and foreign waste; art 48 of the Constitution of Chad outlaws toxic and polluting wastes; art 47 and 48 and of the Constitution of Congo bans of toxic, polluting or radioactive wastes; art 81 of the Constitution of Nigeria bans use of toxic wastes, that of South Africa in article 24 focuses on future generations; Tanzania accords priority in article 27 of its Constitution to natural resources.

In the first category are those constitutions, which have environmental rights in the chapter for fundamental rights and duties. Rights in this chapter of the constitution are binding and have force of law⁶⁸.

Secondly, there is that category where though environmental rights are not placed in the chapter for fundamental rights and duties, they nonetheless acquire the latter's binding character through the use of expressions of a compulsory nature like "shall"⁶⁹.

Thirdly, some constitutions have environmental rights in a chapter entitled "national objectives" or "directive principles" or "declaration of state policy". It is debatable whether rights in this category are enforceable. In *New Patriotic Party v Attorney General*⁷⁰ it was held that these principles

...are not of and by themselves legally enforceable by any court. However, there are exceptions to this general principle. Since the courts are mandated to apply them in the interpretive duty, when they are read together or in conjunction with other enforceable parts of the Constitution, they then, in that sense, become enforceable.

These principles are thought to be tools to guide the state and its institutions in the application and interpretation of the Constitution⁷¹. Contemporary constitutional law jurisprudence seems to suggest that they are enforceable. In *Sachinadad Pande v State of West Bengal*⁷², when a constitutional directive principle came to contention as to its enforceability, an Indian court held that:

⁶⁸ Constitutions of this nature include Mozambique, Angola, Cape Verde, Congo and Chad.

⁶⁹ See for example the Constitution of Togo, which provides that everyone shall have the right to a clean environment.

⁷⁰ (1996-97) SCGLR 729, 745.

⁷¹ See for example, NA Kotey 'human rights and administrative justice in Ghana under the Fourth Republic' *Human rights and public administrations* (1997) 153.

⁷² 1987 A.I.R. (S.C.) 1109 (1987). See also the decision in Philippines in *Juan Oposa v Factorian* G.R No 101083 (Supreme Court of Philippines August 9 1993) where the court said that the fact that the right to a balanced ecology was under the declaration of state policy did not make it less important. See also the ruling of Nepal's Supreme Court in *Prakash Mani Sharma v Ministers of Council Writ Nos 2961 and 2052* where it was held that the unenforceability of a directive principle can only hold water when it is not violated. The moment it is violated, it becomes enforceable.

When the Court is called upon to give effect to the directive principles, the fundamental duty of the court is not to shrug its shoulders and say that priorities are a matter of policy and so it is a matter for policy-making authority... The court may always give necessary directions.

Fourthly, environmental rights can also be enforced as penumbral rights. These are rights that are not specifically mentioned in the constitution but are thought to be consistent with its principles and existing rights⁷³. Environmental rights can be argued to be within the spirit of the new liberal constitutions that provide for civil and political rights and socio-economic rights.

3.3 The enforcement of substantive environmental rights and duties

3.3.1 Right to a healthy environment

Despite the inclusion of the right to a healthy environment in many constitutions, its degree of enforcement has been lax especially in African jurisdictions. This is attributable to various reasons.

First, constitutional environmental law is still a new area of jurisprudence lacking judicial experience and precedent. Secondly, public interest litigation and especially that pertaining to environmental justice is still new in young democracies. In undemocratic societies the law is there to serve the state, it is practically impossible to question the fiat of the ruling class. Thirdly, the judiciary in many third world countries is not trained in human rights law. Many judges are trained mostly in private law. Fourthly, institutions and state apparatus for enforcement of environmental rights are still to be put in place or inexperienced where they are already in place. Fifthly, non-state actors such as the non-governmental organisations and civil society have only recently ventured into the pursuit of environmental rights.

⁷³ See for instance art 29 of Eritrea's Constitution, which provides that rights enumerated in it, shall not preclude other rights which ensure the spirit of the Constitution and the principles of a society based on social justice, democracy and the rule of law. See also art 32 of the Constitution of Algeria.

Despite the above shortcomings, there are still a few developments that are worth mentioning.

The constitutional right to a healthy environment has been enforced in many parts of the world. India has taken a lead in this endeavour. Indian courts have used different approaches to give effect to environmental rights.

Firstly, they have enforced the right without demanding proof of environmental damage or health hazards. In *L.K Koolwal v Rajasthan*⁷⁴, the court held that the constitutional rights to health, sanitation, and environmental preservation could be violated by poor sanitation resulting in a 'slow poisoning' of residents without specific allegations of injury⁷⁵.

Secondly, the courts have emphasised ecological balance. The Supreme Court of India has recognised the right of people to live in a healthy environment with minimal disturbance and ecological balance⁷⁶.

Similar developments have taken in place other parts of the world. In *Protected Forest case*⁷⁷ a Hungarian court refused to give an amendment of the law to transform a protected forest into private land. The court reasoned that the amendment would violate the right to a healthy environment to the highest level of physical and spiritual health⁷⁸.

In *Fundacion Natura v Petro Ecuador de la Buenos Aires*⁷⁹, the court held that a defendant's trade in banned leaded fuel violated the plaintiffs right to healthy environment⁸⁰.

⁷⁴ 1988 A.I. R. (Raj.) 2 High Court of Rajasthan,(1988).

⁷⁵ See also *Rural litigation and entitlement Kendra v Uttar Pradesh* 1985 A.I.R. (S.C.) 652 (1985)

⁷⁶ T *Damodhar Rao v Municipal Corp of Hyderabad* 1987 A.I.R. (A.P.) 171 (1987) where it was stated that it is the legitimate duty of courts to forbid all action of the state and the citizen from upsetting the environmental balance.

⁷⁷ *Magyar Kozlony* Case No 1994/No. 55, p. 1919 (Hungarian Constitutional Court, 1994)

⁷⁸ See also the Slovenian Case of *Drusto Ekologov Slovenije*, case No U-I-30/95-26 where the court held that all persons have the interest to prevent actions damaging the environment.

⁷⁹ Case No 221-98-RA (Constitutional Court).

In Chile, there has been developments on environmental impact assessment. In the *Trillium case*⁸¹, for instance, the Supreme Court rescinded a license in timber where the government failed to adduce evidence to support the viability of an environmental impact assessment⁸².

The above developments make it clear that substantive environmental rights are recognised and enforceable against the general view that they are not. Courts have been ready to adopt interpretations that have given effect to environmental rights. This spirit is however still lacking in many jurisdictions, especially those in the African continent.

3.3.2 Environmental duties

Environmental duties are provided in some constitutions⁸³. The constitutional duty can be directed to the government and its organs, individuals, legal persons or a combination of these parties. In *L.K Koolwal v Rajasthan (supra)*⁸⁴, an Indian court ruled that the fundamental duty to protect the environment in the Constitution extended not only to the citizens but also to the instrumentalities of the state

This is a welcome development given the fact that it is not only the State that violates environmental rights but natural and artificial persons as well. This is especially so in developing countries where multinationals involved in investment ventures are known to

⁸⁰ *Arco Iris v Insituto Ecuatoriano de Minería* Case No 224/90, Judgement No 064-93-CP (Constitutional Court of Ecuador) where it was held that environmental degradation is a threat to environmental human rights.

⁸¹ Case reported at < <http://www.elaw.org/cases/chile/trilliumenglish.htm>>.

⁸² See also the Argentine case of *Fundacion Fauna Marina v Ministerio de la Produccion de la Provincia de la Buenos Aires* Federal Court No 11, Mar del Plata, Civil and Commercial Secretariat, May, 8, 1996.

⁸³ See for instance article 51A(g) of the Indian Constitution, which provides for the fundamental duty to protect the environment. Section 24 of the South African Constitution imposes the duty to the state to take reasonable legislative and other measures to prevent pollution, promote conservation and secure ecologically sustainable development.

⁸⁴ See also *M.C. Mehta v Shriram Food and Fertilizer industries* 1987 A.I.R. (S.C.) 1026 (1987) where the court held that writs against the state for any breach of fundamental rights also applies to private parties.

be polluting the environment⁸⁵. It is significant for the enforcement of environmental rights as it broadens the scope of persons who can be held liable in environmental rights litigation.

3.3.3 Procedural environmental rights

Procedural rights are provided in many domestic constitutions. These rights are important as they provide environmental activists and the public at large with mechanisms for fighting for and participating in the decision making process that relate to environmental justice. They are also important as they lay down mechanisms that make environmental rights litigation possible through access to justice. Freedom of association, access to information, public participation in decision making and access to justice are some of the most important procedural rights for the enforcement of environmental rights. These are discussed seriatim below.

3.3.3.1 Freedom of Association

Freedom of association is fundamental to the enjoyment of virtually all human rights. When the freedom of association is guaranteed, people are able to organise and mobilise themselves for environmental concerns. It is especially important for the enforcement of environmental rights given the fact in environmental litigation organisations are more likely to bring enforcement actions than private individuals.

Freedom of association is provided in many constitutions. The right is however constrained by claw-back phrases such as 'subject to law', subject to 'conditions fixed by law', which are famous in many constitutions⁸⁶. It is also limited by legislations that give

⁸⁵ Shell for, instance, has constantly been blamed for oil spills and hydrocarbon pollution in Nigeria. See Human Rights Watch *The price of oil: corporate responsibility and human rights violation in Nigeria's oil producing communities* (1999).

⁸⁶ See for example art 20 (1) of the Constitution of Tanzania, which provides for freedom of association subject to the laws of the land. For a thorough discussion of the freedom of association in Tanzania, see CP Maina *Human rights in Tanzania: selected cases and materials* (1997) 648-707.

the executive unfettered discretion when it comes to the registration and operation of associations⁸⁷.

3.3.3.2 Access to information

Enforcement of environmental rights is only possible where people have the necessary information about the environment.

The right to access to information is provided by many national constitutions⁸⁸. In Africa countries like South Africa, Congo, Kenya and Uganda have very strong constitutional provisions that guarantee access to information⁸⁹.

India has a very inspirational jurisprudence on the right to access to information. In the leading case of *S.P. Gupta v President of India*⁹⁰ the Supreme Court held that the concept of an open government emanates from the right to know and that the disclosure of information should be respected and withholding it should only be where strictest requirement of public interest requires. This decision is significant, as States are notoriously known to withhold vital environmental information in the pretext of state security. This is especially so when the information relates to vital state defence instruments like atomic and nuclear energy facilities.

3.3.3.3 Public participation in decision-making

Environmental democracy is achieved best if the public is able to participate in the process of making laws and policies that are relevant for the protection of the

⁸⁷ The government of Tanzania has recently for instance invaded the offices of the Lawyers' Environmental Action Team looking of documents linked to the alleged killings of artisanal miners at Bulyanhulu in 1996 and arrested the president of the said Association. See < <http://www.ipppmedia.com> >(accessed on 25 November 2001)

⁸⁸ In Africa alone 21 national constitutions provide for access to information in one way or another. See ELI Report (n 67 above).

⁸⁹ See art 24 of the South African Constitution, art 27 of the Constitution of Congo and art 41 of the Ugandan Constitution. The Constitution of Kenya reproduces the right to information as provided in article 9 of the UDHR.

⁹⁰ 1982 A.I. R (S.C.) 149 (1982), see also *Reliance Petrochemicals v Indian Express*, S.C.C. 592 (1988), where the Supreme Court of India held that the right to know was a basic public right which is necessary for public participation and democracy.

environment. This right is recognised both at the international, regional and national levels.

Principle 10 of the Rio Declaration makes it clear that environmental issues are best handled with the participating of all concerned citizens at the relevant levels. The right is also provided in the Aarhus Convention⁹¹ and the Inter-American Strategy for the Promotion of Public Participation in Decision Making for Sustainable Development⁹². The position is less succinct in domestic constitutions but nonetheless provided in indirect terms. The Liberian Constitution⁹³, for instance, requires all government and private enterprises to manage the national economy and the natural resources and to ensure the maximum feasible participation of all citizens.

3.3.3.4 Access to Justice

The most important procedural right in the enforcement of environmental rights is perhaps that of access to justice. This right is a tool for citizens to enforce environmental rights in courts and administrative tribunals. Access to justice includes the power of courts to review government's actions and omissions and the right to appeal against decisions made by the same with. More than two thirds of African countries have incorporated this right in their constitutions⁹⁴.

Two important components of access to justice-legal standing and judicial review are worth special mention.

⁹¹ See arts 6, 7 and 8 of the United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Aarhus, Denmark June 25 1998.

⁹² Policy Recommendations 2 and 3 of the draft Framework and Recommendations for Further Action, September 8, 1999, Mexico City, Mexico.

⁹³ Art 7 of the Liberian Constitution. See also the Constitution of Cape Verde (art 57), the Constitution of the Gambia (art 25 (f)) and the Constitution of Eritrea (art 24).

⁹⁴ Benin and Cote D'Ivoire incorporate access to justice as provided in the UDHR. Different expressions are used e.g. 'protection of the law' (Botswana art, 3(a), "appeal against any act of administration" (Congo art 19; Liberia, art 26), 'right to judicial review'(Eritrea, art 24(2) and 28(2); (Tanzania, art 3(6) (a)). For some like Seychelles, Uganda and Zimbabwe the right is provided in more general terms like "equal protection of the law", "right to uphold and defend the constitution", etc.

(a) Judicial Review

Courts have inherent powers to call to task administrative decisions or omissions when they fail to meet the requirements of justice and fairness. Judicial review can be used expediently to stop administrative actions that are environmentally harmful⁹⁵.

(b) Locus standi

Locus standi is a judge made rule⁹⁶, which means that it is only persons who can demonstrate an injury to a legally protected right that should be given audience by the courts. Traditionally it was only persons who had suffered direct economic loss that had standing. This position is still maintained in some jurisdictions. In *Wangari Maathai v Kenya Times Media Trust Ltd.*⁹⁷, public interest litigants were refused standing on the ground that they failed to prove a distinct injury than the one had by the public at large.

A more modern and progressive approach is the one that is less restrictive and allows anybody to bring an action given that the matter is of public interest. In *Festo Balegele v Dar-es-Salaam City Council*⁹⁸ the High Court of Tanzania recognised the *locus standi* of more than 700 residents to sue the respondent for dumping wastes without imposing the traditional rules of standing. The same *Court in Christopher Mtikila v Attorney General*⁹⁹ followed this trend where Lugakingira J (as he then was) asserted that:

If there should spring up a public spirited individual and seek the Court's intervention against legislation or actions that pervert the constitution and what it stands for, the court is under an obligation to rise up to the occasion and give standing.

⁹⁵ Judicial review can for, instance, be used to interdict a construction work that it environmentally harmful.

⁹⁶ See *O'Shea v Littleton*, 414 US. 488, 497 (1974) in L Fisher *American Constitutional Law* (1990) 101.

⁹⁷ Civil Case No. 5403 of 1989 (High Court of Kenya at Nairobi, Dec 11, 1989). This position is not in conformity with a latter decision in *Maina Kamanda v Nairobi City Council*, Civil Case No 6153 (High Court, Nairobi, December 8, 1992) where two citizens were given standing in a suit against officials alleged to have misused public funds. In this case the stringent requirements of standing were not imposed on the plaintiffs.

⁹⁸ Misc Civil Case No 90 (High Court of Tanzania at Dar es Salaam) 1991.

⁹⁹ Civil Case No 5 (High Court of Tanzania at Dodoma) 1993. Reported in Vol 1 Commonwealth Human Rights Law Digest 1996 11.

The Court went further to say that standing will be granted on the basis of public interest where the petition is *bonafide* and evidently for the public good and where the Court can provide an effective remedy.

The old requirements of standing make it difficult for environmental rights groups to enforce environmental rights, as it is not easy for them to show personal injury. The new approach is welcome as all it requires is one to show that the matter is of public interest.

3.4 Environmental rights and other rights

3.4.1 The right to life

All constitutions of African countries provide for the right to life in one way or another¹⁰⁰. The right to life is not defined making one wonder whether it implies only the physical aspect of life or whether it also extends to means that sustain life. Does the right for instance imply the right to clean water and air? A few examples will illustrate this.

Tanzania is said to be the first country in Africa to address the constitutional right to life in the context of environmental protection¹⁰¹. In *Joseph D Kessy v Dar es Salaam City Council*¹⁰² residents of Tabata suburb challenged the respondent's decision to construct a garbage dump, which created air pollution. The court issued an order requiring the respondent to stop dumping wastes in the area. Relying on the right to life provision¹⁰³ the court held that the garbage dump endangered the health and lives of the residents¹⁰⁴.

Outside Africa, India has generated the largest jurisprudence on the environmental aspects of the constitutional right to life. In *Damadhar Rao v Municipal Corporation, Hyderabad*¹⁰⁵, where the Life Insurance Corporation and the Income –Tax department

¹⁰⁰ ELI Report (n 67 above).

¹⁰¹ *Ibid.*

¹⁰² Civil Case No. 299 of 1998(High Court of Tanzania at Dar –es-Salaam).

¹⁰³ Art 14 of the Constitution.

¹⁰⁴ The same constitutional provision was relied in *Festo Balegele v Dar es Salaam City Council* (supra).

¹⁰⁵ 1987 A. I. R (A.P.) 171 (Andra Pradesh Court 1987).

wanted to convert land in a recreational area into a residential area, the court stated that article 21¹⁰⁶:

Embraces the protection and preservation of nature's gifts without which life cannot be enjoyed. There can be no reason why practice of violent extinguishments of life alone should be regarded as violative of article 21 of the Constitution. The slow poisoning by the polluted atmosphere caused by environmental pollution...should be regarded as amounting to violation of article 21....¹⁰⁷

Indian environmental rights jurisprudence has inspired courts in other jurisdictions. In *General Secretary, West Pakistan Salt Miners Labour Union (CBA) Hrwa, Khelum v The Director, Industries and Mineral development, Punjab Lahore*¹⁰⁸, where mining companies operations polluted drinking water, the Pakistani Supreme Court invoked the right to life in article 9 of the constitution saying that the right to have water free from pollution and contamination is a right to life in itself.

In *Leaders v Godawari Marble Industries*¹⁰⁹, Nepal's Supreme Court held that "since a clean and healthy environment is an indispensable part of human life, the right to a clean, healthy environment is undoubtedly embedded within the right to life".

Similar developments have taken place in Latin America. In *Victor Roman Castrillon Vega v Federacion Nacional de Algodoneros of Corpora Corporacion Autonoma*

¹⁰⁶ This article provides for the right to life.

¹⁰⁷ The right life has been construed in environmental rights litigation in a score of other Indian Cases- *Indian Council for Environ-Legal Action v Union of India*, 3 S.C.C. 212 (1996); *Corralie v Union Territory*, 1981 A.I.R. (S.C.) 746 (1981); *Vikram Deo Singh v State of Bihar*, 1998 A.I.R. (S.C.) 1782 (1988); *F.B.Tarapowala v Bayer India Ltd.*, 6 S.C.C. 58 (1996); *Chhetriya Pardushan Mukdi Sangarsh Samiti v State of Uttar Pradesh*, 1996 A.I.R. (S.C.) 2060 (1996); and *Vellore Citizens Welfare Reform v Union of India* 1996 A.I.R (S.C.) 2715 (1996).

¹⁰⁸ Case No. 120 of 1993, SCMR 2061 (1994). See also *In re: Human Rights case (Environmental pollution in Balochistan Human Rights Case No. 31-K/92(Q), P.L.D 1994 Supreme Court 102(1992)* In *Shehla Zia and others v WAPDA Human Rights case No 15-K/ 1992, P.L.D. 1994 Supreme Court 693 (1992)* the Supreme Court broadened the right to life to include protection from being exposed to the hazards of electro- magnetic field and related operations.

¹⁰⁹ Supreme Court of Nepal October 31, 1995).

*Regional del Cesar (CORPROCESAR)*¹¹⁰, the Supreme Court of Colombia found violation of the right to life where an industry released toxic fumes¹¹¹.

The right to life can be very useful to give effect to environmental rights, especially in those jurisdictions, which do not have statutory provisions for environmental protection.

3.4.2 The right to development

There is a close link between the environment and development. The right to development is recognised as a human right in itself¹¹². The Stockholm Declaration affirms the inextricable link between the environment and development¹¹³. The Rio Declaration requires the right to development to be fulfilled to meet the developmental and environmental needs of present and future generations¹¹⁴. The World Commission on Environment and Development in its report to the UN General Assembly¹¹⁵ emphasised the relationship between the world economic system and the environment.

There is a cause-effect relationship between poverty and the environment¹¹⁶. Poor people tend to deplete the environment for survival and are easy to buy when it comes to the dumping of hazardous wastes. They are also powerless when it comes to decisions that effect the environment. Furthermore, they cannot access the necessary information that relate to environmental issues. A worn out environment is a cause of

¹¹⁰ Case No 4577 (Supreme Court Chamber of Civil and Agrarian Cession, November 19,1997).

¹¹¹ For similar jurisprudence see *FUNDAPUBLICO v SOCOPAU Ltd.* Case No T-101, Judgement No T-45 (Constitutional Court June 17, 1992), *FUNDAPUBLICO v Compania Maritina de Transporte Croatia Line Y Comar S.A.*, Case No 076 (Superior Court of Santa Marta Civil Chamber, July 22, 1994). These and other cases are also available at <<http://www.Fundepublico.org.co/htm/logros.htm>>.

¹¹² Declaration on the Right to Development adopted by the General Assembly in its resolution 41/128 of 4 December 1986. See the Report of the UN Special Rapporteur on Human Rights and the Environment available at <<http://www.unhchr.ch/Huricoda.nsf>> (accessed on 25 August 2001).

¹¹³ See for instance principal 8, which provides that economic and social development is essential for ensuring a favourable and working environment.

¹¹⁴ Principles 3 and 4.

¹¹⁵ The Brundtland Report- "Our Common Future", UNEP/GC.14/13

¹¹⁶ According to a recent statement issued by African Ministers, poverty reduction can only be achieved if economic growth, social development and environmental protection are given attention- see African Ministerial Statement, "From Rio De Janeiro to Johannesburg" issued in the African Preparatory Conference for World Summit on Sustainable Development, Nairobi, 18 October 2001, available at <<http://www.elaw.org/resources>>(accessed on 17 November 2001).

poverty in many parts of the world, and a polluted environment is neither good for production nor conducive for human lives.

3.4.3 Right to privacy

The right to privacy can be invoked to challenge environmental harm. In *Arondele v U.K*¹¹⁷, a complaint was brought before the European Commission of Human Rights (the Commission) to challenge noise pollution from Gatwick airport¹¹⁸. The Commission found that the intolerable noise was a violation of the right to private life¹¹⁹. In the *Lopez Ostra's* case¹²⁰, the European Court on Human Rights found violation of the right to private and family life by a noxious leather industry situated near the applicant's residence¹²¹. In Colombia the right to privacy has been successfully invoked to force an animal food industry to suspend emission of fetid fumes¹²².

3.4.4 The right to property

The right to property can be used as a tool for environmental protection or as a bar to the same. The right to property is a double-edged sword, it can be employed either to support or deny environmental claims or relief¹²³. The right to property in some jurisdictions imply not only the right to own property but also the right to enjoy use of the same without interference. Article 1 of Protocol 1 of the European Convention of Human Rights (the European Convention) provides that "every natural or legal person is entitled to the peaceful enjoyment of his possession¹²⁴". An individual whose property is affected

¹¹⁷ Application 7889/77 19 D & R (1980), 186 (decision on admissibility); 26 D& R (1982), 29 (friendly settlement).

¹¹⁸ Seem S Dhanusha 'Human rights and environmental protection' <<http://www.geocities.com/Sarathdhanuha/paper3.htm>> (accessed on 25 August 2001)

¹¹⁹ This right is guaranteed in art 8 of the European Convention on the Protection of Human Rights and Fundamental Freedoms (the European Convention), 1950. In *Baggs, Powel and Rayner v U. K* Application 9310/81, 44 D&R (1985), 13 (decision on admissibility); 52 D&R (1987), 29 (friendly settlement) however, where a complaint was brought against the noise from Heathrow airport the court found the interference on private life justifiable, as the airport was necessary for the economic well being of the country.

¹²⁰ Ser A No 303C(1994).

¹²¹ Dhanusha (n 118 above).

¹²² See G Sarpornig 'Environmental justice in Ghana' (unpublished) 4.

¹²³ *Ibid.*

¹²⁴ See also arts 11(2) and 21 of the American Convention on Human Rights. Art 8 of the European Convention provides that "everyone has the right to respect of his private life and his home."

by various forms of environmental degradation or pollution can invoke these provisions. In *Rayner v United*¹²⁵ Kingdom for example where a complaint was brought against noise pollution from Heathrow Airport, the European Commission observed that article 8 covered not only direct measures taken against a persons home but also “indirect intrusions which are not necessarily directed to private individuals. The pollution was however justified for the economic well being of the country¹²⁶.

Individual property rights can at times interfere with the enforcement of environmental rights. Designating certain areas as protected areas for instance imply expropriating or limiting the use of private property.

3.5 Interim conclusion

A few points became clear in this chapter. Firstly, environmental rights are now incorporated in many constitutions but their enforcement is still lax. Secondly, enforcement is constrained, *inter alia*, by stringent rules of legal standing and lack of other procedural rights. There have, however, been instances where environmental rights have been successfully prosecuted without establishing the requirement of standing.

¹²⁵ Application 9310/81, 47 D&R (1986).

¹²⁶ See also *S v France* Application 13728/88, 6 D &R (1990).

4.0 CHAPTER FOUR: THE NEW SOUTH AFRICAN CONSTITUTION AND THE ENFORCEMENT OF ENVIRONMENTAL RIGHTS

4.1 Introduction

The South African Constitution incorporates various fundamental human rights including environmental rights. It has also put in place mechanisms for their enforcement. The Constitution also requires that policy and legislative measures be put in place to give effect to the rights incorporated. The aim of this chapter is to see how this new constitutional culture can be employed for environmental concerns. To be able to arrive at the above, it is imperative to give an overview of the constitutional structure singling out as, it were, important elements that characterise the new constitutional dispensation. The environmental clause in the Constitution will also be evaluated. Acts of Parliament that give effect and supplement the rights under the Constitution will also be examined.

4.2 An overview of the South African Constitutional dispensation

4.2.1 Human rights in the old South Africa

The present form of the Bill of Rights cannot be separated from the historical context within which it developed.

For centuries South Africa was characterised by gross violation of human rights. The then ruling apartheid minority regime curtailed the enjoyment of fundamental freedoms of the majority non-white population. The rift between it and liberation movements that were struggling to oust it, exacerbated the situation. Apartheid was sustained in many ways, most notably through the legalisation of its inhumane practices. The parliament was not representative of all groups of people in the society. This state of affairs is best expressed by the words of Mahmood DP in *AZAPO v President of South Africa*¹²⁷:

The legitimacy of law itself was deeply wounded and the country haemorrhaged dangerously in the force of this tragic conflict...¹²⁸

¹²⁷ 1996 (4) SA 741 (CC).

¹²⁸ *Ibid* at para 1.

Characteristic of the old order was the notion of parliamentary sovereignty, where parliament could make any law it wished and no person or institution (including the courts) could challenge them¹²⁹. Parliament was representative only of a few people¹³⁰.

The above system was a major setback for the enforcement of human rights. It was almost impossible for courts to intervene in human rights causes. They could only declare laws invalid on procedural grounds but never on substantive grounds¹³¹.

But even then, courts could not strictly speaking be separated from the oppressive regime. In undemocratic societies, the judiciary is normally there to serve the fiat of the ruling class. Courts rarely invoked their inherent jurisdiction in administrative laws to regulate administrative use of power.

4.2.2 Fundamental principles of the new order

The country adopted its final constitution (the Constitution) in 1996, which replaced the 1993 Interim Constitution (the Interim Constitution). The new Constitution, which was attended to remedy mistakes and injustices of the past, puts in place key principles that are important for the protection, promotion and enforcement of human rights.

First, parliamentary sovereignty has been replaced by constitutional supremacy. The Constitution is now the supreme law of the republic and law or conduct inconsistent with it is invalid and the obligations involved by it must be enforced¹³².

¹²⁹ AV Dicey *An introduction to the study of the Law of the Constitution* 110th edition (1959) XXXIV in J De Waal, I Currie & G Erasmus (eds) *The Bill of Rights Handbook* (2001) footnote 2 at 2.

¹³⁰ The 1909 Union Constitution of South Africa created a situation where it was only the white minority who were represented in parliament. The rest of the population were to be governed by the executive using laws that were made by the white minority representatives in parliament.

¹³¹ A court could for example declare laws invalid if they were enacted unprocedurally but not for instance when it violated human rights. See J De Waal et al (n 129 above) 3.

¹³² Sec 2 of the Constitution.

Secondly, the new Constitution incorporates rule of law principles¹³³, a basic principle of liberal democracy¹³⁴. Rule of law requires that all (including the state) should act according to well-established laws and principles¹³⁵.

Thirdly, principles of democracy and accountability are constitutionalised. One of the purposes of adopting the new Constitution was to heal the divisions of the past and lay foundations for a democratic and open society where the government is based on the will of the people¹³⁶.

Fourthly, the Constitution incorporates the concept of separation of powers, which is intended to prevent abuse of powers by concentrating the same in the hands of one person or organ¹³⁷. The functions of all organs of state are clearly defined in the Constitution¹³⁸.

¹³³ Dicey, its architect advocated for absolute supremacy of regular law as opposed to arbitrary power on the part of the government. He further understood the rule to imply equality before the law, excluding the exemption of officials or others from the duty of obedience of the law, which governs other citizens, or from the jurisdiction of the ordinary tribunals. See M Wambali 'The doctrine of the rule of law and the functioning of a democratic government in Tanzania' in CK Mtaki & M Okema *Constitutional reforms and democratic governance in Tanzania* (1994) 120.

¹³⁴ IG Shivji 'The changing state: from an extra-legal to an intra-legal state in Tanzania' in GM Fimbo & SE Mvungi (eds) *Constitutional reforms for democratisation in Tanzania* (1993) 42.

¹³⁵ The rule of law has now been extended to include civil and political rights, as well as socio-economic rights-See J De Waal *et al* (n 129 above) 10. The rule of law is also linked to the principles of legality and rationality- see for example the reasoning of the Constitutional Court in *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA (CC) where the Court made it clear that the legislature and the executive must exercise their functions according to Law. In *New Party v Government of the Republic of South Africa* 1999(3) SA 191 (CC) the Court held that Parliament and other constitutional actors must exercise their power rationally-i.e. there must be a rational connection between their actions and the achievement of a legitimate purpose.

¹³⁶ See Preamble to the Constitution. For similar expressions see secs 1, and 2 of the Constitution.

¹³⁷ See CK Mtaki 'The doctrine of separation of powers and constitutional developments in Tanzania' in CK Mtaki & M Okema (n 133 above) 95.

¹³⁸ The Parliament and provincial legislatures are vested with legislative authority (sec 43 of the Constitution); executive authority of the Republic is vested in the President, that of the Provinces in the premiers (secs 85 and 125); judicial authority is vested in the Courts (sec 165). At the local level, executive and legislative powers are vested in the Municipal Council, sec 151(2).

4.3 Structure the Bill of Rights litigation

The constitutional dispensation in place has created a structure for Bill of Rights litigation. Environmental rights will be taken as a case study. There are two stages that have to be passed before litigation is complete under the Bill of Rights: the procedural and the substantive stage.

4.3.1 The procedural stage

When an issue is brought to a court a few procedural issues must be considered before substantive issues are explored.

Firstly, the court must consider whether the Bill of Rights applies directly or indirectly to a given situation.

Direct application is geared towards showing inconsistency between the Bill of Rights and ordinary law or conduct that is in contention¹³⁹. This means that environmental legislation or conduct is weighed against the environmental clause in the Constitution. If the conduct or legislation is inconsistent with the Constitution, then a finding will be made that the environmental clause has been violated.

Indirect application means that the ordinary law is interpreted in a manner that conforms to the values and spirit of the Constitution. Courts are required to try to resolve disputes by applying constitutional principles to ordinary law before resorting to the Constitution itself. This is the principle of avoidance. This means for example that the National Environmental Management Act (NEMA)¹⁴⁰ or any other Act will be construed to give effect to a certain environmental right without having to invoke the Constitution.

¹³⁹ De Waal et al (n 129 above) 2.
¹⁴⁰ Act 107 of 1998.

4.3.1.1 Justiciability

The court must also look whether a matter brought before it is justiciable. A matter is said to be unjusticiable if it is not ripe¹⁴¹ and if it is moot or academic¹⁴². An environmental rights matter is not for instance ripe if it still in a lower court or tribunal that has jurisdiction over it. An environmental law matter will be considered moot if it is brought under a non-existent law, say, for example under the Environmental Conservation Act (NCA)¹⁴³, which has now been replaced by NEMA.

4.3.1.2 Jurisdiction

Not all courts have jurisdiction to determine constitutional matters. The Constitutional Court¹⁴⁴, the Supreme Court of Appeal¹⁴⁵ and the High Court¹⁴⁶ are the only courts with jurisdiction to apply the Constitution directly. Magistrate courts can apply the Constitution indirectly, that is to construe ordinary law in a manner that conforms to the spirit of the Constitution¹⁴⁷.

¹⁴¹ See for instance *Ferreira v Levin NO* 1996 (1) SA 984 (CC) where Ackerman J said that the business of the Court is to deal with situations or problems that have already ripened or crystallised, and not with prospective or hypothetical ones. See also the principle in *S v Mhulungu* 1995 (2) SA 867(CC).

¹⁴² In *JT Publishing v Minister of Safety and Security* (1997) (3) SA 514 (CC), it was made clear that courts should not decide points, which are merely abstract, academic or hypothetical.

¹⁴³ Act 73 of 1989.

¹⁴⁴ The Constitutional Court can adjudicate on the constitutionality of provincial or parliamentary bills that relate to the environment and other matters using the powers vested by it in sec 167 (3) of the Constitution.

¹⁴⁵ The Supreme Court of Appeal has power to hear any appeals. This means it can adjudicate on any constitutional environmental matter that is brought to it by way of appeal. It can also adjudicate on the constitutionality of any environmental legislation subject to the approval of the Constitutional Court (This can be inferred from sec 167(5) which gives the Constitutional Court the final say on matters *inter alia* concerning invalidities of legislations.

¹⁴⁶ The High Court can decide on any constitutional matter save for those within the exclusive jurisdiction of the Constitutional Court. It also has the power to grant interim relief in constitutional matters. See sec 172(2)(b) of the Constitution.

¹⁴⁷ Magistrates Courts can for example construe provisions of NEMA or other legislation to give effect to the rights under sec 24 of the Constitution.

4.3.2 The substantive stage

At this stage, the court is concerned with the allegation that a right has been infringed upon or has been threatened. This stage calls into operation issues of interpretation and limitation. If the applicant is successful the court will give appropriate remedies.

4.3.2.1 Interpretation

When interpreting the Bill of Rights, courts must consider international law and may consider foreign law¹⁴⁸. This is progressive for the enforcement of environmental rights, as courts in South Africa will have to consider international environmental law conventions that it is signatory to when interpreting the Constitution. Secondly, courts not being constrained from applying comparable foreign law can borrow from the jurisprudence of other jurisdictions.

The Constitutional Court has developed a few tools of interpretation. These include literal interpretation¹⁴⁹, purposive interpretation¹⁵⁰, generous interpretation¹⁵¹, historical interpretation,¹⁵² and contextual interpretation¹⁵³.

¹⁴⁸ Sec 39 of the Constitution.

¹⁴⁹ See for example the dictum of Kentridge in *S v Zuma* 1995 (2) SA 642 (CC).

¹⁵⁰ In South Africa, the concept of an open and democratic society based on human dignity, equality and freedom underlies the constitutional order in place. A purposive interpretation should give heed to these principles. See for example the statement of the Canadian Supreme Court in *R v M Drug Mart Ltd* 185 18 DLR (4th) that was adopted for its persuasive value by the Constitutional Court in *S v Zuma* (supra).

¹⁵¹ □ See *S v Zuma* (supra) where the Constitutional Court adopted the reasoning of Lord Wilberforce in *Minister of Home Affairs (Bermuda) v Fisher* (1980) AC 319 (PC) 32-9 that a supreme constitution requires generous interpretation suitable to give individuals the full measure of the fundamental rights and freedoms.

¹⁵² Cardinal in this is the political history of the country, which was characterised by oppression and totalitarianism. It is this unfortunate history that the new Constitution is intended to remedy-See for example the dictum of Mahomed J in *Mhulungu* (supra) para 8 and that in *Brink v Kitshoff NO* 1996(4) SA 197 (CC) para 40. The drafting history is also important given the fact the present Constitution is a compromise between different groups in the Country-. See *S v Makwanyane* 1995 (3) SA 391(CC) para 18.

4.3.2.2 Limitation

If a court finds that a right has been infringed upon or threatened, it will proceed to see whether the infringement is saved by the limitation clause¹⁵⁴. This is in view of the fact that not everything that seems on the face of it to infringe the Constitution is unconstitutional¹⁵⁵.

4.3.2.3 Remedies

When the court is satisfied that the infringement is not saved by the limitation clause, it will proceed to give the requisite remedies. These could be in the form of interdicts, severance, administrative law remedies, invalidation of legislations and declarations of rights¹⁵⁶.

4.4 Environmental rights

The Constitution provides for environmental rights along with mechanisms for their enforcement. In this, the new order departs from the position obtaining before. Before discussing the new order it is prudent to preface that inquiry with a few historical antecedents.

4.4.1 The common law position

¹⁵³ In *Makwanyane* (supra) the Court treated the right to life, the right to equality and the right to dignity as together giving meaning to the prohibition of cruel, inhuman or degrading treatment or punishment -see De Waal et al (n 129 above) 138.

¹⁵⁴ Sec 36.

¹⁵⁵ The limitation clause allows infringement given that the same is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. Actions that would for instance seem to violate environmental rights can be justified if there are undertaken to give effect to a superior goal. If a forest is for instance cleared to create a settlement or to build a road, action to challenge it can fail even though the environment is right away endangered by such a move.

¹⁵⁶ This can be read together with sec 28 NEMA which provides that "every person who causes, has caused or may cause significant pollution or degradation of the environment must take reasonable measures to prevent such pollution or degradation from occurring, continuing or recurring, or, in so far as such harm to the environment is authorized by law or cannot reasonably be avoided or stopped, to minimise and rectify such pollution or degradation of the environment".

The old position was characterised by the norms of Roman and Roman-Dutch law, which constitutes South Africa's common law. The enforcement of environmental rights was difficult due to a narrow approach towards *locus standi* and lack of enforceable environmental provisions¹⁵⁷.

At common law an environmental norm is the public law counterpart to the private law neighbour principle, which demands that no one may use one's property in a way, which harms others¹⁵⁸.

The focus of the common law is on private law rights and obligations as opposed to public interests rights. The private law position is weak in that it does not impose positive obligations to protect the environment. One can use his property in a manner he deems fit but should not harm others¹⁵⁹.

Enforcement of environmental rights was also constrained by the stringent requirements of legal standing. Traditionally, South African courts had adopted a narrow approach towards *locus standi*. This was both in private rights as well as for public rights¹⁶⁰. For a private person to have *locus standi*, one needed to demonstrate sufficient interest, which meant right or recognised interest that is direct and personal to the complainant¹⁶¹. This requirement was harsh for environmental rights litigation as it was very difficult for an individual to show that an instance of environmental damage is direct and personal to him, since it will likely have the same impact on other people.

When it came to public interest actions (*actio popularis*), the situation is no better. Roman-Dutch law did not generally recognise *actio popularis*. In *Director Education*,

¹⁵⁷ C Glinski 'Public interest environmental litigation in South Africa' (1999) available at <<http://www.saep.org>> (accessed on 8 November 2001).

¹⁵⁸ J Glazewski 'The new South African Constitution' in A Boyle & MR Anderson (n 8 above) 180.

¹⁵⁹ See for instance *King v Dykes* (1971) 3 SA, 540 RA where it was made clear that no one may use his land in a manner that is prejudicial to others and future generations.

¹⁶⁰ In fact a sound distinction between public and private rights when it comes to *locus standi* was only made in academic circles and not in courts. See TP van Reenen '*Locus standi* in South African environmental law: A reappraisal in international and comparative perspective' (1995) 2 SAJELP 122.

¹⁶¹ Glinski (n158 above). See also *Van Moltoko v Costa Aerosa* 1975 (1) SA 255 CPD where it was held that a party seeking relief must show that he is suffering or will suffer some injury, prejudice or damage or invasion or right peculiar to himself and over and above that sustained by the members of the public in general.

*Transvaal v McCagie & Others*¹⁶², for instance, the court maintained that *actio popularis* was not part of South African law and a private individual could only sue on his own behalf and not on behalf of the general public¹⁶³.

In *Verstappen v Port Edward Town Board & others*¹⁶⁴, where the applicant challenged the action of a local authority to operate a disposal site without a permit against the Environmental Conservation Act 73 of 1989, the court held that the Act was intended to operate in the interest of the public at large and hence a party seeking to interdict a local authority from unlawfully operating a disposal site was required to show that contravention of the Act has caused or is likely to cause him or her special damage¹⁶⁵.

Pertinent too is the *locus standi* of organisations in the old order. In environmental litigation organisations are more likely to challenge administrative actions than private individuals. The general rule was that organisations did not have locus standi unless they could show that they themselves were affected. They could not litigate on behalf of their members save where the life or liberty of the individual was in danger¹⁶⁶.

Before the incoming into force of the new constitutional dispensation, it was therefore difficult to enforce environmental rights in view of the unfavourable locus standi requirements and lack of environmental rights provisions in the laws of the country.

4.4.2 The environmental clause in the Constitution

The new Constitution departs largely from the position obtaining before. It relaxes the then stringent requirements of standing. It also, for the first time includes environmental rights as a fundamental right in the Constitution and creates a mechanism through which

¹⁶² 1918 AD 616.

¹⁶³ There was however an exception to this rule where there is illegal deprivation of liberty, which is a threat to the values of a society based on law and order. See for example *Wood & Others v Ondangwa Tribal Authority & Another* 1975 (2) 294 (A).

¹⁶⁴ 1994 (3) SA 569 (D).

¹⁶⁵ M Kidd (n 9 above).

¹⁶⁶ In *Ahmadiyya Anjuman Ishaati- Islam Lahore (South Africa) and Another v Muslim Judicial Council (Cape) and Others* 1983 (4) SA 855 (C), the court held that the association can only sue in respect of matters where the members have a cause of action as members of that association. The interests of the association sometimes are the same as that of its members. See for, instance, *Transvaal Canoe Union v Butgereit and Another* 1986 (4) SA 207(T).

they can be given effect by policy and legislative measures. In terms of section 24 of the Constitution:

Everyone has the right-

- (a) to an environment that is not harmful to their health or well-being; and
- (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that-
 - (i) prevent pollution and ecological degradation;
 - (ii) promote conservation; and
 - (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development

4.4.3 Analysis of the environmental clause

4.4.3.1 The phraseology

The environmental clause in section 24 is negatively phrased in that it confers a right to an environment, which is not detrimental to health, rather than simply a right to healthy environment¹⁶⁷. This negative phraseology has two major weaknesses.

First, the negative phraseology implies a right to minimum environmental rights rather than guaranteeing a limitless enjoyment of such rights. Secondly, the negative phraseology is problematic when it collides with positively phrased rights. When this collision occurs, courts will most probably rule in favour of those that are positively phrased.

The phraseology of the environmental clause can be criticised for being too anthropocentric. The focus on health, well-being, sustainable development and intergenerational equity have anthropocentric undertones thus obscuring the larger polycentric interests of nature to which man is just a part.

¹⁶⁷ Glazewski (n 158 above) 187.

4.4.3.2 Operation of the environmental clause

An important question can be asked as to whether the environmental clause in section 24 operates only between government bodies and private persons or whether it also operates between private persons *inter se*. The former position is what is called horizontal operation while the latter is what is normally known as vertical operation. This problem seems to be resolved by section 8 of the Constitution which provides that the rights protected in the Bill of Rights bind not only the State in its relations with individuals, but that individuals may, where appropriate, assert their rights against the state and against other individuals¹⁶⁸.

The nature of the right that is provided in section 24 (a)¹⁶⁹ is of the nature that section 8(2) applies horizontally. This is because it is not only the State that is potentially capable of violating the right but also natural and juristic persons. This is a progressive step in the enforcement of environmental rights as it implies that whenever a person's right to a healthy environment is violated, anybody can invoke the right and bring an action against the violation.

Horizontal operation does not, however, apply to 24(b), which requires the government to take appropriate legislative measures to protect the environment. This obligation does not operate among private persons *inter se*. It is not the responsibility of private persons to put legislations in place; the obligation is imposed on the government only.

4.4.3.3 Sustainable development

The environmental clause recognises the importance of ecologically sustainable development and the link between the environment and economic and social development¹⁷⁰. This is a welcome development as it is now accepted worldwide that there is an inextricable link between the environment and development¹⁷¹. The

¹⁶⁸ J De Waal et al (n 129 above) 405.

¹⁶⁹ This section provides that everyone has the right to an environment that is not harmful to his or her health or well being.

¹⁷⁰ See sec 24(b) (iii).

¹⁷¹ Principle 1 of the Rio Declaration, 1992 for instance, provides that "Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature".

Constitution also requires that sustainable environmental development take place in a manner that allows regeneration. It further implies that the environment is exploited in such a way “that will be able to sustain human and, plant and animal life over the longest possible period¹⁷²”.

4.4.3.4 The duties of the state

The state is duty bound to take legislative and administrative measures to protect the environment. The goal of the State’s obligations as enshrined in sec 24(b) (i)-(iii) is to prevent pollution and ecological degradation, to promote conservation and to secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development. If the state does not adhere to these duties, the individual rights in section 24(a) will be violated.

4.4.3.5 Intangible qualities of the environment

It is not clear whether the term “well being” in article 24 can be construed to apply to intangible qualities of the environment¹⁷³. There is already a lead in South Africa when it comes to intangible qualities of the environment. In the Review Panel Report for the Eastern shores of Lake St Lucia Dune Mining Proposal for instance, it was recommended that mining in the area would cause damage to a place, which is special for being rich in history, ecology and biological diversity¹⁷⁴. Similarly, in *The Director: Mineral Development, Gauteng Region and Another v Save the Vaal Environment and Others*¹⁷⁵, it was argued that the constant noise, light, dust and water pollution will destroy, the sense of place of the wetland and the spiritual, aesthetic and therapeutic qualities associated with the area¹⁷⁶. In light of the above, it is likely that the

¹⁷² De Waal et al (n 129 above) 406.

¹⁷³ Intangible qualities of the environment may include such aspects like recreational, spiritual, historical, cultural etc

¹⁷⁴ See media release, Eastern shores of Lake St Lucia, Review Panel Report, 10, December 1993 in Glazewski (n 158 above) 181.

¹⁷⁵ 1999 (2) SA 709 (SCA).

¹⁷⁶ In G Ferreira ‘ A license to mine, *audi alteram partem* and NEMA’ (1999) 6 SAJELP 245.

Constitutional Court will interpret the term “well being” to refer to intangible qualities of the environment¹⁷⁷.

4.5 Procedural Rights

Substantive environmental rights are meaningless if procedural rights to enforce them are not in place. The constitution provides for a range of procedural rights that can be used effectively for the enforcement of environmental rights.

4.5.1 Legal standing

The Constitution gives standing to a wide array of persons. It is afforded to people acting in their own interest, acting on behalf of other persons, acting as member of a group or class of persons or acting in the public interest. Associations are also given standing in the interests of their members¹⁷⁸.

This is perhaps the new Constitution’s strong point as it gives standing to virtually all potential litigants in the enforcement of the Bill of Rights. It is particularly significant for public interest litigation generally and environmental rights in particular. The new position is elaborated in the dictum of Chaskalson P in *Ferreira v Levin* (supra), when his lordship stated that:

.... we should ... adopt a broad approach to standing. This would be consistent with the mandate given to this Court to uphold the Constitution and would serve to ensure that constitutional rights enjoy the full measure of protection to which they are entitled...¹⁷⁹.

Legal standing is also afforded to people who allege infringement or threat of rights that are not provided in the Constitution. This position elaborated in the dictum of Chaskalson P in *Ferreira v Levin NO and others* (supra) when he said that:

¹⁷⁷ This is especially so where there is already a rich jurisprudence worldwide on the intangible qualities of the environment.

¹⁷⁸ See sec 38 of the Constitution.

¹⁷⁹ The learned Judge was relying on sec 7(4) of the Interim Constitution, 1993, which corresponds to sec 38 of the 1996 final Constitution.

Whilst it is important that this Court should not be required to deal with abstract or hypothetical issues ...I can see no good reason for adopting a narrow approach to the issue of standing in constitutional cases. On the contrary, it is my view that we should adopt a broad approach to standing¹⁸⁰.

4.5.2 Administrative justice

Administrative justice is necessary to check administrative malpractices of those in authority. The old South Africa was characterised by administrative malpractices and courts were often unenthusiastic about exercising their inherent powers of review to correct those abuses¹⁸¹. This is among the reasons why the framers of the new Constitution thought it wise to incorporate administrative justice principles in it.

The just administrative action clause provides for the right to lawful, reasonable and procedurally fair administrative action. People adversely affected by those actions are supposed to be given written reasons. The Constitution also imposes the duty on the state to enact legislations to give effect to just administrative action¹⁸².

The new position codifies and specifies the common law principle that courts have inherent powers to prevent abuse of power by those in administration¹⁸³. The common law position was not exercisable in the old South Africa. Though courts could review the lawfulness of the actions of the administration, Parliament could ultimately determine what was lawful and what was not¹⁸⁴. Secondly, through the use of ouster clauses parliament could prevent courts from reviewing certain administrative actions. By

¹⁸⁰ So where an impugned legislation has a direct implication on the applicant's common law right, the court will give standing for the declaration of the constitutionality of that legislation. See Glinski (n 157 above).

¹⁸¹ J De Waal et al (n 129 above) 489. A good example of this attitude is seen in the case of *Administrator, Transvaal and the Firs Investment (pty) Ltd v Johannesburg City Council* 1971 (1) SA 56 AD where though the court found a development of a shopping complex to violate sound town planning principles, it nonetheless found the action not to amount to gross unreasonableness.

¹⁸² See sec 33 of the Constitution.

¹⁸³ See *Johannesburg Consolidated Investment Company Ltd v Johannesburg Town Council* 1902 TS 111, 115.

¹⁸⁴ J De Waal et al (n 129) 490.

constitutionalising administrative justice, courts can longer be constrained as the Constitution reigns supreme and it prevents legislations from infringing such rights¹⁸⁵.

4.5.3 Access to information

The importance of access to information cannot be over-emphasised. One will only be able to enforce environmental rights if he has the necessary information about the same. The South African constitution incorporates this important right in the Constitution. Everyone has the right to access information held by the state or any other person¹⁸⁶.

The importance of the right to information can better be understood in the light of the history of South Africa. One of the reasons why there has not been much environmental litigation in South Africa in the past is the difficulty potential litigants had in obtaining information from those in authority¹⁸⁷.

4.6 Environmental rights and other rights

It is a settled principle that human rights are interrelated, interdependent and indivisible. Environmental rights are therefore best understood in relation to other rights.

4.6.1 The rights to housing and health

The Constitution provides for the socio-economic rights including the right to health and housing¹⁸⁸. These rights have a close relationship with environmental rights. A clean environment and adequate housing are prerequisites for good health. Similarly, a

¹⁸⁵ Section 2 of the Constitution provides that the Constitution is the supreme law of the Republic and any law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled. In *Pharmaceutical Manufacturers Association of South Africa: In re: ex Parte the President of the Republic of South Africa* 2000 (2) SA 674 (CC), it was held that the common law principles that previously provided the grounds for judicial review of public power have been subsumed under the constitution, and in so far as they might continue to be relevant for judicial review, they gain their force from the Constitution

¹⁸⁶ Sec 32 of the Constitution.

¹⁸⁷ Glazewski (n 158 above) 193. This is even more so when security needs clash with environmental interests. The South African army is for instance reported to have been conducting missile testing in De Hop Nature Reserve.

¹⁸⁸ See sect 27 of the Constitution.

dilapidated environment cannot sustain good housing and environmental catastrophes can uproot structures, destroy water sources and cause health catastrophes as a result.

The above interrelationship is better understood in the light of the recent Constitutional Court judgement in *Minister of Public Works and Others v Kyalami Environmental Association and Others*¹⁸⁹. In this case an attempt by the respondents to challenge the government's decision to construct temporary shelter in Leeuwkop for flood victims of Alexandra Township failed *inter alia* because the Court reasoned out that:

The provision of relief to the victims of natural disasters is an essential role of government in a democratic state, and government would have failed in its duty to the victims of the floods, if it had done nothing¹⁹⁰.

The position above was already taken in *Government of the Republic of South Africa and Others v Grootboom and Others*¹⁹¹ where it was made clear that the government has the responsibility to facilitate access to temporary relief for people who are in crisis because of natural disasters such as floods and fires.

What the above two cases intend to underscore is the fact that environmental rights extend also to situations where peoples' well being are at stake as a result of environmental catastrophes. The reaction to environmental catastrophes invokes the realisation of other rights like that of health and housing.

4.6.2 Property rights

Property rights have direct implications on the enforcement of environmental rights. Property rights in the constitution are not absolute and can be derogated *inter alia* for public interest subject to compensation¹⁹². Public interest is not defined in the constitution but it can legitimately be construed to include environmental concerns. Environmental protection in some case entails restricting property rights. Creation of

¹⁸⁹ Case CCT 55/00.

¹⁹⁰ *Ibid* at 21.

¹⁹¹ 2001 (1) SA 46 (CC).

¹⁹² See sec 25 of the Constitution.

parks and game reserves sometimes entails expropriating private property. When compensation is raised then environmental concerns become restricted.

4.6.3 Right to development

The South African society has just emerged from the oppression of the turbulent past, which was characterised by a wide gap of development between blacks and whites. Equitable development is therefore among the priorities of the new government. Environmental rights can legitimately be restricted for development purposes. The limitation clause can be used to restrict environmental rights when it is in the public interest to do so.

4.7 Environmental rights in Acts of Parliament

The new constitutional order in place cannot be limited to the Constitution alone; it should be extended to Acts of parliament and policies that have been put in place to give effect to the values and principles enunciated in the Constitution¹⁹³. A few of such legislation have already been put in place. For purposes of environmental rights however, two of them are significant-the National Environmental Management Act¹⁹⁴ and the National Water Act¹⁹⁵.

4.7.1 The National Environmental Management Act (NEMA)

NEMA, which replaces the Environmental Conservation Act,¹⁹⁶ is concerned primarily with environmental governance and decision-making. It is an important piece of legislation for environmental rights as it contains provisions that supplement environmental rights in the Constitution¹⁹⁷. NEMA puts in place certain principles¹⁹⁸ that are fundamental for the enforcement of environmental rights.

¹⁹³ See for example sec 32 of the Constitution, which requires national legislation to be put into place to give effect to the right to information.

¹⁹⁴ Act 107 of 1998.

¹⁹⁵ Act 36 of 1998.

¹⁹⁶ Act 73 of 1989.

¹⁹⁷ M Kidd (n 9 above).

¹⁹⁸ These are found in Chapter 1 of the Act, which has been hailed to be the “environmental bill of rights”- See M Kidd (n 9 above).

4.7.1.1 National environmental management principles

First, NEMA requires that environmental justice be pursued so that environmental impacts may not be distributed to unfairly discriminate against any person, particularly the vulnerable and the disadvantaged¹⁹⁹.

Secondly, equitable access to environmental resources to meet human needs and well-being must be ensured. Special measures may be taken to ensure that access to those disadvantaged by unfair discrimination²⁰⁰.

Thirdly, community well-being and empowerment must be promoted through environmental education, awareness and other appropriate means²⁰¹.

Fourthly, participation of all interested and affected parties in environmental governance must be promoted, and all people must be given the opportunity to equitable and effective participation by getting the necessary skills and capacity for the same²⁰².

Fifthly, NEMA incorporates the “polluter pays principle” for remedying pollution, environmental degradation and adverse effects thereto and for preventing and controlling further damage²⁰³.

Sixthly, NEMA provides that the environment is held in public trust and the use of the environment must be for public interest and the environment must be protected for the people’s common heritage²⁰⁴.

Apart from the above principles, NEMA also provides for a few aspects of environmental concerns that are important for the enforcement of environmental rights. These include the right to access to information, private prosecution in environmental matters and the right for workers not to do environmentally hazardous work.

¹⁹⁹ NEMA sec 2(4)(c).

²⁰⁰ *Ibid* sec 2(4)(d).

²⁰¹ *Ibid* sec 2(4)(h).

²⁰² *Ibid* sec 2(4)(f).

²⁰³ *Ibid* sec 2(4)(p).

²⁰⁴ *Ibid* sect 2(4)(o).

4.7.1.2 Access to environmental information

The scope of the right to information in NEMA is confined to the environment²⁰⁵. Every person is entitled to have access to information held by the state and its organs relating to the implementation of NEMA and any other law affecting the environment. Organs of the State themselves are entitled to have access to information relating to the environment and actual and future threats to the same.

NEMA is also progressive in that it affords protection to whistleblowers. Nobody should be criminally or civilly liable for any disclosure of environmental risks given in good faith²⁰⁶.

4.7.1.3 *Locus standi* to enforce environmental laws

NEMA extends and specifies the legal standing scope in the Constitution for environmental matters. Before the coming into force of NEMA, any person who felt that his/her environmental right was being infringed or threatened would have *locus standi* provided that he or she fell within the categories listed in section 38 of the Constitution.

NEMA adopts the list in section 38 almost verbatim but additionally, it gives *locus standi* to anybody acting in the interest of protecting the environment²⁰⁷. This addition is necessary in the event that an alleged breach or threat does not fall within the environmental clause in the Constitution²⁰⁸.

NEMA is also progressive when it comes to costs in environmental litigation. Courts are given the discretion not to award costs against persons who lose in environmental

²⁰⁵ The Constitution in sec 32 provides for the right to information generally.

²⁰⁶ NEMA, sec 31(4). This provision is significant as it gives people the confidence to report the likelihood of environmental hazards without fear of prosecution.

²⁰⁷ NEMA, sec 32 (e).

²⁰⁸ With this, it will not be necessary to rely on the position of the Constitutional Court in *Ferreira v Levin NO* (supra) to argue the *locus standi* will be afforded even in situations where the alleged threatened or violated right is not provided in the Constitution. Environmental litigation is no longer confined to the common law rules existing hitherto.

litigation that are of public interest or in the interest of protecting the environment²⁰⁹. This development is welcomed, as the fear of paying costs is one of the factors that constrain environmental litigation²¹⁰.

4.7.1.4 Private prosecution

NEMA expands the enforcement mechanisms of environmental rights by providing for private prosecution. Anybody acting in the public interest or in the interest of the public can institute a prosecution in respect of any breach or threatened breach of any duty²¹¹ in any national or provincial legislation dealing with the environment²¹². This is another tool that environmental activists can use for the enforcement of environmental rights.

4.7.1.5 Protection of workers in environmentally hazardous work

NEMA gives workers protection against civil or criminal liability, dismissal or harassment when they refuse to do any work that they reasonably believe to be hazardous to the environment²¹³. This development is welcome in view of environmental catastrophes that have affected workers in their working places²¹⁴. Workers can now guard themselves and the environment without the fear of prosecution or dismissal from employment²¹⁵.

4.7.2 The National Water Act (NWA)²¹⁶

NWA augments the right to sufficient water in the Constitution²¹⁷. The Constitution is intended to remedy the inequitable water laws that were in place hitherto. NWA is

²⁰⁹ NEMA, section 32.

²¹⁰ M Kidd (n 9 above).

²¹¹ The duty does not however include that resting on an organ of state.

²¹² NEMA, section 33.

²¹³ *Ibid* sec 29.

²¹⁴ An immediate example in mind is the Thor Chemical plant which exposed its workers to dangerous chemical substances. See <<http://www.earthlife.org.za>> (accessed on 20 October 2001).

²¹⁵ M Kidd (n 9 above).

²¹⁶ Act 36 of 1988.

²¹⁷ The right to sufficient water as provided in section 27(b) of the Constitution is not included in the environmental clause but it is normally taken to be a component of substantive environmental rights.

legislated to give effect to this right²¹⁸. NWA attempts to remedy the inequities in the old water laws by creating the ecological and basic human needs water reserves. It also addresses the results of past racial and gender discrimination in the decision making process on water use and allocation²¹⁹. NWA operates along the Water Services Act (WSA)²²⁰ that provides for the right to access to basic water supply and sanitation²²¹.

4.8 Interim conclusion

The South African Constitution provides for environmental rights along with procedural rights for their enforcement. The requirements for legal standing have been relaxed to a large extent and principles of administrative actions have been constitutionalised. The environmental clause in the Constitution is supplemented by legislations put in place to give effect to environmental rights.

²¹⁸ According to the preamble of NWA the aim of water resource management is to achieve sustainable use of water for all.

²¹⁹ M Kidd (n 9 above).

²²⁰ Act 108 of 1997.

²²¹ According to the preamble of WSA, water supply and basic sanitation are necessary to ensure sufficient water and environment not harmful to health or well-being, rights that are recognised by the environmental clause in the Constitution.

CHAPTER FIVE: CONCLUDING REMARKS AND RECOMMENDATIONS

The work has been an attempt to discuss the enforcement of environmental rights. The new South African constitution was chosen as a case study. Few things became clear in the discussion.

First, the exact meaning, scope of environmental rights is not ascertainable to date. Different expressions are used in different legal instruments on environmental rights to refer to substantive environmental rights. It also became evident that substantive environmental rights are toothless if procedural rights to enforce them are not provided. The stringent requirements of legal standing in many jurisdictions were found to be an obstacle for the enforcement of environmental rights.

Secondly, environmental rights have been criticised for being anthropocentric and redundant in a situation where international environmental law has already sufficiently provided for human rights concerns. It also became evident that a human rights approach to the environment is needed given the weakness of environmental law in its enforcement mechanisms and the fact that environmental law cannot address all human rights issues pertaining to the environment and vice versa. An area of law that merges the environment and human rights becomes inevitable.

Thirdly, it became obvious that environmental rights are now provided in many domestic constitutions. This notwithstanding, the level of enforcement of those rights has been lax. There have, however, been remarkable on the enforcement of environmental rights.

Fourthly, it became evident that environmental rights cannot be understood in isolation from other rights. The right to life for instance can be construed to give effect to environmental rights. The right to privacy and development can also be used effectively to address environmental concerns.

Fifthly, the new South African constitutional dispensation was found to be revolutionary and exemplary when it comes to the enforcement of environmental rights. The Constitution provides for environmental rights along with procedural mechanisms for their enforcement. Some policy and legislative measures have already been put in place

to give effect to the rights provided. The Environmental Management Act, the National Water Act and the Water Services Act, are some of the most important legislations that have been put in place to give effect to environmental rights in the Constitution.

In view of the above, the following recommendations can be given.

First, there is a need to harmonise the different meanings that have been accorded to substantive environmental rights. This is central to the success of the enforcement of environmental rights since the field of law requires that courts be approached with clearly defined concepts. It is easy for courts to throw away matters that are not properly defined.

Secondly, there is a need to revisit the environmental law regime with the aim of devising means through which environmental law conventions can be enforced. Compliance mechanisms like those to be found in the leading human rights instruments can be devised.

Thirdly, there is a need for courts in municipal jurisdictions to adopt less stringent requirements of standing to give litigants the opportunity to approach courts for environmental concerns. This should be done in respect of other procedural rights as well. Claw back clauses in the constitutions that limit the realisation of procedural rights such as the right to association should be done away with.

Fourthly, South African courts should use the leverage on interpretation in the Constitution to give effect for environmental rights. Given that the Constitution requires courts to have regard to international law and comparable foreign jurisprudence when interpreting the Bill of Rights, South Africa courts could borrow environmental rights jurisprudence from jurisdictions like India to give effect to environmental rights.

Fifthly, there is a need for the legislature in South Africa to enact more legislation to give effect to the environmental rights in the Constitution. This is especially so where the environmental clause in the Constitution does not cover all areas of traditionally known environmental rights. Similarly, one would have expected NEMA to expand the use of the term “well being” to include intangible aspects of the environment. Similarly, one

would have expected the new environmental law legislations to address the issue environmental catastrophes in the light of floods, industrial leaks and emissions that are rampant in South Africa. NEMA could be amended to incorporate provisions that guarantee relief services to the people in the event of environmental catastrophes. A special legislation could even be enacted to provide for the assessment, prevention, preparedness and management initiatives, establishment of warning systems and the promotion of public involvement and information exchange on matters relating to environmental catastrophes.

Finally, the South African Constitution and the way it relates to environmental rights is exemplary and should inspire changes in the whole of the African continent. No case has so far gone to the Constitutional Court on an issue of purely environmental rights. It will be interesting to see how the Court will interpret the environmental clause when confronted with a practical situation of environmental rights.

Word Count 17,997

BIBLIOGRAPHY

1. Books

Berting J, et al (eds) (1990) *Human rights in a pluralist world: individuals and collectivities* Westport: Greenwood Press

Birnie PW & Boyle, A (1995) *International law and the environment* Oxford: Clarendon Press.

Birnie, PW & Boyle, A (1995) *Basic documents on international law and the environment* Oxford: Clarendon Press

De Waal, J, Currie Erasmus, G (eds) (2001) *The Bill of Rights handbook I* 4th ed Western Cape: Juta & Co. Ltd.

Deimann, S & Dyssli, D (eds) (1995) *Environmental rights: law, litigation & access to justice* London: Cameron May

Fisher, L (1990) *American constitutional law* New York: Fisher McGraw-Hill Publishing Co.

Hegarty, A & Shernard, S (1999) *Human rights: an agenda for the 21st Century* London: Cavendish Publishing

Human Rights Watch (1999) *The price of oil: corporate responsibility and human rights violations in Nigeria's oil producing communities* New York: Human Rights Watch

Leader, S (1992) *Freedom of association, a study in labor law and political theory* London: Yale University Press

Maina, CP (1997) *Human rights in Tanzania: selected cases and materials* Koln: Rudiger Verlag

Muldoon, P & Lindgren R (1995) *The environmental bill of rights: a practical guide* Toronto: Edmond Montgomery publication Ltd

Verloren van Themaat Centre (1993) *South Africa in transition: green rights and an environmental management system* Pretoria: UNISA

2. Chapters from books

Anderson, MR 'Individual rights to environmental protection in India' Anderson, MR & Boyle, A (eds) (1996) *Human rights approaches to environmental protection* Oxford: Clarendon Press

Boyle, A 'The role of international human rights law in the protection of the environment' in Anderson, MR & Boyle, A (eds) (1996) *Human rights approaches to environmental protection* Oxford: Clarendon Press

Burns, Y 'Green rights: theory and development' in Verloren van Themaat Centre (1993) *South Africa in transition: green rights and an environmental management system* Pretoria: UNISA

Cameron, J & Mackenzie, R 'Access to environmental justice and procedural rights in International Institutions' in Anderson, MR & Boyle, A (eds)(1996) *Human rights approaches to environmental protection* Oxford: Clarendon Press

Churchill, RR "Environmental rights in existing human rights treaties" in Anderson, MR & Boyle, A (eds)(1996) *Human rights approaches to environmental protection* Oxford: Clarendon Press

Flinterman, C 'Three generations of rights in Berting, J et al (eds) (1992) *Human rights in a pluralist world: individuals and collectivities* Westport: Greenwood Press

Glazewski, J 'The new South African constitution' in Anderson, MR & Boyle, A (eds) (1996) *Human rights approaches to environmental protection* Oxford: Clarendon Press

Kidd, M 'Environmental rights' in Centre for Social Legal Studies (2000) 18 South African human rights yearbook (1997-97) Durban: Centre for Social Legal Studies

Kotey, NA "Human rights and administrative justice in Ghana under the Fourth Republic" in Costa, J-P & Cananea, G della (eds) (1997) *Human rights and public administrations* Brussels: IISA

Mtaki, CK 'The doctrine of separation of powers and constitutional development in Tanzania' in Mtaki, CK & Wambali, M (eds) (1994), *Constitutional reform and democratic governance in Tanzania* Dar-es-Salaam: Dar-es-Salaam University Press

Shivji, IG 'The changing state: from an extra-legal to an intra-legal state in Tanzania' in Fimbo, GM & Mvungi, SE (eds) (1993) *Constitutional reforms for democratisation in Tanzania* Dar es Salaam: Dar -es-Salaam University Press

Wambali, M 'The doctrine of the rule of law and the functioning a democratic government in Tanzania' in Mtaki, CK & Wambali, M (eds) (1994), *Constitutional reform and democratic governance in Tanzania* Dar-es-Salaam: Dar-es-Salaam University Press

3. Journal articles

Alston, P 'A third generation of solidarity rights: progressive development or obfuscation?' (1982) 29 *Netherlands International Law Review*

Asmal, K 'Environment and the constitution' (1996) *SAJELP*

Du Plessis, W, 'right to environmental information in the USA" (1997) 5 *SAJELP*

Ferreira, G ' A license to mine, *audi alteram partem* and NEMA' (1999) 6 *SAJELP*

Makete, BT & Ojwang JB 'the right to a healthy environment: possible juridical bases (1996) 3 *SAJELP*

Obiora, LM, "Symbolic episodes in the quest for environmental justice"(1999) 21 *Human Rights Quarterly*

Okonmah, PD 'Right to a clean environment: the case of the people of oil producing communities in the Niger Delta' (1997) *Journal of African Law*

Peter, CM 'The right to a clean and satisfactory environment' (1990) 6 *Lesotho Law Journal* 24.

Shelton, D 'Human rights, environmental rights and the right to environment', (1991) 28 *Stanford Journal of International Law*

Solo, K 'Keeping a clean environment-the case of Botswana (1999) 6 *SAJELP*

Van Reen TP '*Locus standi* in South African environmental law: A reappraisal in international and comparative perspective' (1995) 2 *SAJELP*

4. Websites consulted

<<http://geocities.com>>

<<http://www.arbld.unimelb.edu.au>>

<<http://www.cedha.org.ar>>

<<http://www.csls.org.za>>

<<http://www.elaw.org>>

<<http://www.Fundepublico.org.co>>

<<http://www.globallearning.org>>

<<http://www.ippmedia.com> >

<<http://www.oas.org>>

<<http://www.saep.org>>

<<http://www.unhcr.ch>>

5. Conventions and declarations

Abuja Treaty Establishing the African Economic Community, 1991

Additional Protocol to the American Convention on Human Rights in the Areas of Economic, Social and Cultural Rights, 1988

African Charter on Human and Peoples Act, 1981

American Convention on Human Rights, 1969

Bamako convention on the Ban of the Import of Hazardous Wastes into Africa and on the Control of their Transboundary Movements Within Africa, 1991

Convention on the Protection of the Environment Between Denmark, Finland, Norway and Sweden, 1974

Declaration of the United Nations on the Human Environment, 1972

Economic Commission Convention on Damage Resulting from Activities Dangerous to the Environment, 1993

European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950

International Covenant on Civil and Political Rights, 1966

International Covenant on Economic, Social and Cultural Rights, 1966

Protocol 11 Additional to the Geneva Conventions (on the protection of victims of Armed Conflicts) 1977

Protocol I Additional to the Geneva Conventions Related to the Protection of International Armed Conflict, 1977

Rio Declaration on the Environment and Development, 1992

The Lagos Plan for the Economic Development of Africa, 1981

UN Convention on the Prohibition of Military or any Other Use of Environmental Modification Techniques, 1976

United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, 1998

Universal Declaration of Human Rights, 1948

Vienna Declaration and Programme of Action, 1993

World Charter for Nature, 1983

6. Reports

Environmental Law Institute Report on Constitutional Environmental Law: Giving Force to Fundamental Principles in Africa, 2000

Report of the UN Special Rapporteur on Human Rights and the Environment, 1994

Report of the African Preparatory Conference for World Summit on Sustainable Development, Nairobi, 18 October 2001.

Report on the First African Ministerial Conference of the Environment, 1985

7. South African legislations

Final Constitution, South Africa, 1996

Interim Constitution, South Africa, 1993

National Conservation Act, 1989

National Environmental Management Act, 1998

National Water Act, 1998

National Water Services Act, 1997

Union Constitution, South Africa, 1909

8. Cases law

8.1 South African cases

Administrator, Transvaal and the Firs Investment (pty) Ltd. v Johannesburg City Council
1971 (1) SA 56 AD

Ahmadiyya Anjuman Ishaati-Islam Lahore (South Africa) and Another v Muslim Judicial Council (Cape) & Others 1983 (4) SA 855 (c)

AZAPO v President of South Africa 1996(4) SA 741 (CC)

Brink v Kitshoff NO 1996 (4) SA 197 (CC)

Director Education, Transvaal v McCagie & Others 1918 AD 616

Director: Mineral Development, Gauteng Region & Another v Save the Vaal Environment & Others 1999 (2) SA 709 (SCA)

Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council 1999 (1) SA (CC)

Ferreira v Levin NO 1996 (1) SA 984 (CC)

Johannesburg Consolidated Investment Company Ltd v Johannesburg Town Council 1902 TS 111, 115

JT Publishing v Minister of Safety and Security 1997(3) SA 514 (CC)

King v Dykes 1971 (3) SA, 540 RA

Minister of Public Works & Others v Kyalami Environmental Association & Others Case CCT 55/00

New Party v Government of the Republic of South Africa 1999(3) SA 191 (CC)

Pharmaceutical Manufacturers Association of South Africa: In re: ex Parte the President of South Africa 2000 (2) SA 674 (CC)

Republic of South Africa & Others v Grootboom & Others 2001 (1) SA 46 (CC)

S v Makwanyane 1995 SA 391 (CC)

S v Mhulungu 1995 (2) SA 867 (CC)

S v Zuma 1995 (2) SA 642(CC)

Transvaal Canoe Union v Butgereit & Another 1986 (4) SA 207 (T)

Van Moltoko v Costa Aerosa 1975 (1) SA 225 CPD

Verstappen v Port Edward Town Board & Others 1994 (3) SA 569 (D)

Wood & Others v Ondangwa Tribal Authority & Another 1975 (2) 294 (A)

8.2 Cases from other jurisdictions

(Supreme Court Chamber of Civil and Agrarian Cession, November 19, 1997)

Arco Iris v Insituto Ecuatoriano de Mineira Case No 224/90, Judgment No 064-93-CP (Constitutional Court of Ecuador)

Aronelle v United Kingdom Application 7889/77 19 D& R (1980), 186 (decision of admissibility); 26 D&R (1982), 29 (friendly settlement)

Baggs, Powel & Rayner v U.K Application 9310/81, 44 D&R (1985), 13(decision on admissibility; 53 D&R (1987), 29 friendly settlement

Chhetriya Pardushan Mukdi Sangarsh Samiti v State of Uttar Pradesh, 1996 A.I.R. (S.C.) 2060 (1996)

Christopher Mtikila v Attorney General Civil Case No 5 of 1993 (High Court of Tanzania at Dodoma)

Corralie v Union Territory, 1981 A.I.R. (S.C.) 746 (1981)

Damodhar Rao v Municipal Corp of Hyderabad 197 A.I.R. (A.P) 171 (1987)

Drusto Ekologov Slovenije Case No U-1-30/95-26

EHP v Canada Communication No. 67/1980, 2 Selected Decisions of the Human Rights Committee (1990) 20

FB Tarapowala v Bayer India Ltd., 6 S.C.C. 58 (1996)

Festo Balegele v Dar -es -Salaam City Council Misc Civil Case No 90 of 1991 (High Court of Tanzania at Dar-es-Salaam)

Fundacion Fauna Marina v Ministerio de la Produccion de la Provincia de la Buenos Aires Case No 221 98-RA (Constitutional Court 1998)

Fundacios Natura v Petro Ecuador de la Buenos Aires Case No 221-98-RA (Constitutional Court)

FUNDAPUBLICO V Compania de Transporte Croatia Line Y Comar S.A, Case No 076 (Superior Court of Santa Marta, Civil Chamber, July 1994)

FUNDAPUBLICO v SOCOPAV Ltda. Case No T-101, Judgement No T-45 (Constitutional Court 17 June 1992)

General Secretary, West Pakistan Salt Miners Labour Union (CBA) Hrwa, Khelum v The Director, Industries and Mineral Development, Punjab Lahore Human Rights Case No. 120 of 1993, SCMR 2061(1994)

Indian Council for Environ-Legal Action v Union of India, 3 S.C.C 212 (1996)

Joseph D Kessy v Dar-es-Salaam City Council Civil Case No 288 of 1988 1991 (High Court of Tanzania at Dar -es-Salaam)

Juan Oposa v Factorian G.R No 101083 (Supreme Court of the Philippines)

L K Koolwal v Rajasthan 1988 A.I.R. (Raj.) 2 High Court of Rajasthan, (1988)

Leaders v Godawari Marble Industries Supreme Court of Nepal October 31, 1995

Lopez Ostras Case Ser A No 303 C (1994)

Magyar Kozlony Case No 1994/No 55(Hungarian Constitutional Court)

Maina Kamanda v Nairobi City Council Civil Case No 6153 1992 (High Court of Kenya at Nairobi)

MC Mehta v Shriam Food and Fertilizer Industries 1987 A.I.R. (S.C) 1026 (1987)

Minister of Home Affairs (Bermuda) v Fisher (1980 AC 319

Minister of Home Affairs (Bermuda) v Fisher (1980) AC 319 (PC)

New Patriotic Party v Attorney General (1996-97) SCGLR 729

Prakash Mani Sharma v Minister of Council Writ Nos 2961 and 2052

R v M Drug Mart Ltd 185 18 DLR (4th)

Re: Human Rights Case (Environmental pollution in Balochistan) Human Rights Case No. 31-K/92 (Q), PLD 1994 Supreme Court of Chile 102 (1192)

Reliance Petrochemicals v Indian Express S.C.C. 592 (1988)

Rural Litigation & entitlement Kendra v Uttar Pradesh 1985 A.I. R. (S.C) 652 (1985)

S v France Application 13728/88,6 D&R (1990)

Sachinadad Pande v State of West Bengal 1987 A.I.R (S.C) 1109 (1987)

Shella Zia & Others v WAPDA Human rights Case No 15-k 1992 P.L.D. 1994 Supreme Court 693 (1992)

SP Gupta v President of India 1982 A.I.R. (S.C.) 149 (1982)

Vellore Citizens welfare Reform v Union of India A.I.R. (S.C.) 2715(1996)

Victor Roman Castrilon Vega v Federacion Nacional de Algodoneros of Corpora y Coporacion Atonoma Regional del Cesar (CORPROCESAR) Case No 4577

Vikram Deo Singh v State of Bihar, 1998 A.I.R. (S.C.) 1782 (1988)

Wangari Maathai v Kenya Times Media Trust Ltd. Civil Case No 5403 1989 (High Court of Kenya at Nairobi)