

**THE RIGHT TO ENVIRONMENT IN ARTICLE 54 OF THE TRANSITIONAL  
CONSTITUTION OF THE DEMOCRATIC REPUBLIC OF CONGO OF 2003: A  
COMPARATIVE ANALYSIS BETWEEN THE DEMOCRATIC REPUBLIC OF  
CONGO AND THE REPUBLIC OF SOUTH AFRICA**

by

KIHANGI BINDU

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## DECLARATION

Student number: **3566-395-2**

I declare that **The right to environment in article 54 of the transitional Constitution of the Democratic Republic of Congo of 2003: a comparative analysis between the Democratic Republic of Congo and the Republic of South Africa** is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.

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**SIGNATURE**

**(MR KIHANGI BINDU)**

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**DATE**

## LIST OF ABBREVIATIONS

AU:	African Union.
CBOs:	Community-Based Organisations.
CC:	Constitutional Court.
CITES:	Convention on International Trade in Endangered Species of Wild Fauna and Flora 1973
DRC:	Democratic Republic of Congo.
HELRL:	<i>Harvard Environmental Law Review.</i>
HRCLJSA:	<i>Human Rights and Constitutional Law Journal of South Africa.</i>
Ibid:	Ibidem, which means in the source just referred to.
ICCN:	Institut Congolais pour la Conservation de la Nature (Congolese Institute for the Conservation of the Nature).
ICRW:	International Convention for the Regulation of Whaling 1946.
Id.:	Idem.
ILM:	<i>International Legal Materials.</i>
JAL:	<i>Journal of African Law.</i>
NEMA:	National Environment Management Act 107 of 1998.
NGOs:	Non-Governmental Organisations.
No:	Number.
Op. cit.:	Opere citato.
PAJA:	Promotion of Administrative Justice Act of 2000.
RSA:	Republic of South Africa.
S.d:	Sine datum, meaning, no date of publication given.
SADC:	Southern African Development Community.
SAJELP:	<i>South African Journal of Environmental Law and Policy.</i>
SAJHR:	<i>South African Journal on Human Rights.</i>
SAYIL:	<i>South African Yearbook of International Law.</i>
SCA:	Supreme Court of Appeal.
THRHR:	<i>Tydskrif vir Hedendaagse Romeins-Hollandse Reg.</i>

ULPGL: Université Libre des Pays des Grands Lacs (Open University of Great Lakes Countries).

UN: United Nations.

UNCLOS: United Nations Convention on the Law of Sea 1982.

Unisa: University of South Africa.

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## **SUMMARY**

This study examines the implementation and enforcement of the right to environment in the Constitution of the Democratic Republic of Congo, and compares it with the situation in South Africa. To date, there is no legislation in the DRC that gives effect to this right, and the gap between the guaranteed right and the reality remains significant. Guidance may be found in the South African model for implementing and enforcing environmental right(s) which is sustained by an array of legislation. While the priorities on the agenda of political leaders in the DRC lack real willingness to deal with this matter, parliament must be pressured to pass legislation that gives effect to the right to environment and to improve the current framework of environmental regulation. It is imperative to create awareness in government and at grassroots level for the protection of the environment as a human right.



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## CHAPTER 1: SCOPE OF THE STUDY AND THE INTERNATIONAL AND NATIONAL CONTEXT OF THE RIGHT TO ENVIRONMENT

### 1.1 Scope of the study

#### 1.1.1. Research problem

Currently, the entrenchment of environmental rights in many bills of rights remains a much debated point. It is an issue that is prominent in people's minds and deserves a higher priority on political agendas. It can be argued that constitutional environmental clauses offer ample opportunities for development and the enjoyment of basic human rights, such as the right to life. A 'fully-fledged' right to environment establishes an individual right of action to conserve the environment, and the right for the public to be informed of, and indeed to participate in, decisions relating to the environment.<sup>1</sup> Constitutional provisions should act as a powerful instrument for protecting the environment against all forms of degradation but, unfortunately, observation suggests that such provisions are underutilized in most African countries, including the Democratic Republic of Congo (DRC), because the recognition and incorporation of environmental provisions in the constitution have been made with different motivations. At this stage, the questions of 'how' and 'why' African constitutional environmental provisions can and ought to be utilized to create real, enforceable environmental rights, wait in the wings.

The right to environment contained in the Constitution of the DRC, and the state of its implementation and enforcement deserve to be examined closely. Article 54 provides that:

All Congolese have the right to a healthy environment, one which is favourable to their development.

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<sup>1</sup> Van der Vyver J "The criminalisation and prosecution of environmental malpractice in international law" (1998) 23 *SAYIL* 1-33 at 9.

Public authorities and citizens have a duty to provide for the protection of the environment in accordance with the conditions defined by the law.<sup>2</sup>

With this in mind, the effectiveness of the right to environment in the DRC (and other supporting rights such as access to information, effective access to judicial and administrative proceedings and adequate redress and remedies) needs to be examined in the light of the following questions:

- What is the aim of the legislature with, or the meaning of, the incorporation of the right to environment in the Constitution? Is article 54 of the Constitution an opportunity or a guarantee for the enjoyment of the right to environment? Is it an efficient way to conserve and protect the environment, and does it ensure the implementation and enforcement of the right to environment and other rights related to the environment?
- Is the role of the organs of state (legislative, executive and judiciary) and citizens defined in the application of the right to environment?
- Can the South African experience<sup>3</sup> of trying to implement and enforce the right to environment contained in the Bill of Rights of the Republic of South Africa Constitution, 1996, serve as a helpful model for the DRC?

These are critical questions to which the dissertation purports to bring some answers.

### 1.1.2 Study objectives

In studying the environmental right in the Constitution of the DRC and other rights related to environment (environmental rights), and comparing it with the situation in South Africa, the author has identified the following objectives:

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<sup>2</sup> The transitional Constitution of the Democratic Republic of the Congo of 5 April 2003 (hereinafter the Constitution). Researcher's translation out of the French language.

<sup>3</sup> South Africa serves as a model of predilection in this comparative study because of its impressive array of environmental rights guaranteed by the Constitution and environmental legislation that gives effect to environmental rights. The DRC may be inspired to look at what is happening in South Africa, and to improve his environmental regulatory framework.

1. The insertion of the fundamental right to a healthy environment in the Constitution of the DRC should be considered an important guarantee; one that places a correlative obligation on the part of the country's government and all citizens to give effect to that right<sup>4</sup> in a democratic society.

2. The Government should be called upon to take steps to protect the environment by means of legislative and other measures. In fact, the provisions of the Constitution may be used defensively or restrictively to protect against actions that violate citizens' constitutional rights, and affirmatively to compel the government to ensure constitutional rights.<sup>5</sup>

3. The DRC should review the incomplete nature of its environmental legislative and regulatory regimes to address all environmental concerns for a better life for all. The introduction of these rights in the Constitution (theoretical phase) should also be accompanied by enforcement measures (practical phase) which are generally lacking in the DRC. The political willingness of all organs of state and entities to respect the Constitution should be the key component in building a democratic society.

4. Environmental protection should also be established as an educational goal. Mandatory environmental education will foster a public environmental consciousness and facilitate the establishment of a framework of social norms that inculcate respect for the environment. Evidence shows that the international movement towards the protection of the environment by means of the constitutional entrenchment of fundamental rights is growing increasingly stronger. This confirms not only the fact that the environment is (paradigmatically) recognized as an essential determinant in the quality of human life, but also that human environmental interests form part of the holistic structure of civic life in

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<sup>4</sup> Paragraph 2 of the article 54 of the Transitional Constitution of the DRC of 2003.

<sup>5</sup> Bruch, C, Coker W and Van Arsdale C "Breathing life into fundamental principles: implementing constitutional environmental protections in Africa" (2000) 7 *SAJELP* 21-96 at 23.

which various interests have to be (programmatically) balanced to achieve the golden mean in peaceful human coexistence.<sup>6</sup>

### 1.1.3 Research Methodology

The main sources of information are legislation, textbooks, judicial decisions and journal articles. These sources are relevant because they serve to unlock and to identify the nature and the scope of environmental rights in the international and national context, to determine the intention of the legislature in constitutionalising environmental rights and to examine objectively the implementation and enforcement of the right to environment and related environmental rights in different jurisdictions, namely in the DRC and South Africa.

### 1.1.4 Division of work

The dissertation consists of four chapters.

Chapter 1 deals with the scope of the study and the international and national context of the right to environment. The second examines the environmental rights in the Constitution of the Democratic Republic of Congo of 2003 and in the Constitution of the Republic of South Africa of 1996. The third deals with the implementation and enforcement of environmental rights in the Democratic Republic of Congo and in the Republic of South Africa. The fourth presents the challenges and recommendations.

## 1.2 International context of the right to environment

During the last three decades there has been worldwide recognition and awareness of the growing severity of local and global environmental problems. Although attention has been drawn to the need to deal with environmental matters, the national and international

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<sup>6</sup> Van Reenen TP "Constitutional protection of the environment: fundamental (human) right or principle of state policy?" (1997) 4/2 *SAJELP* 269-289 at 288.



level of real commitment to the conservation and protection of the environment is debatable.

### 1.2.1 International environmental law

International environmental law is that part of international law, which deals with the protection and management of the environment and the control of environmental pollution. International environmental law shares the sources of international law. In terms of article 38 (1) of the Statute of the International Court of Justice, the sources of international law are:

- (a) International conventions (treaties), whether general or particular;
- (b) International custom, as evidence of a general practice accepted as law;
- (c) The general principles of law recognized by civilized nations; and
- (d) Judicial decisions and the teachings of the most highly qualified publicists, as subsidiary means for the determination of rules of law.<sup>7</sup>

Although these sources are all relevant to international law, the first two, conventions and customary law, are generally recognized as the primary sources of international law providing the substantive context of international environmental law.<sup>8</sup> 'Soft law', on the other hand, consist of imprecise standards generated by declarations adopted by diplomatic conferences or resolutions of international organizations and are intended to serve as guidelines to states in their conduct, but which lack the status of 'law'.<sup>9</sup> One of the principal attributes of soft law, making it particularly attractive to states, is its non-binding character. Thus, states are under no legal obligation to implement the specific actions set out by the instruments. Their obligation rather lies at a moral and political level. In spite of their voluntary nature, it would be wrong to classify these often-influential instruments as non-law.<sup>10</sup> Soft law sources such as the Rio Declaration on

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<sup>7</sup> Dugard J *International law: a South Africa perspective* (2003) 2<sup>nd</sup> ed. Juta Cape Town 26.

<sup>8</sup> Glazewski J *Environmental law in South Africa* (2000) Butterworths Durban 36.

<sup>9</sup> Dugard J *op. cit.* (n 7) 36.

<sup>10</sup> Olivier EM "Enforcement of international law" (2002) 9 *SAJELP* 151-162 at 151.

Environment and Development and Agenda 21 contributed greatly to the development of international environmental law, for example, it paved the way for cooperation among nations in the development of the concept of sustainable development.

Indeed, the development of a system of international norms for the preservation and protection of the environment more or less coincided with the transformation in the late 1960s of international human rights law; the initial era of norm creation and promotion was followed by an era of protection. International environmental law was not conceived under the rubric of human rights, but towards the end of the 1970s environmental rights came to be identified as part of a ‘third generation’ of human rights.<sup>11</sup>

### 1.2.2 Recognition of and relationship between human rights and the environment

An important debate surrounds the recognition of and the relationship between human rights and the environment. One could argue that there is no general, comprehensive international treaty on human rights and the environment. However, there are international instruments that include a right to the environment, most notably regional instruments.<sup>12</sup>

- At the universal level, the landmark Stockholm Declaration on the Human Environment, albeit ‘soft law’, was adopted on 16 June 1972 by acclamation at the United Nations Conference on Human Environment. It is an important instrument along the path to the recognition of environmental rights as human rights.<sup>13</sup> The Declaration proclaims in its Preamble that ‘The environment is essential to ... the enjoyment of basic human rights – even the right to life itself.’

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<sup>11</sup> The emergence of a third generation of rights was first conceptualized by Karel Vasak in his Inaugural Address to the Tenth Study Session of the International Institute of Human Rights in Strasbourg in France in 1971. The title of Vasak’s address was ‘for the third generation of human rights: the right to solidarity.’ See Van der Vyver *op. cit.* (n 1) at 8.

<sup>12</sup> Feris AL and Tladi D “Environmental rights” [ *s.d* ] (unpublished document) at 7.

<sup>13</sup> Ouguerouz F *The African Charter on Human and Peoples’ Rights: a comprehensive agenda for human dignity and sustainable democracy in Africa* (2003) Martinus Nijhoff Publishers The Hague, London, New York 355.

At the Rio Summit in 1992, the link between the environment and human rights was reiterated. Despite the fact that the Rio Declaration on Environment and Development contains no reference to environmental rights, it indeed proclaims as its first principle that: 'Human beings are at the centre of concerns for sustainable development.' In fact, a distinctive change of emphasis was evident in that the link between environmental concerns and the need for development was acknowledged and prioritised.<sup>14</sup>

- At the regional level, environmental rights have been recognized in different instruments.

In terms of its article 11 entitled 'Right to a healthy environment', the Additional Protocol to the American Convention on Human Rights in the area of economic, social and cultural rights, adopted in San Salvador on 17 November 1998, recognizes the right to a healthy environment:

1 Everyone shall have the right to live in a healthy environment and to have access to basic public services.

2 The states parties shall promote the protection, preservation and improvement of the environment.

However, this article 11(1) of the Additional Protocol to the American Convention on Human Rights in the area of economic, social and cultural rights is clearly viewed as an individual right.

The European Court of Human Rights has recently dealt with the right to a clean environment, and the responsibility of states for its implementation. The jurisprudential basis on which the organs of the European Convention on Human Rights acknowledged this right was article 8, which is founded on respect for private life and the home. Two important cases may be cited. In the *Lopez Ostra* case, the court held that there has been a breach of article 8 because '... severe environmental pollution may affect individuals' well-being and prevent them from enjoying their homes in such a way as to affect their

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<sup>14</sup> Cheadle MH, Davis DM, and Haysom NRL *South African constitutional law: the Bill of Rights* (2002) Butterworths Durban 412.

private and family life adversely, without, however, seriously endangering their health...'<sup>15</sup> Additionally, in the case of *Guerra and 39 Others v Italy*, the European Commission held that '... what requires protection is, in the last analysis, the applicants' right to life and also the right to respect for their private life and their home...'<sup>16</sup>

The African Charter on Human and Peoples' Rights of 1981, adopted at Banjul, gives recognition to environmental rights. Article 24 lays down that: 'All peoples shall have the right to a general satisfactory environment favourable to their development.' One asserts that the significance of the Charter lies in that it was the first international instrument to recognize the right to the environment.<sup>17</sup> This Charter proclaims it as a collective right. It is in this respect that the African Union identifies amongst its objectives the promotion and protection of human and peoples' rights in keeping with the African Charter on Human and Peoples' Rights and other relevant human rights instruments.<sup>18</sup>

Ultimately, one must bear in mind that, with the exception of the African Charter and the 1998 Protocol of San Salvador, the Declarations of Stockholm and Rio de Janeiro are the only two international but legally non-binding instruments to elevate the environment to the status of a right, and even then they do not do so directly.<sup>19</sup> Arguably, there is an unequivocal recognition of an environmental right in international law. The separate opinion of Vice-President Weeramantry in the case concerning the *Gabakovo-Nagymaros Project (Hungary-Slovakia)* in the International Court of Justice proceeded on the assumption that protection of the environment in international law 'is a *sine qua non* for numerous human rights such as the right to health and the right to life itself.'<sup>20</sup> The draft Declaration of Principles on Human Rights and the Environment identifies the close relationship between human rights violations and environmental degradation and declares

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<sup>15</sup> *Lopez Ostra v Spain* of 9 December 1994, Series A no 303-C, Paragraph 51, European Court of Human Rights. See also Ouguergouz *op. cit.* (n 13) 360.

<sup>16</sup> *Guerra and 39 Others*, Reports 1998-I. See also Ouguergouz *op. cit.* (n 13) 360.

<sup>17</sup> Feris AL and Tladi D *op. cit.* (n 12) at 8.

<sup>18</sup> Article 3 (h) of the Constitutive Act of the African Union adopted in Lomé (Togo) on 11<sup>th</sup> July 2000. See also [http://www.au2002.gov.za/docs/key\\_oau/au\\_act.htm](http://www.au2002.gov.za/docs/key_oau/au_act.htm) (accessed on 2006/01/21).

<sup>19</sup> Ouguergouz *op. cit.* (n 13) 360.

<sup>20</sup> Van der Vyer *op. cit.* (n 1) at 11.

human rights and an ecologically sound environment, sustainable development and peace to be interdependent and indivisible.<sup>21</sup>

Many countries are signatories to the above international instruments on environmental rights, including the DRC and the Republic of South Africa (RSA). It is in this context that the preamble to the Constitution of the DRC proclaims the attachment of the Congolese people to the principles of democracy and human rights, as defined by the Universal Declaration of Human Rights of 1948, the African Charter of Human and Peoples' Rights of 1981 and all other international and regional instruments adopted under the United Nations and African Union ratified by the DRC. The explicit acceptance by the South African Constitution of international agreements and rules of customary international law<sup>22</sup> is particularly relevant in the environmental context in view of the numerous international environmental conventions to which South Africa is a party, and in view of the emerging and generally accepted rules of customary international law which are relevant to the environment. South Africa is, for example, party to the International Convention for the Regulation of Whaling 1946 (ICRW), the Convention on International Trade in Endangered Species of Wild Fauna and Flora 1973 (CITES), the Convention on Biological Diversity 1993, the United Nations Convention on the Law of Sea 1982 (UNCLOS), the Convention to Combat Desertification 1994, and the Framework Convention on Climate Change 1992.<sup>23</sup>

### **1.3 National context and constitutionalisation of environmental rights**

To show an understanding of the right to environment in a national context and the aim of its entrenchment in a constitution, it seems useful to present briefly the meaning of the concept 'environment' and the scope and sources of environmental law.

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<sup>21</sup> Winstanley T "Entrenching environmental protection in the new Constitution" (1995) 1 *SAJELP* 85-97 at 86.

<sup>22</sup> Sections 39, 232 and 233 of the South African Constitution.

<sup>23</sup> Bray W Environmental Law (2003-2004) *LCP 407- P* Study Guide University of South Africa Pretoria at 51.

### 1.3.1 The concept of 'environment'

This concept of 'environment' is controversial and much debate surrounds its real meaning and content. The term 'environment' has been viewed in both a wide and a narrow sense. The wide description includes the natural, spatial and social environments, but such a wide interpretation may prove to be unwieldy because it includes virtually everything which influences human existence or quality of life. On the other hand, the limited or narrow approach includes the natural environment, but excludes the social environment.<sup>24</sup> The concept of 'environment' appears to be a dynamic one and may change over time; it may differ from one country to another depending on the context in which it is being used. Rabie notes that there is no general agreement on what the term 'environment' encompasses. An all-embracing concept of environment is unacceptable as a workable basis for determining the scope and content of environmental law because the all-encompassing nature of the environment would tend to make all law environmental law.<sup>25</sup>

Considering the fact that the concept 'environment' must, to some extent, be regarded as open-ended and still evolving, for the purpose of the present analysis, one relies on both wide and narrow approaches. It is in this perspective, for example, that the National Environment Management Act (NEMA) 107 of 1998 of the Republic of South Africa defines the concept 'environment' in section 1 as follows:

- ... the surroundings within which humans exist and that are made up of
- (i) the land, water and atmosphere of the earth;
  - (ii) micro-organisms, plant and animal life;
  - (iii) any part or combination of (i) and (ii) and the interrelationships among and between them; and
  - (iv) the physical, chemical and aesthetic and cultural properties and conditions of the foregoing that influence human health and well-being.

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<sup>24</sup> Kidd M *Environmental law: a South African guide* (1997) Juta Cape Town 1.

<sup>25</sup> Rabie quoted by Glazewski J *Environmental law in South Africa* (2005) 2<sup>nd</sup> ed. Butterworths Durban 9.

### 1.3.2 Scope and sources of environmental law

Against the background of the term ‘environment’ as a dynamic, developing concept, the law relating to the environment is a cross-divisional field of law in the sense that it incorporates norms and principles of public law, private law and international law. The ambit of environmental law is extremely wide, and its scope imprecise, leading some authorities to regard the subject as simply a collection of the various relevant branches of the law.<sup>26</sup> Environmental law is a relatively modern branch of law. Cowen comments that environmental law is in the process of developing its own distinctive principles, thus justifying its treatment as a legal subject in its own right.<sup>27</sup> One of the many challenges facing the discipline is to define its specific parameters more clearly. According to Glazewski,<sup>28</sup> the only current certainty is that environmental law is a young, dynamic and evolving branch of law whose parameters are not yet fixed as it is still in the process of developing its own identity. The various sources from which environmental law draws upon include international law, common law, the constitution, statute law, customary law and African customary law. Environmental law is currently undergoing a process of transformation in both countries (DRC and RSA), which means that environmental legislation has to be updated to be in line with the framework provided by the constitution of each country.

### 1.3.3 Introduction of the right to environment in the constitution

The incorporation of the right to environment and other rights related to environment (environmental rights) into national constitutions throughout the world<sup>29</sup> is also not a new phenomenon in Africa. African nations figure prominently among those countries that have incorporated environmental provisions into their constitutions: at least more than

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<sup>26</sup> Glazewski J *op. cit.* (n 8) 11.

<sup>27</sup> Cowen “Towards distinctive principles of South African environmental law: some jurisprudential perspectives and a role for legislation” (1989) *THRHR* at 3 quoted by Glazewski J *op. cit.* (n 8) 10.

<sup>28</sup> Glazewski J *op. cit.* (n 8) 10.

<sup>29</sup> There are some fifty Nation States which have guaranteed environmental rights in their constitutions. See Winstanley T *op. cit.* (n 21) at 87.

half of them have incorporated environmental provisions in their constitutions.<sup>30</sup> However, African constitutions that were amended before 1989, generally lack explicit environmental provisions, while most African constitutions that were amended after 1992, generally include environmental provisions.<sup>31</sup> The latter is illustrated in the case of the Constitution of Malawi<sup>32</sup> which provides in section 13 that:

The State shall actively promote the welfare and development of the people of Malawi by progressively adopting and implementing policies and legislation ... to manage the environment responsibly in order to

- (i) prevent the degradation of the environment;
- (ii) provide a healthy living and working environment for the people of Malawi;
- (iii) accord full recognition to the rights of future generations by means of environmental protection and the sustainable development of natural resources; and
- (iv) conserve and enhance the biological diversity of Malawi.

It is important to recognize that not all constitutions adopted or amended after 1989 have incorporated environmental provisions. Rwanda and Sierra Leone, for example, both adopted new constitutions in 1991 that are silent on environmental rights and obligations. Since these constitutions were adopted during the early stage of the international surge towards environmental awareness, it should not be viewed as an oversight. This fact also reflects the recent constitutional history of the Democratic Republic of Congo (Zaire) where the Constitution adopted on July 5 1990 remained silent on environmental rights and obligations. However, article 53 of the 1998 Constitution, after the 1994 Transitional Constitution, sets forth the environmental rights and duties of citizens and State.

The constitutionalisation<sup>33</sup> of environmental rights remains an important step in the process of their protection, as the link between environmental rights and human rights is

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<sup>30</sup> Mohamed AL "Le droit a l'environnement dans la Charte Africaine des Droits de l'Homme et des Peuples" *Etudes Juridiques de la FAO en ligne* #16 avril (2001) note 26.

<sup>31</sup> Bruch C *et al. op.cit.* (n 5) at 34.

<sup>32</sup> Constitution of Malawi of 1994.

<sup>33</sup> Constitutionalisation means the recognition and introduction of the right to environment in the constitution through the bill of rights.



highlighted, but equally important, is the protection of the environment against all forms of degradation. In a democratic society, a constitution that is the fundamental and paramount law of the land has a binding force on citizens, non-citizens and the state. The constitution guarantees certain inalienable rights to each and every person, including their environmental rights. The entrenchment of environmental rights in a constitution therefore carries some advantages:<sup>34</sup>

- it should promote environmental protection to the highest level of municipal legal normativity;
- if it is entrenched as a fundamental right it might be interpreted as enjoying the protected status accorded to other fundamental rights;
- even if not considered a fundamental right, it means that environmental protection is more firmly rooted in the legal order since it will not be dependent upon narrow majorities in legislative bodies.

With the influence of constitutionalism, and the increasing consciousness in recent decades of the importance of environmental protection through constitutional provisions, people may claim expressly their right to a healthy environment as well as the procedural rights necessary for the implementation and enforcement of that right. Constitutionalism emphasises the primacy of the constitution as a source of legal rights and obligations, and empowers legal practitioners and courts to look at the constitution as a positive source of law. Most constitutions include a set of fundamental rights to be enjoyed by all persons. While these provisions confer objective rights upon citizens, courts often hold that the rights are not self-executing, but that they require legislation to implement them, set their scope and provide the means to exercise them.<sup>35</sup>

To achieve the goals of constitutionalism, it remains important that the courts exercise a ‘watchdog’ role in the implementation and enforcement of the bill of rights to overcome all attempts to disregard constitutional provisions. One should however be cautious as

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<sup>34</sup> Brandl Ernst and Hartwin Bungert “Constitutional entrenchment of environmental protection: a comparative analysis of experiences abroad” (1992) 16 *Harvard Environmental LR* 1 at 3-6. See also Van Reenen TP *op. cit.* (n 6) at 269.

<sup>35</sup> Bruch C *et al. op. cit.* (n 5) at 27.

constitutionalisation has become a ‘buzzword’, which in many countries all over the world is being used to conceal the real position on human rights protection and the promotion of democracy. Admittedly, if the constitutionalisation of environmental rights has become a reality and a political priority to ensure a better life for all, its effectiveness remains questionable in many jurisdictions.

The concept of environmental rights remains a very complex one and it can be quite difficult to determine its precise nature and scope. Various means have been advocated to reach an understanding of environmental rights. It has been suggested that the philosophical foundations of theories developed in this regard seem to be the cornerstone of their adoption. Unfortunately, it may be unwise to expect the philosophies to be clear, consistent or uniform but, nevertheless, it should be possible to identify particular attitudes and approaches.<sup>36</sup>

#### **1.4 Interpretation of environmental rights**

Several approaches to the concept of environmental rights have been pointed out. Kidd identifies essentially two kinds of environmental rights: the right of humans to a safe and healthy environment, and the right of the environment itself not to be degraded. He proposed that the environment ought to be accorded rights in order that it might best be protected against degradation.<sup>37</sup> This latter idea does not appear, unfortunately, to have found official favour anywhere in the world. Theron, on the other hand, considers environmental rights as procedural rights, rights of future generations, human rights and rights of the environment.<sup>38</sup>

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<sup>36</sup> Theron C “Environmental rights: an overview of interpretations” (1997) 4 *SAJELP* 23-44 at 23.

<sup>37</sup> Stone C “Should trees have standing? – Towards legal rights for natural objects” (1972) *Southern California Law Review* 450. See also Kidd M *op. cit.* (n 24) 34.

<sup>38</sup> Theron C *op. cit.* (n 36) at 24.

#### 1.4.1 Environmental rights as procedural rights

On this basis, the right to environment and the rights related to environment (environmental rights) are considered to be procedural in character. One recognizes that the right is formulated as an individual right rather than a collective right. This right serves to secure for individuals the right to access to information, to participate in the decision-making process and the right to administrative and judicial remedies. Primarily rights are afforded to individuals within a national legal system to challenge actions or decisions detrimental to environmental interests. Accordingly, the Rio Declaration<sup>39</sup> recognizes the procedural side of environmental rights, including public participation in environmental decision-making, access to information concerning the environment, effective access to judicial and administrative proceedings and adequate redress and remedies.<sup>40</sup> The procedural character of environmental rights has been underlined by other important international instruments<sup>41</sup> and the courts. The Supreme Court of Peru recognised in its decision in 1992 that the right to environment belongs to the whole community and referred to the ‘new procedural instruments that allow access to justice to protect interests that affect undermined (classes) of persons.’<sup>42</sup>

#### 1.4.2 Environmental rights as rights of future generations

This assertion of environmental rights as rights of future generations highlights the right to a healthy environment as a generational right. The Supreme Court of the Philippines<sup>43</sup> recognized the rights of future generations to inherit an environmentally sound world. This decision is regarded as a major step forward in environmental protection because it recognized the right to a sound environment as a self-executing constitutional right and, secondly, it rendered operational the concept of intergenerational equity by recognising

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<sup>39</sup> Rio Declaration on Environment and Development (1992) 31 *ILM* 876.

<sup>40</sup> Aguilar AB and Popovic NAF 1994, “Lawmaking in the United Nations: The UN study on human rights and the environment” 3 *RECIEL* 201 ff.

<sup>41</sup> The Preamble of United Nations General Resolution on a World Charter for Nature (1982) 22 *ILM* 445 at 456 and Principle 2 United Nations Economic Commission for Europe Charter on Environmental Rights and Obligations adopted at the Experts Meeting in Oslo, Norway, 29-31.

<sup>42</sup> *Protterra v Ferroaleaciones San Roman SA*. See Theron C *op. cit.* (n 36) at 26.

<sup>43</sup> *Minors Oposa v Secretary of the Environment* (1994) 33 *ILM* 173.

the right of present generations to sue on behalf of future generations. Brown Weiss argues in favour of a planetary trust for future generations to whom humans have an obligation.<sup>44</sup> Caring for the future is an effective way of managing the present and intergenerational equity has found its way into a number of constitutions of the world. The idea which prevailed in the past, that ownership of land conferred the right on the owner to use his land as he pleased, is rapidly giving way in the modern world to the more responsible conception that an owner must not use his land in a way which may prejudice his neighbours or the community in which he lives, and that he holds the land in trust for future generations.<sup>45</sup> In fact, the idea is that the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations in order to uphold the principle of intergenerational equity.

#### 1.4.3 Environmental rights as a human right to the environment

Amongst the definitions suggested by scholars, Maurice Cranston's definition remains a much quoted definition of a human right:

A human right by definition is a universal moral right, something which all men everywhere, at all time ought to have, something of which no one may be deprived without grave affront to justice, something which is owing to every human being simply because he is human.<sup>46</sup>

The movement towards the recognition of environmental rights as human rights has become more significant and has received strong support through different institutions. It was suggested that environmental issues belong within the human rights category, because the goal of environmental protection is to enhance the quality of human life. To protect human life, our environmental life support system must be maintained and protected. Thus, environmental matters deserve to be debated through a statement or assertion of existing human rights, such as the right to life, to personal security, and to

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<sup>44</sup> Weiss B *In fairness to future generations: international law, common patrimony and intergenerational equity* 1989 quoted by Cheadle MH *et al. op. cit.* (n 14) 425.

<sup>45</sup> *King v Dykes* (1971) 3 SA 540 RA at 545. See Cheadle MH *et al. op. cit.* (n 14) 426.

<sup>46</sup> Cheadle MH *et al. op. cit.* (n 14) 32.

health and food.<sup>47</sup> At this stage, the concept of environmental rights deserves to be circumscribed and understood properly to avoid ambiguity that can lead to environmental degradation.

Kidd<sup>48</sup> points out that human rights are classified in three different categories or ‘generations’:

First generation rights, called fundamental rights or ‘blue’ rights are civil and political rights of individuals. They are characteristically negative in that they require the state to desist from certain acts. Examples are the right to equality, right to life, and freedom of association.

Second generation or ‘red’ rights are positive rights in that they represent claims for government intervention on behalf of the individual.<sup>49</sup> These rights include social, economic and cultural rights.

Third generation or ‘green’ rights have been referred to as ‘people’s or solidarity rights.’<sup>50</sup> These rights include environmental rights, the right to development and the right to peace, and are usually exercised as group rights. In other words, they are the rights of the public at large rather than rights of specific individuals. Indeed, the right to environment assumes solidarity with mankind.

Indeed, such a classification of human rights is questionable since it triggers the idea that some rights (those of the first generation, for instance) should be asserted before the others. Mangu notes that the so-called three generations of rights are intertwined, and should not be isolated from each other, but considered as a whole.<sup>51</sup> Furthermore, the

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<sup>47</sup> Theron, *C op. cit.* (n 36) at 30

<sup>48</sup> Kidd *M op. cit.* (n 24) 35.

<sup>49</sup> Glazewski J “Environmental provisions in a new South African bill of rights” (1993) *JAL* 177-184 at 181. See also Theron, *C op. cit.*(n 36) at 33.

<sup>50</sup> Glazewski J “The environment, human rights and a new South African Constitution” (1991) 7 *SAJHR* 167 at 172.

<sup>51</sup> Mangu AMB *The road to constitutionalism and democracy in post-colonial Africa: the case of the Democratic Republic of Congo* (2002) University of South Africa Pretoria [unpublished thesis] 145.

South African Constitutional Court in *Government of RSA and Others v Grootboom and Others*,<sup>52</sup> stressed that all the rights in the Bill of Rights are inter-related, indivisible and mutually supporting.

#### 1.4.4 Rights of the environment

In some instances, environmental rights are considered as eco-rights, in other words, as rights that belong to the environment itself. It is currently maintained that the idea of legal rights could be extended to the environment as a whole. According to Stone, legal rights are continually expanding to encompass persons and concepts that previously were regarded as being unable to possess rights. He submits that each successive extension of rights to some new entity was initially unthinkable but despite this, when the so-called “rightless” entity receives its rights, it becomes valued.<sup>53</sup> Two environmental movements arose during the 1960s that Arne Naess articulated as ‘a shallow anthropocentric technocratic environmental movement concerned primarily with pollution, resource depletion, and the health and affluence of people in the developed countries’, and an eco-centric ‘deep, long range ecology movement.’<sup>54</sup> Shallow ecology is anthropocentric. In this perspective, humans are considered as above or outside of nature, as the source of all value, and ascribe only a utilitarian value to nature. On the contrary, deep ecology does not separate humans from the natural environment, nor does it separate anything else from it. It does not see the world as a collection of isolated objects but rather as a network of phenomena that are fundamentally interconnected and independent. Thus, it recognizes the intrinsic value of all living beings and views humans as just one particular strand in the web of life.<sup>55</sup> This approach of deep ecology sustains even the point of view that environment has an inherent value, completely apart from its usefulness to mankind, which must be protected in itself.

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<sup>52</sup> 2001 (1) SA 46 (CC).

<sup>53</sup> Theron C *op. cit.* (n 36) at 36.

<sup>54</sup> Naess quoted by Theron C *op. cit.* (n 36) at 41.

<sup>55</sup> Fritjof C “Deep ecology: A new paradigm” in *Ibid* (n 51) at 42.

In fact, from the interpretations of environmental rights, flow three theories developed by Colleen Theron.<sup>56</sup>

- An ego-centric approach, which considers humans as separate and superior to the environment.
- An anthropocentric approach which rejects the separation of human beings and their environment. Humans are acknowledged as the dominant species who can control the environment. They are also viewed as stewards of the ecosystem.
- Ecocentric or deep ecology philosophy, which does not start with the premise that humans are in a position of dominance in which ‘rights are given and sympathies extended.’ The assertion is that humans are no more and no less than an integral part of the environment along with all other organisms. By the way, a deeper more spiritual and holistic approach to nature is sustained.

From the author’s point of view, the deep ecology constitutes a better foundation to the relationship between human rights and the right to environmental integrity. The Permanent Court of International Justice in the litigation between Hungary and Slovakia<sup>57</sup> held that ‘the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of states to ensure that activities within their jurisdiction and control respect the environment of other states or of areas beyond national control is now part of the corpus of international law relating to the environment.’<sup>58</sup> The rights of the environment should be considered and implemented in the same way as human rights. By safekeeping environmental integrity the fulfilment of such human rights as the right to development become truly possible. The stronger message is that government and citizens are called to look after the integrity of the environment to achieve the goal of human ‘flowering’.

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<sup>56</sup> *Ibid.* (n 51) at 24.

<sup>57</sup> The International Court of Justice case *Gabakovo-Nagymaros Project (Hungary/Slovakia)* (1998) 37 *ILM* 162.

<sup>58</sup> Cowen DV “The new South African Constitution and opportunities for environmental justice in a democratic South Africa” (1999) *Acta Juridica* 121-141 at 138.

## **1.5 Conclusion**

The right to environment is recognized and protected in both international and national laws. A close relationship between human rights and the environment is highlighted through international instruments and national constitutions. The constitutionalisation of environmental and other rights related to the environment remains an efficient way of their protection because the constitution is the supreme law of a country and has binding force on citizens, non-citizens and the state. All the rights incorporated in the constitution through the bill of rights are interrelated, indivisible and mutually supportive. However, the increased concern about the politicization of environmental issues remains one of the fetters to its effectiveness. The judiciary is therefore called upon to play a key role in this process.



## CHAPTER 2: ENVIRONMENTAL RIGHTS IN THE CONSTITUTION OF THE DEMOCRATIC REPUBLIC OF CONGO OF 2003 AND IN THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA OF 1996

The introduction of environmental rights in the constitutions of both the DRC and the RSA remains an important step taken towards the protection and promotion of the environment for a better life for all.

### **2.1 Environmental rights in the Democratic Republic of Congo**

The management of the environment in the DRC during the colonial era was one of the matters with which Belgian colonial power had to deal with and while it was interested in the protection of the environment, it was with the aim of its exploitation and without any concern for the welfare of the Congolese people. The Congolese were treated as subjects without any rights. Through different treaties and royal decrees the management of the environment was clearly practised but with different motivations. The Convention on the Conservation of the Flora and Fauna in its natural state was ratified by the colonial power in 1935; the Institute of National Parks of Congo was created by the Royal Decree in 1934 while others areas were protected or reserved to avoid widespread destruction of biodiversity.<sup>59</sup> The Convention of London of 1933 contributed substantially to the conservation of the fauna in Africa because it created important and prestigious parks in different African countries. Dzidzornu notes that modern environmental law and policy in Africa have their roots in the political economy of colonialism. The ecological effects of the exploitation of resources were dealt with under treaties applied to the colonies to preserve useful and/or endangered flora and fauna. National parks or nature or forest reserves were established to achieve this goal. In the main, the exploitation of flora and the hunting, killing and capture of fauna were controlled by restrictions imposed on access to the reserves. There was no integrated approach to resource and environment management. Therefore, how effectively each colonial administration observed the

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<sup>59</sup> Piron P et Devos J *Codes et lois du Congo-Belge* (1943) éditions des codes Louwers-Strouvens Bruxelles Léopoldville 823.

treaties determined the scope of the discharge of the responsibility of environmental protection of the land resources of each colony.<sup>60</sup> During the colonial era, the Congolese were not involved in the management of the environment and could not, *ipso facto*, claim any rights.

#### 2.1.1 Environmental rights prior to the transitional Constitution of 2003

Many constitutional texts are silent on the matter of environmental rights and duties and this is also true of the DRC during and after colonisation.

##### 2.1.1.1 *The Colonial Charter*

The Colonial Charter<sup>61</sup> was enacted by the Belgian Government for its Congo colony. In its basic provisions, the Colonial Charter provided that the Congo had a legal personality distinct from that of Belgium itself.<sup>62</sup> However, the Colonial Charter did not contain a bill of rights and, therefore, ignored environmental rights.

##### 2.1.1.2 *The Fundamental Law*

The Fundamental Law was promulgated by the Belgian King in 1960 and served as a transitional structure of government. By its terms, the Fundamental Law should remain in force until such time as the Congolese fashion their own Constitution.<sup>63</sup> At the time, the mind of the people and their political leaders were more concentrated upon political change than upon the claim to such a right, namely, the right to environment.

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<sup>60</sup> Dzidzornu DM “Environment protection in Africa: a panorama of the law and natural resources law” (2004) 22/ 2 *Journal of Energy and Natural Resources Law* 148-170 at 148.

<sup>61</sup> Belgian Law of October 18, 1908, entitled “Law of the Government of the Belgian Congo.

<sup>62</sup> Article 1.

<sup>63</sup> Article 3 of the Fundamental Law of 19 May 1960 in Iyeleza Moyu-Mbey, Masika Katsuva, Isengingo Kambere Ing’s *Recueil des textes constitutionnels de la République Démocratique du Congo du 19 Mai 1960 au 28 Avril 1991 avec en annexe la Charte Coloniale du 18 Octobre 1908 Editions Ise-Consult Kinshasa.*

### 2.1.1.3 *The Constitution of 1964*

The Constitution promulgated in August 1964, called '*Constitution de Luluabourg*' marks an important stage in the political and legal evolution of the Congo but did not open the door to the introduction of any environmental clause. According to Briton, the new Constitution represented generally a continuation of the basic style and concepts of government that the Fundamental Law had inaugurated.<sup>64</sup>

### 2.1.1.4 *The Constitution of 1967*

A new Constitution under President Mobutu was adopted on June 24, 1967 with minor changes in the light of the Constitution of 1964 regarding human rights. The constitutional changes brought about by the new dispensation were followed by different modifications and did not offer the opportunity for personal and human rights. The last modification adopted July 5, 1990 was also silent on environmental rights. It is only the Constitutional Decree of 28 May 1997 completed by the Constitution of 1998, after the Constitutional Act of the Transition of 1994, which set forth environmental rights and duties for citizens and the state. Article 53 of the Constitution of 1998 provided that: 'All Congolese have a right to a healthy environment favourable to their development. The state and citizens have the duty to ensure the protection of the environment.' Article 54 adds that 'All Congolese have the right of enjoyment of humankind's common patrimony.'

## 2.1.2 Environmental rights under the Constitution of 2003

After the Constitution of 1998, the Constitution of 2003 (hereafter the Constitution) came into operation on 05 April 2003. To show an understanding of the environmental rights and duties embodied in the environmental clause of this Constitution, it will be useful to

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<sup>64</sup> Briton JT "The Constitution of the Congo promulgated August: August 1, 1964" (1965) *The American Society of International law* 1-55 at 5.

present briefly the political climate in which the constitutional framework was elaborated and adopted.

### *2.1.2.1 Political context of the incorporation of an environmental clause in the Constitution*

As a point of departure, it may be noted and stressed that the elaboration and adoption of the Constitution was made in a particular political context of reconciliation and a search for peace among all the parties involved in the war in the DRC.

After the *coup d'état* of 1965, President Mobutu renamed the Congo 'Zaire' and maintained power by portraying himself as anti-communist, gaining financial and military support from the United States and France. With the end of the Cold War, Mobutu's power came to an end and the United States severed ties with him in 1997. The rebel group, Alliance for the Democratic Forces for the Liberation of the Congo, led by Laurent Kabila, was supported and sponsored by the Vice President of Rwanda, and the Presidents of Uganda, Burundi and Angola facilitated by the mediation led by South Africa. The new Congolese regime that emerged in May 1997, after overthrowing Mobutu, renamed the country the 'Democratic Republic of the Congo'. Kabila used the same approach and strategy as Mobutu, but with different tactics.<sup>65</sup> He was assassinated in 2001 and succeeded by his 30-year-old son Joseph Kabila. Rebel forces of the Congolese Movement for Democracy, supported by Rwanda and Uganda, took control of East Congo. In December 2002, representatives of the warring parties and the members of the Inter-Congolese Dialogue met in South Africa and signed the All Inclusive Agreement in Sun City, which defined the terms for the end of hostilities and the formation of a Transitional Government.<sup>66</sup> This reflects the zenith of a peace process that began with the Lusaka Accords in 1999 and the atmosphere in which the Constitution of 2003 was elaborated. South African political leaders played a key role during the

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<sup>65</sup> Mondonga M *et al.* "Prerequisites for a development-oriented state in the Democratic Republic of Congo" (November 1998) *The World African Region Rural Development and Environment Department* at 30.

<sup>66</sup> Kachikwu MK "Diamonds and civil conflicts in Africa – the conflicts in central Africa and West Africa" (2004) 22/2 *Journal of Energy and Natural Resources Law* 171-193 at 174.

negotiations, which led to the adoption of the Constitution. Congolese leaders were not only inspired but also surprised by the impressive South African democracy sustained by the Constitution of the RSA of 1996. Environmental rights were incorporated in the Constitution of DRC, following the South African model, but not on the same scale.

#### *2.1.2.2 Environmental rights and duties*

This Congolese Constitution includes environmental rights and duties under heading III, titled ‘The public liberties, the fundamental rights and duties of citizens’. Environmental matters are dealt with in articles 54, 55, and 56 that provide respectively:<sup>67</sup>

Article 54: ‘All Congolese have the right to a healthy environment, one which is favourable to their development.

Public Authorities and citizens have a duty to provide for the protection of the environment in accordance with the conditions defined by the law.’

Article 55: ‘All Congolese have the right to enjoy a national health service.

The state has the duty to fairly redistribute and to guarantee the right to development.’

Article 56: ‘All Congolese have the right to enjoy the humankind’s common patrimony. The state has the duty to facilitate that enjoyment.’

In the light of article 54, there is no doubt that the Constitution expressly and unequivocally provides for a distinct right to a healthy environment. It is also clear that both state and citizens have the duty or obligation to provide for the protection of the environment under the conditions determined by the legislation. Thus, in analysing this article, the focus will be on the aim of the provision, to whom the right applies, and who the beneficiaries are.

It can be argued that article 54 has two general aims. The first paragraph guarantees to all Congolese the right to a healthy environment, one that is favourable to their development. The second paragraph places a specific obligation or duty on public authorities and citizens to provide for the protection of the environment. The right under this provision

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<sup>67</sup> Researcher’s translation from the French language.

binds the public authorities. The Constitution guarantees the inviolability of the fundamental rights and liberties of human beings. All law declared by the Supreme Court as inconsistent with the Constitution is null and void.<sup>68</sup> The exercise of human rights and fundamental liberties can only be suspended or limited in terms of the Constitution.<sup>69</sup> The Constitution is the supreme law of the country. It is binding on all persons,<sup>70</sup> the legislature,<sup>71</sup> the executive<sup>72</sup> and the judiciary.<sup>73</sup> In this regard, the Constitution applies both vertically and horizontally.<sup>74</sup> Through the above constitutional provisions, citizens are protected against unwarranted interference by the state but are at the same time called to respect the Constitution as a whole for the benefit of the entire nation. The courts are established as the guardians of human rights and fundamental liberties.<sup>75</sup>

A close look at the language of the legislature in paragraph one ‘All Congolese have the right to a healthy environment ... favourable to their development’ and paragraph two which emphasizes that ‘Public authorities ... have a duty to provide for the protection of the environment...,’ reveals the implicit support for the principle of intergenerational equity and sustainable development proclaimed by international agreements or treaties on the environment ratified by the DRC. For instance, the 1972 Stockholm Declaration and the 1992 Rio Declaration recognize respectively ‘the need to safeguard the environment against degradation for the benefit of present and future generations’<sup>76</sup> and ‘the right to development should be fulfilled so as to equitably meet the developmental and environmental needs of present and future generations.’<sup>77</sup> The principle of intergenerational equity, Weiss argues, is an *obligatio erga omnes*<sup>78</sup> (an obligation towards the international community as a whole). The idea is that future generations have rights against present generations for a healthy environment. It is in the interest of present

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<sup>68</sup> Article 2.

<sup>69</sup> Article 62.

<sup>70</sup> Article 63

<sup>71</sup> Articles 97,98.

<sup>72</sup> Articles 68, 67, and 85.

<sup>73</sup> Article 147.

<sup>74</sup> Article 61.

<sup>75</sup> Article 147 paragraph 3.

<sup>76</sup> Principle 2 of the 1972 Stockholm Declaration on the Human Environment.

<sup>77</sup> Principle 3 of the 1992 Rio Declaration on the Environment and Development.

<sup>78</sup> Feris AL and Tladi D *op. cit.* (n 12) at 5.

generations to manage the environment in a sustainable manner giving equal regard to the rights of future generations. However, in spite of any deduction that may be made, it would be wise that the legislation to be enacted by Parliament integrates and defines clearly the principle of sustainable development, intergenerational equity and other important principles for the protection of the environment to avoid any misunderstanding. In this respect, the National Environment Management Act 107 of 1998 of the Republic of South Africa provides adequately<sup>79</sup>.

The contents of environmental rights have, indeed, derived from the existing universally recognized rights, both with regard to substantive (such as the rights to life, health and privacy) and procedural (namely access to information and due process of law) rights. In this context, the Constitution of the DRC guarantees the right to life in terms of article 15, the right to information in terms of article 29, and the right to public health care and food in terms of article 34.

The right to environment implies a corresponding duty that may constitute a limitation on the right. An express duty is placed on the Congolese citizens and public authorities to protect the environment according to legislative norms and principles. However, for a better fulfilment of this duty by the citizens, government must stimulate people's awareness on environmental concerns, mainly the conservation and protection of the environment in the interests of present and future generations.

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<sup>79</sup> NEMA is discussed on page 50.

## 2.2 Environmental rights in South Africa

Environmental rights were entrenched in the 1993 Constitution and retained in the 1996 Constitution.

### 2.2.1 Environmental rights before the Interim Constitution of 1993

South Africa's context, its historical background, has lent itself to generally ineffective environmental management, which contributed to environmental resource degradation. Previous environmental management systems were poorly funded and lacked public support.<sup>80</sup> Furthermore, the Apartheid legislation distorted access to natural resources denying the majority of the population access to and use of, *inter alia*, land, and water resources. Major inequities therefore existed in respect of resource access and distribution, and there was no constitutional protection of the environment. However, Welsh points out that it would be incorrect to assume that the environment was entirely unprotected, because numerous parliamentary acts, provincial ordinances and local by-laws dealt with assorted aspects of the environment.<sup>81</sup>

### 2.2.2 Environmental rights in the 1993 and 1996 Constitutions

The Interim Constitution signalled the beginning of a new democratic constitutional system for South Africa. After the multiracial national elections in April 1994 the new democratic Government commenced with policy-making to address the inequities of the past. The politicisation of environmental concerns has resulted in the inclusion of environmental considerations in the negotiation process and the inclusion of environmental provisions by different negotiating parties in their respective draft bills of rights.<sup>82</sup> The Bill of Rights in section 29 provides that: 'Every person shall have the right

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<sup>80</sup> Peart P and Wilson J "Environmental policy-making in the new South Africa" (1998) 5 *SAJELP* 237-268 at 240.

<sup>81</sup> Welsh A *Environmental impact assessment and the constitutionally protected right to an ecologically sustainable environment* (1997) University of South Africa Pretoria [LLM Thesis unpublished] 1.

<sup>82</sup> Glazewski J *op. cit.* (n 49) at 79.



to an environment which is not detrimental to his or her health or well-being.’<sup>83</sup> Several criticisms have been made of the right contained in this provision. One argued that the right has been negatively phrased; the provision does not place duties on either the state or individuals to protect the environment.<sup>84</sup> The section was deemed to be equally inadequate for its failure to include the notion of sustainability, as it was too anthropocentric<sup>85</sup> and it did not refer to the general accepted components of environmental law: resource utilization and conservation, pollution control and waste management, and planning and development law.<sup>86</sup>

Considering various criticisms held against the environmental clause of the Interim Constitution, the 1996 Constitution was called to contain a broader right. The negative phraseology and the absence of a duty to protect the environment were seen as areas for improvement.<sup>87</sup> It is in this light that the 1996 Constitution included the right to environment in section 24 of the Bill of Rights. It stipulates that:

Everyone has the right-

- (a) to an environment that is not harmful to their health and 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.

Compared to section 29 of the Interim Constitution, and despite the fact that the right remains negatively formulated, and does not impose any duty on individuals or corporate entities to have regard for the environment itself,<sup>88</sup> the clause does reflect some improvements. The right is a fundamental right and although essentially anthropocentric

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<sup>83</sup> Act 200 of 1993.

<sup>84</sup> Winstanley T *op. cit.* (n 21) at 93.

<sup>85</sup> Glazewski J “The environment and the new Interim Constitution” (1994) 1 *SAJELP* 1-16 at 6.

<sup>86</sup> *Id.*

<sup>87</sup> Kidd M *op. cit.* (n 24) 37.

<sup>88</sup> Winstanley T “The Final Constitution and the environment” (1997) 4 *SAJELP* 135-140 at 138.

in nature, it also includes the protection of the natural environment.<sup>89</sup> It includes an express reference to intergenerational equity. It can be argued that it would have been more relevant and appropriate for subsection (a) to be included in section 27: Health care, food, water and social security. However, the words ‘well-being’ are quite interesting as they, *inter alia*, pertain to the environmental livelihood of a person. Subsection (b) guarantees the right to have the environment protected through reasonable legislative and other measures. It means that the government can be forced to take steps to protect the environment in cases where the state is inactive. The right may, however, be severely curtailed in that the measures must be ‘reasonable’.<sup>90</sup> The legislature opens the door to a discussion of what ‘reasonable’ measures means, because if ‘reasonable’ is considered from the state’s perspective, it may well be that a lack of resources could be cited as a reason for the state failing to take the desired measures.<sup>91</sup> Having the environment protected ‘for the present and future generations’ enshrines sustainable development. Furthermore, subsection (b) is framed as a directive principle and has a socio-economic character for it imposes a constitutional imperative on the State to secure the rights of individuals to have the environment protected and conserved as well as sustainably utilised and developed, while promoting economic and social development by implementing legislation and other reasonable measures.<sup>92</sup> A duty of care is placed on every citizen to look after the environment and prevent it from being damaged in terms of the National Environmental Management Act (NEMA).<sup>93</sup>

In considering the right to environment, this clause<sup>94</sup> cannot be interpreted in isolation. It is necessary to take cognisance of those procedural (and other) rights contained in the Bill of Rights that support the right to environment. First of all, one must bear in mind that the Bill of Rights which contains the right to environment and those rights related to environment (environmental rights) applies both vertically and, depending on the

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<sup>89</sup> Bray W “Towards sustainable development: Are we on the right track?” (1998) 5 *SAJELP* 1-15 at 9.

<sup>90</sup> Kidd M *op. cit.* (n 24) 37.

<sup>91</sup> *Id.*

<sup>92</sup> Glazewski J “Environmental justice and the new South Africa democratic legal order” (1999) *Acta Juridica* 1-35 at 6.

<sup>93</sup> Section 28 of the National Environment Management Act 107 of 1998.

<sup>94</sup> Section 24 of the Constitution of the RSA of 1996.

circumstances, horizontally as well.<sup>95</sup> Section 8 regulates the application of the fundamental rights contained in the Bill of Rights to the relationship between government and citizen (the public law relationship), as well as to the relationship between the individual citizens reciprocally (the private law relationship),<sup>96</sup> and all organs of state are accordingly bound.

The supportive rights are:

Section 32: Access to information.

People are entitled to information held by the state and persons. In order for the public to effectively advocate environmental protection, access to relevant information is important. Civil society needs to know of environmental threats and the origins of those threats. As indicated in section 32(2), the Promotion of Access to Information Act 2 of 2000 has been promulgated to give effect to this right. The purpose is to promote transparency and accountability in all organs of the state, by making it obligatory for all organs of state to provide the public with timeous, accessible and accurate information, thus effectively empowering members of the public to scrutinise and participate in government decision-making that affects them. It is in this context of giving effect to this right that the High Court held in *Van Huyssteen v Minister of Environmental Affairs and Tourism*<sup>97</sup> that a person is entitled to information held by the state where it is ‘reasonably’ required for the protection of that person’s rights. Whether it would be reasonable and justifiable to require the information under those circumstances should be tested in terms of the general limitation clause in the Bill of Rights.

Section 33: Just administrative action.

Administrative action must be lawful, reasonable and procedurally fair. Written reasons should be given when administrative action affects rights adversely. The Promotion of

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<sup>95</sup> Devenish GE *The South African Constitution* (2005) Butterworths Durban 45.

<sup>96</sup> Ferreira GM “Constitutional values and the application of the fundamental right to a clean and healthy environment to the private-law relationship” (1999) 2 *SAJELP* 171-187 at 171.

<sup>97</sup> 1996 (1) SA 283 (C) 300B-F.

Administrative Justice Act 3 of 2000 has given effect to this right. All legislation relating to environmental management must be consistent with the Constitution, including the right to administrative justice, to ensure lawful, reasonable and procedurally fair environmental action against individuals. For instance, in *Director, Mineral Development, Gauteng Region and Another v Save the Vaal Environment and Others*<sup>98</sup> the Court held that ‘the hearing need not necessarily be a formal one, but interested parties should at least be notified of the application and given an opportunity to raise their objections in writing. If necessary a formal procedure can then be initiated ... the Constitution, by including environmental rights as fundamental, justiciable human rights, by necessary implication requires that environmental considerations be accorded appropriate recognition and respect in the administrative processes in our country. Together with the change in the ideological climate must also come a change in our legal and administrative approach to environmental concerns.’

Section 34: Access to courts.

Anyone who has a dispute, which can be resolved by the application of law has a right to have the matter decided in a fair public hearing before a court, impartial tribunal or forum.

Section 38: *Locus standi*.

Anyone listed in the section has the right to approach a competent court in a case where a right in the Bill of Rights has been infringed or threatened. The court may grant appropriate relief (a remedy) in such a case.

Section 237: Diligent performance of obligations.

This section makes it obligatory for the state to perform its constitutional obligations diligently and without delay.

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<sup>98</sup> 1999 2 SA 709 (SCA) 718J-719A and B.

### **2.3 Conclusion**

The right to environment is entrenched in the constitutions of both the DRC and the RSA. There is an urgent need for parliament to put in place legislation that gives effect to this right in the light of the DRC Constitution. Important improvements have been made in South Africa through the provisions of the Constitution. All organs of state and citizens are called to look after the environment for the benefit of present and future generations. Unfortunately, due to the novelty of the subject matter, the content of environmental rights remains a questionable point in both jurisdictions. It falls on the courts to highlight this issue.

## CHAPTER 3: IMPLEMENTATION AND ENFORCEMENT OF ENVIRONMENTAL RIGHTS IN THE DEMOCRATIC REPUBLIC OF CONGO AND IN THE REPUBLIC OF SOUTH AFRICA

In order to give effect to environmental rights enshrined in the constitutions of the DRC and South Africa, a framework of relevant environmental legislation must be put in place, and various mechanisms must also be established to ensure the effective implementation and enforcement of those rights. This process is very important, otherwise, the constitutional guarantee of a right will mean little more than a declaration of objectives, a statement of what the state hopes it will do for its citizens. With this in mind, this chapter focuses on the regulatory framework for environmental management; the implementation and enforcement of environmental rights; administrative and judicial control and remedies; and other mechanisms of protection and promotion of environmental rights in both the DRC and South Africa.

### **3.1 Regulatory framework for environmental management in the Democratic Republic of Congo**

The management of the environment in the DRC deserves to be taken seriously by the political leaders and the people. Evidence shows that environmental management is poor in that country. Obviously, political leaders are not particularly preoccupied with the fulfilment of constitutional environmental provisions and accordingly do not encourage people to claim that right.

#### 3.1.1 General background

The Constitution, which includes the environmental and other fundamental rights,<sup>99</sup> is the supreme (or highest) law of the country.<sup>100</sup> Accordingly, it constitutes the most important source of environmental law in the DRC. The legislative authority in the national sphere

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<sup>99</sup> Title III of the Constitution on public liberties, rights and fundamental duties of citizens.

<sup>100</sup> Article 2, paragraph 2; article 63 of the Constitution.

of government is vested in Parliament, which consists of the National Assembly and the Senate.<sup>101</sup> Parliament is competent to pass legislation on different matters that include the protection of the environment.<sup>102</sup> Unfortunately, since the promulgation and publication of the Constitution in the *Official Journal*, Parliament has not yet passed any legislation in this regard. Regulations are also part of the national legal sources in the DRC, however, they are subject to the Constitution and Acts of Parliament. The Constitution recognizes the regulatory power of, respectively, the President of the Republic<sup>103</sup> and of the Ministers.<sup>104</sup> Judicial precedent or decisions of the Supreme Court of Justice, which is the highest court of the judicial system in the DRC,<sup>105</sup> are also sources of law. They are binding on the lower courts and tribunals. The doctrine and the general principles of law and the customary law, unless inconsistent or in conflict with the written law, are also sources of law in the DRC.

Amongst the international legal sources are the international and regional instruments and, further, the international jurisprudence. In terms of article 193 of the Constitution, treaties and international agreements that have been concluded are not only part of the national legislation, but they are superior to it after their publication in the *Official Journal* and their implementation by other parties. In this respect, the DRC has become and may still become a signatory to a number of the international conventions, covenants and treaties. For example, the DRC remains a signatory of the African Convention on the Conservation of the Nature and Natural Resources adopted in Algiers on 15 September 1968 and signed by the DRC on 13 November 1976; Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) of 3 March 1973 signed by the DRC in 20 July 1976; Treaty of the Southern African Development Community (SADC) signed Windhoek 17 August 1992. At this stage, it appears useful to emphasise that almost all environmental agreements ratified by the DRC are not followed by legislation

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<sup>101</sup> Article 97 of the Constitution.

<sup>102</sup> Article 54 paragraph 2.

<sup>103</sup> Article 71.

<sup>104</sup> Article 91.

<sup>105</sup> Article 148.

in the municipal law and defining the measures of their application.<sup>106</sup> Therefore, implementation and enforcement are so much less likely to occur.

Considering that no legislation has been passed by Parliament to give effect to the right to environment guaranteed by the Constitution, for the purpose of the present analysis, reference will be limited to the regulatory framework<sup>107</sup> that existed in the country prior to the coming into operation of the Constitution. This legislation remains applicable in terms of article 203 of the Constitution, providing that ‘Legislation in force which has not yet been modified or abrogated is applicable unless it is inconsistent with the Constitution.’

It is against the general backdrop of the present environmental legislative framework of the country, that the responsibilities of the administration for the implementation and enforcement of environmental rights will be examined<sup>108</sup>. The courts have an equally important and ongoing role to play in the process of judicial control of administrative (environmental) actions.

### **3.2 Implementation and enforcement of environmental rights in the Democratic Republic of Congo**

Owing to the predominantly public law character of the administration of environmental affairs, nature conservation and management and pollution control are primarily entrusted to administrative (public) bodies. For example, Ministers share the responsibilities in the DRC (the Ministry of Environment is the main player; Ministry of Tourism; Ministry of

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<sup>106</sup> The collection of legal texts on environmental concerns in the DRC published in 2000 by Jusdata editions does not contain the legislation, which incorporates the environmental agreements ratified by the DRC in the municipal law and lacks the measures of their application. Mbalanda Kisoka P, Mponyi Mbunga A, and Mopiti Ilanga D *Recueil des textes juridiques en matière environnementale en République Démocratique du Congo* (2000) Jusdata éditions Kinshasa.

<sup>107</sup> <http://www.ecolex.org/en/javagateway.php>? (accessed 2006/01/12) *Ecolex portrait au droit de l'environnement*. See also Mbalanda Kisoka P, Mponyi Mbunga A, and Mopiti Ilanga D *Recueil des textes juridiques en matière environnementale en République Démocratique du Congo* (2000) Jusdata éditions Kinshasa.

<sup>108</sup> Considering the limited scope of this dissertation, it is not possible to fully discuss the existing legislative framework in DRC. Only certain examples are used to highlight the application or lack of application within the system.



Urbanism; Ministry of Mines; ... ) at National, Provincial and Local levels<sup>109</sup> and other bodies, such as the Congolese Institute for the Conservation of Nature<sup>110</sup> (*Institut Congolais pour la Conservation de la Nature* [ICCN]) and the National Centre of Information on Environment are also involved.<sup>111</sup> Important powers are conferred on the Ministry of Environment.<sup>112</sup> The Ministry has, for example, the mission to promote and coordinate the activities pertaining to the environment, nature conservation, and to take initiatives and appropriate measures to fulfil this mission.

Thus, for environmental legislation to be effectively implemented, important powers have been given to administrative bodies in the DRC. It is therefore obvious that the success of the implementation of environmental legislation, which contains provisions on environmental rights, depends largely on the discretionary powers conferred upon these administrative bodies and their ability to exercise these powers in the public interest and with respect for the principle of legality of administrative (environmental) action.

### 3.2.1 Powers of administrative bodies

Various powers are recognized to administrative bodies through the regulatory environmental framework. These powers are sometimes extensive powers. They may include the powers to legislate and authorise specific performance as well as the powers to execute or enforce legislation.

#### 3.2.1.1 *Extensive powers*

Public bodies and officials (usually ministers) are granted extensive powers of management over natural resources like water<sup>113</sup> and mines.<sup>114</sup>

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<sup>109</sup> Articles 11, 49, 71, 119, 161 and 169 of the Act No 95-005 of 20 December 1995 on Territorial Decentralisation, Administrative and Political of the Republic of Zaire (currently DRC) during the transitional period.

<sup>110</sup> Act No 75-023 of 22 July 1975 on the Status of the Congolese Institute for the Conservation of Nature.

<sup>111</sup> By-law No 029/CAB/MIN/EPF/98 of 25 June 1998.

<sup>112</sup> Ordinance No 75-231 of 12 July 1975 defining the attributions of the Ministry of Environment and Conservation of the Nature; Decree No 003/027 of 16 September 2003 on the Attributions of Ministries.

<sup>113</sup> Decree of 6 May 1952 on Concessions and Administration of Water.

<sup>114</sup> Law of 11 July 2002 on Mines Code.

### 3.2.1.2 Powers to legislate and to authorise specific performance

Most statutes delegate the legislative function to public bodies and officials. They perform a limited legislative function because they adopt subordinate legislation in the form of regulations, statutory directives, permits or licensing requirements, abatement notices and other measures. Amongst the regulations adopted as subordinate legislation, one may refer to the Ministerial By-law<sup>115</sup> on the Forestry Transaction Procedure and the Ministerial By-law<sup>116</sup> on Measures Pertaining to Forestry Exploitation. The exercise of certain environmental activities is subject to the permit or licensing requirements such as the forestry exploitation permit/licence;<sup>117</sup> the hunting permit<sup>118</sup> and the personal authorization of prospecting permits subject to the requirements defined by the Ordinance law<sup>119</sup> on General Legislation on Mines and Hydrocarbon.

### 3.2.1.3 Powers to execute

A public body may itself execute the provisions of the legislation.<sup>120</sup> This is the case, for example, in article 39 of the Law<sup>121</sup> on Hunting Regulation of 1982, where the competent Minister has the power to withdraw a hunting permit in the case of violation of the provisions of this Law and also has the power to limit the number of permits that may be granted during a specific period of time. In performing their functions, ministers and other authorities (provincial and local) are requested to act in accordance with the Constitution<sup>122</sup> and the law.

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<sup>115</sup> No CAB/MIN/AF.F-ET/259/2002 of 3 October 2002.

<sup>116</sup> No CAB/MIN/AF.F-E.T/262/2002 of 3 October 2002.

<sup>117</sup> Chapter II section 1 pertaining to the permit types of the By-law No CAB/MIN/AF.F-E.T/262/2002 of 3 October 2002

<sup>118</sup> Chapter 3 of the Act No 82-002 of 28 May 1982 on Hunting Regulation.

<sup>119</sup> No 81-013 of 2 April 1981.

<sup>120</sup> Article 94 paragraph 1 of the Constitution.

<sup>121</sup> No 82-002 of 28 May 1982.

<sup>122</sup> Article 8 of the Constitution.

### 3.2.2 *The principle of legality*

The exercise of administrative actions is subjected to the principle of legality.<sup>123</sup> All administrative actions or decisions must comply with the law, but may in the event of unlawfulness be challenged or subjected to internal administrative review or appeal through an administrative process. Judicial review by the courts usually constitutes the final resort for legal redress. It has been stated that the principle of administrative legality, which underlies the exercise of all administrative powers entails that the administration is bound by the law to promote the public interest and to recognize and protect individual rights and liberties.<sup>124</sup>

In this context, administrative bodies and their officials, despite their discretionary powers, can never override the fundamental right of a person to a clear and healthy environment and such related rights as the rights to access to information and to lawful and fair administrative action, unless special circumstances exist in terms of the Constitution (limitations of the rights).<sup>125</sup> The Supreme Court of Justice must declare whether the urgent measures justifying the limitation of the rights are consistent with the Constitution as a whole.<sup>126</sup>

### 3.2.3 *Administrative control and remedies*

Various methods whereby administrative actions can be challenged or controlled have been put in place to give effect to the requirements of administrative legality. As a result of the authoritative public law relationship, private individuals are in a subordinate position in this relationship, and in exercising its administrative action the state must ensure it does not use its superior position to infringe unnecessarily upon the

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<sup>123</sup> Articles 8 and 63.

<sup>124</sup> Chapus R *Droit administratif général* (2000) T.1 14eme éd. Montchrestien Paris 989; Burns Y *Administrative Law under the 1996 Constitution* (2003) 2<sup>nd</sup> ed. Butterworths Durban 270.

<sup>125</sup> A state of emergency may be presented as a circumstance which may justify the limitation of rights, but one must not ignore that any legislation enacted in consequence of a declaration of a state of emergency may derogate from the public liberties and rights only to the extent that the derogation is strictly required by the emergency and the legislation is consistent with the Constitution. Article 62.

<sup>126</sup> Article 136 of the Constitution.

environmental rights of the individual.<sup>127</sup> On the other hand, it is equally important that individuals are called upon to conduct themselves in compliance with administrative environmental obligations. To this effect, administrative bodies are conferred with the power to put in place administrative regulations that can be challenged through the process of administrative appeal.

### 3.2.3.1 Administrative regulations

Among the regulations one may mention the abatement notice procedure, the administrative suspension or cancellation of authorization, detention as security and investigation and seizure.<sup>128</sup>

### 3.2.3.2 Internal administrative control on environmental affairs

The internal appeal lies only in respect of purely administrative actions and for individual cases. These purely administrative actions have to be seen as those actions, which are performed by the administration for the purpose of creating, varying and terminating individual administrative law relationships. This would automatically exclude legislative acts because these, as a rule, relate only to general relationships, as well as judicial acts, whose aim is to determine the content of existing individual relationships finally and authoritatively. The term ‘purely administrative action’ is thus used to indicate the normal activities of the organs of the executive in the state.<sup>129</sup>

Internal administrative control over administrative actions is exercised by the administration itself (internal review and appeal), and comprises both an appeal to a higher body in the same administrative hierarchy and a *mero motu* review by that body

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<sup>127</sup> Burns Y *op. cit.* (n 124) 269.

<sup>128</sup> Section 5 on Regulation and restriction, articles 31, 32, 33, 34, 35, 36 and title 3 on Private Forests articles 37, 38, 39, 40, 41, 42, 43 of the Decree of 11 April 1949 on Forestry Regime; Article 88 of the Act No 82-002 of 28 May 1982 on Hunting Regulation.

<sup>129</sup> Wiechers M *Administrative law* (1985) Butterworths Durban 115.

(*recours hiérarchique*).<sup>130</sup> In the main, it takes the form of a rehearing and re-evaluation of the actions of subordinates by senior administrators and takes place when the validity, desirability, or efficacy of administrative action is reconsidered by a superior organ.<sup>131</sup> The aggrieved subject can also approach the author of the act through the so-called *recours administratif gracieux*<sup>132</sup> as provided by article 90 of the Ordinance Law No 81-013 of 2 April 1981 on General Legislation on Mines and Hydrocarbon to withdraw or repeal the act. Internal control occurs generally within the relationship of deconcentration. The superior administrator controls the actions of the subordinate by examining the manner in which the function was executed. He or she may examine the validity of the action in question, as well as its desirability or efficacy, and the subordinate administrator will have to accept the superior officer's action.<sup>133</sup> For instance, in terms of article 12 of the Decree of 12 July 1932 on Fishing Regulation Concessions, a decision of the provincial governor may be subject to an appeal in the time frame of 3 months before the general governor must decide in the last resort.

Admittedly, this form of control is potentially the most comprehensive since all aspects of the environmental dispute are subject to control in a society based on the defence and promotion of fundamental human rights and values. Obviously, the spirit and philosophy defined in the Preamble to the Constitution of the DRC to build an '*Etat de droit*' is not far from this understanding.

Internal administrative control of administrative actions, particularly relating to environmental matters, must be distinguished from appeal to an independent judicial administrative body, the so-called 'administrative appeal' to an administrative tribunal.

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<sup>130</sup> De Laubadere A, Venezia JC and Gaudmet Y. *Traité de Droit administratif* (1988) T1, 10th éd. Librairie générale de Droit et de Jurisprudence Paris 516.

<sup>131</sup> Wiechers M *op. cit.* (n 129) 104.

<sup>132</sup> De Laubadere A *et al. op. cit.* (n 128) 516.

<sup>133</sup> Burns Y *op. cit.* (n 124) 277.

### 3.2.3.3 *Administrative tribunals*

Administrative tribunals are currently part of the administrative machinery of government and have become a prominent feature of democratic society. Their function involves the protection of individual rights and freedoms to ensure that public policy is applied.<sup>134</sup> Neither the judicial nor administrative system of the DRC provides for a separate administrative tribunal or environmental tribunal. Environmental matters of an administrative nature are subject to the competence of the courts and tribunals.<sup>135</sup>

### 3.2.4 Judicial control over administrative environmental actions and remedies

Before we start to examine the judicial control of administrative actions relating to environmental affairs and legal remedies provided for in the Congolese context, it seems useful to have a look at the organization and structure of the judicial system of the DRC.

#### 3.2.4.1 *Organization and structure of the judicial system of the Democratic Republic of Congo*

In terms of the Constitution, the judicial authority is vested in the courts and tribunals (Supreme Court of Justice, Courts of Appeal, Tribunals of Higher Instance and Tribunals of Peace).<sup>136</sup> The Courts and Tribunals are independent *vis-à-vis* the legislature and the executive.<sup>137</sup> The same judges examine all administrative, civil, criminal, labour, environmental and other matters.<sup>138</sup> The Court of Appeal comprises two sections: the judicial section and the administrative section while the Supreme Court of Justice comprises three sections: the judicial section, the administrative section and the section of legislation. The administrative section of the Court of Appeal examines in the first resort the appeal for violation of the law, submitted or formed against the acts or decisions of

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<sup>134</sup> Baxter L *Administrative law* (1984) Juta Cape Town 263.

<sup>135</sup> Ordinance Law No 82-020 of 31 March 1982, J.O No 7 of 1<sup>st</sup> April 1982 completed by Ordinance Law No 83/009 of 29 March 1983, J.O No 7 of 1<sup>st</sup> April 1983, Chapter III.

<sup>136</sup> Article 148 of the Constitution.

<sup>137</sup> Article 147.

<sup>138</sup> Ngondankoy Nkoy-ea-loongya *Droit Congolais des droits de l'homme* (2004) Bruylant Belgium 368

provincial and local administrative authorities. The administrative section of the Supreme Court of Justice examines in the first and last resort the appeal for violation of the law, submitted or formed against the acts, regulations and decisions of the Court of Appeal (administrative section). The Supreme Court of Justice is also competent to grant reparation or damages to exceptional prejudice.<sup>139</sup> The competence of the Supreme Court of Justice is reinforced by article 150, paragraph 3, of the Constitution, which provides that ‘...The Supreme Court of Justice is competent to examine appeals in annulment of central authorities acts and decisions of the Republic...’

#### *3.2.4.2 Legal standing and other requirements for the employment of legal remedies aimed at controlling administrative actions*

Articles 22 and 31 of the Constitution open the door to legal standing in the DRC to those wishing to litigate human rights issues (including environmental rights). Anyone acting individually or collectively has the right to introduce a petition against the public authorities before a competent court if the conditions established by the law alleging that a right contained in the title on the public liberties, rights and fundamental duties of citizens has been infringed or threatened. Through these provisions, which appear to be the basis of any claim that can be formulated before the court against any administrative action that threatened the enjoyment of environmental rights, the stage has been set for the courts to play a pioneering role in developing a body of environmental rights jurisprudence.

But it is important to bear in mind that before the legal remedies aimed at controlling the actions of public authorities may be sought, various procedural requirements must be met. It has been held that the administration itself is in the best position to remedy its mistakes.<sup>140</sup> Thus, internal administrative remedies should be exhausted before an aggrieved person approaches the civil courts, which represent a separate form of control foreign to the internal structure of an administration (*recours gracieux et recours hiérarchique*). It is only after this process that courts (administrative sections of the Court

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<sup>139</sup> Articles 43, 54, 146, 147, 148 and 149 of Ordinance No 82-020 of 31 March 1982 on the Organization and Judicial Competence Code of 1 April 1982 completed by Ordinance No 83/009 of 29 March 1983.

<sup>140</sup> Burns Y *op.cit.* (n 124) 290.

of Appeal and the Supreme Court of Justice) will be competent to assist in the interpretation of fundamental rights, such as environmental rights, where they are in question.

### 3.2.4.3 *The interdict and mandamus*

The interdict and mandamus are also important remedies in the process of judicial control over administrative actions. Where an applicant can prove that any action or proposed action by the administration will be to his or her detriment and will encroach upon his or her rights, an interdict may be sought. An interdict may be final or temporary and is aimed at preventing unlawful administrative action or threatened unlawful action. Wiechers considers an interdict as a decree whereby the administrative organ is ordered to desist from an act or course of conduct, which is causing direct prejudice to the applicant and constitutes an encroachment on his rights.<sup>141</sup> Conventionally, administrative bodies do not use the remedy of an interdict in the case of persons failing to comply with legislation. One of the reasons is that legislation usually provides methods for securing compliance with the legislation, like criminal sanctions, and that an interdict is a common law remedy which is available only where there is, for example, no other suitable remedy available to the applicant.<sup>142</sup>

The mandamus is a legal remedy, which is aimed at compelling an administrative organ to perform a prescribed statutory duty. For instance, a mandamus may be sought to compel the administrative organ to exercise its statutory discretionary power but not to prescribe to it how to exercise the discretion. Admittedly, an interdict and a mandamus are the two sides of the same coin; unauthorized action is prevented by means of an interdict and compliance with a statutory duty is enforced by means of a mandamus.<sup>143</sup> The interdict is a valuable remedy in the field of environmental law since it regulates future conduct, for example, an imminent act of air pollution may be prevented by the issuance of an interdict, which thus prevents damage to the environment. For instance, in

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<sup>141</sup> Wiechers M *op. cit.* (n 129) 267.

<sup>142</sup> Kidd M *op. cit.* (n 24) at 25.

<sup>143</sup> Wiechers M *op. cit.* (n 129) 268.



terms of article 39 of the Decree of 11 April 1949 on the Forestry Regime, the tribunal may forbid for a period not beyond 5 years the granting of authorisation to exploit the forest to anyone convicted for violation of the Decree.

#### *3.2.4.4 Judicial review and statutory appeal*

Judicial review and statutory appeal are important ways to reinforce the principle of legality in a democratic society. One argues that the function of a review court is to examine the legality of administrative actions. The review court determines whether the requirements of administrative justice, namely lawfulness, procedural fairness and reasonableness have been complied with while the function of a court of appeal is to determine whether the decision taken by the administrator is right or wrong. In terms of articles 43, 54, 94, 95, 98, 114, 115, 146, 147, 148 and 149 of the Ordinance Law<sup>144</sup> on the Organization and Judicial Competence Code, the administrative sections of the Court of Appeal and of the Supreme Court of Justice play a key role on these matters in the DRC. The evidence is that not only the courts must take into account the requirements of administrative legality but must, further, apply environmental criteria in their decision-making because of the inclusion of the right to environment in the Constitution.

#### *3.2.4.5 Statutory criminal sanctions*

Criminal sanctions are by far the most important and extensively used sanctions in environmental disputes where specific legislative provisions have been contravened.

As a subsidiary sanction, an administrative measure of control will be used in the first instance to ensure compliance with a legislative prescript. A criminal sanction (penalty) is only invoked as a last resort if and when administrative control has failed.<sup>145</sup> It is in this perspective that, for example, criminal sanctions are provided for by the Law No 82-002 of 28 May 1982 on Hunting Regulation through articles 85, 86, 87 and 88. The tribunal

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<sup>144</sup> No 82-020 of 31 March 1982 on Organization and Judicial Competence Code of 1<sup>st</sup> April 1982 completed by ordinance Law No 83/009 of 29 March 1983 of 1<sup>st</sup> April 1983.

<sup>145</sup> Bray W *op. cit.* (n 23) at 98.

may decide to cancel a hunting permit or disqualify the accused from obtaining another permit for a period of 5 years. In the same way, an array of (criminal) sanctions are laid down in chapter 6 of the Decree of 12 July 1932 on the regulation of fishing concessions when the concessionaire does not respect their obligations. It is only after the exercise of administrative control (exhaustion of administrative procedure provided for by chapters 4 and 5 of the Decree) that criminal sanctions are applied as a last resort.

The use of criminal sanctions as an indirect sanction has some consequences. It is far easier to prove the elements of a crime such as engaging in an activity without a licence, or disobeying an administrative direction, than it is to prove that the accused has committed a certain kind of environmentally detrimental activity. In using a criminal sanction as an indirect sanction, it is not necessary to wait until the detrimental conduct has actually occurred before action can be taken. The use of a criminal sanction in an indirect manner means that criminal law is contributing towards the application of administrative controls. If administrative controls are exercised inefficiently, the shortcomings of environmental administration will be automatically transferred to criminal law enforcement.<sup>146</sup>

### 3.2.5 Other mechanisms of protection and promotion of environmental rights in the Democratic Republic of Congo

Other important mechanisms for the protection and promotion of environmental rights, and which are guaranteed by the Constitution, have been in existence in the DRC through different institutions.

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<sup>146</sup> Bray W *op. cit.* (n 23) at 98.

### 3.2.5.1 *The Ministry of Human Rights*

The Ministry of Human Rights plays a significant role in the promotion of human rights in the country. The functions allocated to this Ministry show clearly what is expected from this institution:

- promotion and protection of human rights and fundamental liberties;
- dissemination of human rights;
- oversee that human rights are respected;
- examination of cases of human rights violation through appropriate mechanisms such as those offered by the Mediation in Human Rights Matters and Control Commission, but without replacing (substituting) the role of the courts, tribunals or administrative procedures provided by the law;
- collaboration with the High Commission of Human Rights, the African Commission on Human Rights and other national, regional and international institutions competent in human rights matters.<sup>147</sup>

The Ministry of Human Rights is also called ‘Mediator of the Republic’<sup>148</sup> because of the significant role it plays in the field of human rights in the country. The understanding seems to be not far from the institution of ‘ombudsman’ as it operates in Sweden and other Scandinavian countries. However, this conception has been subject to criticism because the Ministry cannot perform the role of the ‘protection’ of human rights if it is not independent vis-à-vis the government. As a structure of government, it may be difficult for this institution to control violations of human rights by administrative authorities. Furthermore, the status of the Minister (a member of the government, who is appointed and dismissed by political or administrative authority) may not, obviously, allow him to exercise the function of protector of human rights with complete independence.

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<sup>147</sup> Article 1 B 7 of the Decree No 003/027 of 16 September 2003 on the Attributions of Ministries.

<sup>148</sup> Ngondankoy *op.cit.* (n 138) 400.

### 3.2.5.2 *The National Observer of Human Rights*

The National Observer of Human Rights (*Observatoire National des Droits de l'Homme*) is one of the state institutions supporting democracy in the country and whose mission it is to promote and protect human rights.<sup>149</sup> Until legislation has been promulgated on the organization and responsibilities of this institution as requested by the Constitution,<sup>150</sup> the Resolution of 9 April 2002 which creates this institution defines further the 'missions' of the National Observer of Human Rights, namely:

- to control the application of national, regional and international norms pertaining to human rights;
- to recommend and facilitate the ratification or adherence of the DRC to treaties relating to human rights;
- to look after the application of international instruments pertaining to the promotion and protection of human rights;
- to inform citizens about their rights;
- to examine the internal legislation on human rights concerns and to make recommendations;
- to guarantee the enjoyment by the citizens of individual and collective rights;
- to favour the installation of a real '*Etat de droit*';
- to promote the associations for the defence of human rights;
- training of human rights activists, to ensure their protection and to guarantee their status;
- to create a Commission for the Protection of Children and Women.<sup>151</sup>

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<sup>149</sup> Articles 154, 155 of the Constitution.

<sup>150</sup> Article 160.

<sup>151</sup> Ngondankoy N *op. cit.* (n 138) 415.

### 3.3 Conclusion

Experience has shown that since independence (30 June 1960), public authorities are less and less committed to being bound by the law, and, more specifically, by the legislation on environmental concerns. This attitude may be explained by the politics that characterized the country during the First Republic (1960-1965) and the Second Republic (1965-1990). After independence in 1960, the country was seriously disrupted by socio-political conflicts that ended in the *Coup d'état* of President Mobutu Sese Seko in 1965. No specific duty was placed upon state organs or institutions, in the light of the Constitution, to abide by the Bill of Rights (which contained only first generation rights) and no sanction or remedy was provided for cases where these rights might be infringed or threatened.<sup>152</sup> The President of the Republic was the only holder of governmental power, as Legislator, Judge and Executive Officer. Other organs were to advise or assist the President in the exercise of the power that allegedly emanated from the people.<sup>153</sup> Still experiencing the repercussions of the preceding regime, which did not uphold the separation of powers or the practice of judicial review, and combined with the effects of the war, those who currently govern the country seem to believe that this transitional period is a time of arbitrariness. Despite the administrative measures contained in the legislation that binds officials in terms of environmental matters, the constitutional rights guaranteed to the people, are not yet living rights. The people and the courts are at the mercy of the political rulers' whims.

For a certainty, the main weaknesses of the environmental legislation are due to the lack of specific courts or tribunals to enforce environmental matters, the people's ignorance of the law in spite of the maxim *'nemo censetur ignorare legem'*<sup>154</sup> proclaimed by the Congolese legislation, a lack of judicial familiarity with public interest litigation, and the failure of the government to set up appropriate machinery to implement the constitutional duty, are all reasons which explain the scarcity of jurisprudence on environmental matters

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<sup>152</sup> Mangu AMB *op. cit.* (n 51) 389.

<sup>153</sup> Article 9 of the Amendment of the Constitution of 1967 of 1974.

<sup>154</sup> Mugarukirangabo R 'Quelques réflexions sur le fondement du principe *'nemo censetur ignorare legem'* et son application pratique en République Démocratique du Congo' (2002) No 1 *Analyste Topique* Université Libre des Pays des Grands lacs 'ULPGL' 19-26 at 19.

in the DRC. The challenge to the judiciary to flesh out the content of the right to a healthy environment and so ensure that this right remains real is a daunting one.

Finally, the implementation and enforcement of environmental rights in the DRC remains poor. A closer look at the priorities on the political agenda reveals that political leaders do not yet take into account environmental concerns. There is an urgent need to put Parliament under pressure to pass legislation which gives effect to the environmental rights contained in the Constitution and to improve the environmental regulations already in force, otherwise, it will be difficult to overcome the increasing degradation of the environment, and the opportunity to preserve the rights of present and future generations to a healthy environment as guaranteed by the Constitution will be lost.

Considering the neglect that characterizes the process of implementation and enforcement of the regulatory environmental framework in the DRC, can guidance for some improvement be taken from the South African experience?

### **3.4 Regulatory framework for environmental management in the Republic of South Africa**

South Africa has a much larger regulatory framework for environmental management than the DRC. However, it is only after the apartheid regime and the introduction of new legislation in terms of the Constitution that the proper implementation and enforcement of environmental rights have become a reality.

#### **3.4.1 General background**

Environmental concerns are relatively modern and were not of prime importance in the traditional legal systems of South Africa. Most of the legal sources on environmental management are found in relatively 'modern' legal sources, namely written law. The Constitution and legislation (statutes or laws) as written laws are considered the most

important sources of environmental management. Case law (courts decisions), common law and customary and indigenous law are also classified as part of the sources of law in the RSA. The Constitution is the supreme law of the country,<sup>155</sup> it guarantees the right to environment and establishes the principal framework for the administration of environmental law in terms of which other legislation has to be interpreted.<sup>156</sup> The Bill of Rights includes not only an environmental right, which prompts the development of environmental legislation, but also a number of other clauses which are relevant and supportive to the subject. Legislation is found in a multiplicity of statutes and administrative legislation, namely: regulations, proclamations and departmental rules. These are either general in nature such as the National Environmental Management Act (NEMA),<sup>157</sup> or those dealing with specific resources such as the National Water Act 36 of 1998. NEMA is, to date, the only true environmental framework law.<sup>158</sup> It contains important principles that not only provide a framework and guidelines for environmental policy-making and implementation, but also aids in the interpretation, administration and implementation of any act or law concerned with the protection or management of the environment.<sup>159</sup> NEMA is an Act of particular importance to environmental management and has an ‘umbrella’ role. In effect, responsibility for the administration of environmental law is largely in the hands of the provinces, subject to the power of the national government to lay down national policy, promulgate national legislation which could override provincial environmental legislation in a number of circumstances.<sup>160</sup> However, control over key natural resources such as water, fisheries and minerals is retained at national government level. The case law refers to the judicial decisions of the courts, and it is another important source of environmental law. Further, an important number of common law and customary law rules dealing with environmental management have, currently, been incorporated in the legislation. South African environmental law has been influenced by international law. Taking into account the fact that treaties are considered as the most important source of international law, South

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<sup>155</sup> Section 2 of the Constitution of the RSA of 1996.

<sup>156</sup> Section 24 of Act 108 of 1996.

<sup>157</sup> Act 107 of 1998 of the RSA.

<sup>158</sup> Nel and Du Plessis ‘An evaluation of NEMA based on a generic framework for environmental framework legislation’ (2001) 8 *SAJELP* 1-33 at 2.

<sup>159</sup> Section 2 (1) (b) (c) and (e) of NEMA.

<sup>160</sup> Peart R and Wilson J *op. cit.* (n 80) at 243.

Africa is a party to many international treaties, which require cooperation with other nations to protect the environment. For instance, South Africa was one of the original 12 founding members of the Antarctic Treaty in 1959.<sup>161</sup> In terms of the Constitution, in resolving South African cases, the courts must look for guidance to international law sources, particularly regarding cases or fields of law they have not dealt with before, for example, human rights issues including environmental rights. Courts may also refer to foreign law where applicable.<sup>162</sup>

### **3.5 Implementation and enforcement of environmental rights in the Republic of South Africa**

The implementation and administration of environmental legislation are firmly in the hands of the government departments in the three spheres of government performing functions that involve the management of the environment (the Department of Environmental Affairs and Tourism, Department of Water Affairs and Forestry, Department of Minerals and Energy, Department of Land Affairs, Department of Health and Department of Labour)<sup>163</sup> Government institutions or functionaries (e.g. the Minister, Premier, Director-General, Head of Department, Officials and Committees) and other institutions or functionaries who perform public functions in terms of environmental legislation, such the South Africa National Parks (formerly the National Parks Board), and the Council for Nuclear Safety. In this respect, section 11 of NEMA requires relevant national departments and provincial governments to furnish environmental implementation plans and environmental management plans within one year of promulgating the Act and at least every four years thereafter. The Committee for Environmental Co-ordination, established by section 7 of NEMA, takes responsibility for aligning environmental implementation plans and environmental management plans and promoting their implementation; each provincial department must ensure that municipalities adhere to the relevant environmental implementation and management plans in the preparation of any policy, programme or plan (section 16 (4) (a) and (b) of

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<sup>161</sup> Glazewski J *Environmental law in South Africa* (2005) 2<sup>nd</sup> ed. Butterworths Durban 42.

<sup>162</sup> Sections 39 and 233 of the Constitution.

<sup>163</sup> Section 11 (2), Schedule 2 of NEMA.



NEMA). In the light of the principle of cooperation in environmental administration,<sup>164</sup> cooperative government means that environmental administration is not only exercised by the national government, but also by the provincial and local spheres with the intention of bringing the governance of environmental matters as close as possible to the people. Obviously, the intention is one of decentralisation of environmental administration. The Constitution allocates a number of environmental functions to provincial government.<sup>165</sup> However, most functions are shared between the national government and the provincial governments. Local government also shares most of its environmental functions with the national and provincial government.<sup>166</sup>

It seems clear that the effectiveness of environmental legislation cannot be realised without the cooperation and interaction between the legislative and the executive organs within each sphere of government. Furthermore, the Constitution has made it obligatory for all spheres of government to work in a cooperative, open, transparent and accountable manner in order to administer environmental matters effectively.<sup>167</sup> Courts are always the final forums for enforcement of the law and their decisions are authoritative, final and binding.

Almost all environment-related statutes endow administrative officials and authorities with extensive decision-making and enforcement powers. Thus, it is important that the public be assured that these powers are properly exercised in accordance with the law as a whole.

### 3.5.1 Powers of administrative bodies

The environmental legislation provides a variety of powers conferred on public bodies and officials.

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<sup>164</sup> Chapter 3 of the Constitution on Co-operative Government and Chapter 3 of NEMA on the procedure for co-operative governance.

<sup>165</sup> Schedule 5 part B of the Constitution.

<sup>166</sup> Glazewski *J op. cit.* (n 161) 109.

<sup>167</sup> Chapter 3 of the Constitution.

### 3.5.1.1 Extensive powers

The bodies themselves regulate extensively, in the public interest, the use of the national resources that are entrusted to their care. This is the case of the National Parks Act 57 of 1976<sup>168</sup> in terms of which the South Africa National Parks (formerly National Parks Board) is entrusted with the control and management of national parks. Similarly, in terms of the Conservation of Agricultural Resources Act 43 of 1983, the Minister has discretion to act, as he or she deems necessary with regard to soil and water conservation and the control of weeds and invader plants, in order to achieve the objectives of the Act.

### 3.5.1.2 Powers to legislate and to authorise specific performance

In many cases statutes delegate power to executive officers such as the State President, Minister, Premier or Members of the Executive Council to make subordinate legislation in the form of regulations, proclamations or departmental notices. For instance, in terms of section 44-45 of NEMA, the Minister may make regulations on any matter under the Act in respect of different activities, provinces, geographical areas and owners, or classes of owners of land. The Minister may also issue regulations concerning procedures for the conclusion of environmental management cooperation agreements, which must include procedures for public participation, requirements relating to the furnishing of information and other relevant matters.

In the case of the authorization function, provisions that enable bodies to authorise individuals to perform actions which would otherwise be prohibited or restricted, mean that the public body has a discretion to permit or forbid potentially harmful conduct and to determine conditions for its performance. Thus, in terms of the Nuclear Energy Act 131 of 1993,<sup>169</sup> for example, licences are requested with regard to activities related to nuclear installations, sites and hazardous nuclear material.<sup>170</sup>

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<sup>168</sup> The National Parks Act 57 of 1976 has been repealed (except section 2(1) and schedule 1) and replaced by the National Environmental Management: Protected Areas 57 of 2003.

<sup>169</sup> The Nuclear Energy Act 131 of 1993 has been repealed and replaced by Act 46 of 1999.

<sup>170</sup> Kidd M *op. cit.* (n 24) 19.

### 3.5.1.3 Power to execute

In some cases, a public body may itself execute the provisions of legislation. For instance, one may refer to the terms of sections 20 and 25 (3) (c) of the Sea Fishery Act 12 of 1988<sup>171</sup> regarding the granting and termination of rights of exploitation. A right to exploit fish may be suspended or terminated by the Minister if he is of the opinion that a conviction of an exploiter of an offence in terms of this Act is such that his continued participation is no longer in the interest of either the resource in question or the industry in question or the resource and the industry.

From the powers granted to the administrative bodies, one notices that the entire field of environmental administration operates within the wider constitutional and legislative context, which means that all administrative rules and regulations and action (administrative action) taken must ultimately be in line with the provisions of the Constitution.

### 3.5.2 The principle of legality

The general principle of legality, which is the cornerstone of all administrative action within the state, also applies within the administration of environmental rights. It requires compliance with certain specific conditions for validity, which apply to all administrative action.

In South Africa, the requirements for administrative legality are laid down in the Promotion of Administrative Justice Act (PAJA), 2000. This Act, takes into account the requirements relating to the author of the administrative action; the requirement relating to the purpose of the action; the requirement relating to the consequences of the action; and the requirement of good faith.<sup>172</sup>

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<sup>171</sup> The Sea Fishery Act 12 of 1988 has been repealed by section 84 of the Marine Living Resources Act 18 of 1998, except for section 1 (in its application to sections 29, 38, 47 and 50 (1), (2) and (3), 29 and 38, 47, 48, 50 (1) (2) and (3) (in their application to shells).

<sup>172</sup> Section 6 of PAJA.

The mechanisms of control of administrative action in cases where the requirements of administrative legality laid down in section 6 of PAJA have not been complied with remain important tools that protect and promote the human rights guaranteed by the Bill of Rights. One should remember that section 8(1) of the Constitution states that the Bill of Rights applies to all law and binds the legislature, the executive, the judiciary and all organs of the state. Consequently, the state is prohibited from infringing fundamental rights (including environmental rights), and any such infringement will be unconstitutional unless it falls within the ambit of the limitation clause. In terms of section 36 of the Constitution, the limitation must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.<sup>173</sup>

Various mechanisms in which the validity of an administrative action affecting environmental rights has been put in place. Obviously, these mechanisms serve to ensure transparency, accountability and openness in the young South African constitutional democracy.

### 3.5.3 Administrative control and remedies

Administrative control constitutes an integral part of the day-to-day running of the administration responsible for environmental matters. Different administrative bodies and officials as defined above<sup>174</sup> exercise control, and remedies are available to aggrieved persons.

#### 3.5.3.1 *Administrative regulation*

To ensure that individuals comply with their administrative environmental rights and obligations, administrative bodies are called to put in place administrative regulations,

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<sup>173</sup> A state of emergency that may be evoked as a ground for the limitation of rights is subject to an Act of Parliament. Any legislation enacted in consequence of a declaration of a state of emergency may derogate from the Bill of Rights only to the extent that the derogation is strictly required by the emergency and the legislation is consistent with the Republic's obligations under international law applicable to states of emergency. Section 37 of the Constitution.

<sup>174</sup> On page 53 point 3.5.1.

which must be published in official publications (e.g. the *Government Gazette* and the *Provincial Gazette*) to inform the public about what the administrative bodies expect of them. Unfortunately, despite the publications, most individuals do not have easy access to such publications, and, furthermore, a certain percentage of South African people are illiterate. The presumption of the knowledge of the law posed by the maxim ‘*nemo censetur ignorare legem*,’ (ignorance of the law is no excuse) has been sharply criticised in terms of environmental matters. For example, Snyman notes, ‘Nobody, not even the most brilliant full-time lawyer, could keep abreast of the whole of the law, even if he reads statutes, government gazettes and law reports from morning till night.’<sup>175</sup>

#### Abatement notice and directives:

This procedure empowers certain administrative bodies to serve a notice and/or directives requiring offenders to stop, within a specific time, activities which are detrimental to the environment. Failure to comply with the notice usually amounts to an offence. This power to issue abatement notices is usually accompanied by a provision allowing the official to take steps to remedy the situation upon default by the offender, and allowing the costs of such action to be recovered from the offender. A directive is (section 28 of NEMA) where the authorities may require various stipulated measures to be taken to clean up or prevent pollution.<sup>176</sup> A number of aspects of section 28 as well as a number of other aspects concerning pollution regulation was considered in *Hichange Investments (Pty) v Cape Produce Company (Pty) Ltd/ a Pelts Products, and Others*,<sup>177</sup> concerning the emission of chemical waste products by the respondent tannery in various forms. Judge Leach considered the meaning of ‘significant’ in the context of subsection 28(1) and stated that ‘the assessment of what is significant involves a considerable measure of subjective import ... and ... that the threshold level of significant will not be particularly high’. By so doing he corroborated the view that ‘significant pollution’ must be considered in the light of the constitutional rights to an environment conducive to health and well-being.<sup>178</sup> As one may notice, the *Hichange* case has much in common with

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<sup>175</sup> Snyman CR *Criminal law* (2002) 4th ed. Butterworths Durban 202.

<sup>176</sup> Glazewski J *op. cit.* (n 161) 125.

<sup>177</sup> 2004 (2) SA 393 (ECD).

<sup>178</sup> Glazewski J *op. cit.* (n 161) 150.

*Woodcarb*.<sup>179</sup> The generation of smoke in the circumstances defined before the court, in the teeth of the law, as it were, is an infringement of the rights of the respondent's neighbours to an environment which is not detrimental to their health or well-being.

Administrative suspension or cancellation of authorisation:

These procedures are found in the Nuclear Energy Act of 1993 in which a powerful sanction, a discretionary suspension or cancellation of authorization which may be available to an administrative body is where the holder's non-compliance with such authorization or the public interest demands such a suspension or cancellation.

Detention as security and investigation and seizure:

Having a look at the procedure found in the Prevention and Combating of Pollution of the Sea by Oil Act of 1981, administrative bodies are authorized to seize and detain objects involved in situations, which pose a danger to the environment, pending the payment of costs for which the owners are liable. Administrative bodies are also authorized sometimes to enter premises, search vehicles and conduct examinations to ascertain whether environmental prescriptions have been complied with. They are empowered to seize anything that may furnish proof of any contravention of these provisions.<sup>180</sup>

### 3.5.3.2 *Internal administrative control*

Internal administrative control or the extra-judicial control encapsulates important administrative methods used by administrative bodies to ensure compliance with administrative (environmental) prescriptions. Administrative decisions (their validity and merit) are subject to internal appeal to a higher administrative body or official within the same hierarchy (e.g. the director general or minister) or an appeal to an administrative tribunal outside the particular hierarchy.<sup>181</sup> Certain statutes provide for appeals against administrative decisions, which are heard and decided either by more senior officials or by administrative bodies established for the hearing of appeals or, further, control by

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<sup>179</sup> *Minister of Health and Welfare v Woodcarb (Pty) Ltd* (1996) (3) SA 155 (N).

<sup>180</sup> Bray W *op. cit.* (n 23) at 88.

<sup>181</sup> Burns Y *op. cit.* (n 124) 279.

environmental tribunals. For example, the Environment Conservation Act of 1989 allows for administrative appeals where appeals against certain decisions may be taken to the Minister or competent authority.<sup>182</sup> An appeal to Minister is also provided by section 43 of NEMA.

### 3.5.3.3 Administrative tribunals and environmental tribunals

Administrative tribunals, which offer a speedy, cheap and accessible system of justice to those aggrieved by an administrative action, are created by statute and their powers and functions is laid down in an empowering statute. One could argue that up to now, the establishment of administrative tribunals in South Africa has been done on an *ad hoc* basis and no coherent system exists.<sup>183</sup>

A limited number of environmental tribunals have been established. The Development Facilitation Act of 1995 establishes, for example, special development tribunals.<sup>184</sup>

### 3.5.4 Judicial control and remedies

First of all, one must know that, in reality, judicial control over administrative actions remains additional to internal control and is a form of control which is foreign to the internal structure and operation of the administration.<sup>185</sup> To show an understanding of judicial control and the remedies provided in South Africa, it seems useful to present briefly the organization and structure of the judicial system of the country.

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<sup>182</sup> Section 35 of the Environment Conservation Act 73 of 1989.

<sup>183</sup> Bray W *op. cit.* (n 23) at 90.

<sup>184</sup> Sections 15-26. Special development tribunals are established in the provinces to, *inter alia*, grant interim relief, make final decisions or refer to conciliation a wide range of matters relating to land development.

<sup>185</sup> Wiechers W *op. cit.* (n 129) 270.

### *3.5.4.1 Organization and structure of the South African judicial system*

In terms of section 165 of the Constitution, the courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice. All organs of state must assist and protect the courts to ensure their independence and impartiality. The judiciary system embodies an important number of courts. These courts are, in terms of section 166 of the Constitution: the Constitutional Court (highest court); the Supreme Court of Appeal; the High Courts, including any high court of appeal that may be established by an Act of Parliament to hear appeals from High Courts; the Magistrates' Courts; and any other court established or recognized in terms of an Act of Parliament, including any court of a status similar to either the High Courts or the Magistrates' Courts. The Supreme Court of Appeal may decide appeals in any matter. It is the highest court of appeal except in constitutional matters, and may decide only appeals, issues connected with appeals, and other matters that may be referred to it in circumstances defined by an Act of Parliament.<sup>186</sup> The High Court applies legal rules and principles to determine whether the decisions the administration has taken were taken in a fair manner and whether the decisions taken are reasonable. The High Court has the power to either confirm the administrative decision taken by the official, amend or repeal it, refer it back to the official (or body) for reconsideration, or make a decision itself. Courts are, after all, the 'watchdog' of the democratic principles and values enshrined in the Constitution. It is, therefore, essential that courts and the officers presiding in court remain independent and free from undue influence.

### *3.5.4.2 Legal standing and other requirements for the employment of legal remedies aimed at controlling administrative environmental actions*

Legal standing or the *locus standi* rule has been a basic rule of all legal systems and means that a party may take a matter to court only if he or she has an identifiable interest in the outcome of the case. This requirement that individuals must show personal interest in administrative action under challenge has traditionally been an impediment to those

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<sup>186</sup> Section 168 of the Constitution.



wishing to litigate in environmental matters in South Africa.<sup>187</sup> The new constitutional order has broadened the scope of the legal standing of individuals and groups to seek relief in matters involving fundamental rights, for example environmental rights. The enforcement of rights guaranteed in section 38 of the Bill of Rights dramatically changes the situation by setting out the persons who may approach a competent court alleging that a right in the Bill of Rights has been infringed or threatened. Thus, in terms of section 38 of the Constitution, any person or organization may enforce the rights contained in the Bill of Rights, irrespective of whether that person or organization is affected personally by the alleged infringement or rights. This may arise in both a private law and in a public law situation where the individual has been aggrieved by an action or decision by a public authority.

In NEMA, the scope of *locus standi* has been further extended. The Act provides that any person or group of persons may now approach a court regarding an infringement or threatened infringement of any provision of the law concerned with the protection of the environment or the utilisation of natural resources.<sup>188</sup> Apart from the persons or bodies entitled to approach the court in terms of section 38 of the Constitution, any person or group of persons may now, in terms of the Act, seek appropriate relief in the interest of protecting the environment.

PAJA endorses the approach of wide legal standing. Section 6(1) provides that ‘any person may institute proceedings in a court or tribunal for the judicial review of an administrative action.’

Glazewski<sup>189</sup> notes that the liberalisation of the *locus standi* requirement by the Bill of Rights, coupled with the extension of the circumstances in which one may litigate in the public environmental interests provided in NEMA, considerably increases the opportunities for public interest litigation in the environmental sphere. In various cases the liberalisation of the *locus standi* has had an important effect, for instance, in *Wildlife*

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<sup>187</sup> Glazewski *J op. cit.* (n 161) 101.

<sup>188</sup> Sections 32 and 33 of NEMA.

<sup>189</sup> Glazewski *J op. cit.* (n 161) 123.

*Society of Southern Africa and Others v Minister of Environmental Affairs and Tourism*,<sup>190</sup> Judge Pickering, on behalf of the court, recognized the *locus standi* of the Society under the Interim Constitution. He held further by saying that even if there are circumstances where the section is not applicable and where a statute imposes an obligation on the state to take certain measures to protect the environment in the interest of the public, a body such as the Society should have *locus standi* in common law to apply for an order to compel the state to carry out its statutory obligations.<sup>191</sup> In *Minister of Health and Welfare v Woodcarb (Pty) Ltd*,<sup>192</sup> Judge Hurt similarly considered the question of *locus standi* at some length and held that the applicant could rely on the public interest clause in the Interim Constitution for *locus standi* to apply to the court for an interdict.<sup>193</sup>

In addition to the analysis of the *locus standi* rule, there are various procedural requirements which must be met before the legal remedies aimed at controlling administrative action may be sought via the courts. Thus, the review motion must be brought before the court within a reasonable time and only final decisions of administrative organs may be taken on review. In general, internal remedies should be exhausted before the court is approached for assistance, because one recognizes that judicial control is an external form of control aimed at ensuring adherence to the requirement of legality but not at taking over the administration and its operation. The administration itself is in the best position to remedy its mistakes.<sup>194</sup> However, South African history has shown that the general public has often displayed a lack of confidence in, or even mistrust of the administration. The public has generally chosen to approach the civil courts rather than exhaust internal or domestic remedies.<sup>195</sup> PAJA now regulates this matter through section 7 (2) which provides that:

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<sup>190</sup> (1996) (3) SA 1095 (Tk).

<sup>191</sup> (AT) 1105 (I-J) ; (AT) 1105 (A -B). See also Glazewski J *op. cit.* (n 161) 122.

<sup>192</sup> (1996) (3) SA 155 (N).

<sup>193</sup> Section 7 (4) of the Interim Constitution at 164 G.

<sup>194</sup> Wiechers M *op. cit.* (n 129) 271.

<sup>195</sup> Burns Y *op. cit.* (n 124 ) 290.

- (a) Subject to paragraph (c), no court or tribunal shall review an administrative action in terms of this Act unless any internal remedy provided for in any other law has first been exhausted.
- (b) Subject to paragraph (c), a court or tribunal must, if it is not satisfied that any internal remedy referred to in paragraph (a) has been exhausted, direct that the person concerned must first exhaust such remedy before instituting proceedings in a court or tribunal for judicial review in terms of this Act.
- (c) A court or tribunal may, in exceptional circumstances and on application by the person concerned, exempt such person from the obligation to exhaust any internal remedy if the court or tribunal deems it in the interest of justice.

Many reasons may justify the requirement of exhaustion of internal remedies. The following may be cited:

- administrative officials or bodies dealing with administrative environmental matters are well able and have the expertise needed to deal with the problems ;
- the problems may be dealt with expediently and cheaply, without long delays; court cases are, on the other hand, expensive and time-consuming, and judicial officers often have less ‘hands-on’ experience of technical environmental problems than officers working in this field.

#### 3.5.4.3 *The interdict and mandamus*

It has been stated that if an applicant fears and can prove that an action or intended action on the part of the authority or another private person will affect his or her rights or result in prejudice, the applicant may apply to court for an interdict to restrain the administrative body from carrying out its action. An interdict as a common law remedy can be instituted against the administration or the individual. This has been the situation in different cases in which the courts in South Africa applied the interdict (e.g. preventing unlawful action or threatening pollution in the *Woodcarb*<sup>196</sup> case; or preventing unlawful

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<sup>196</sup> (1996) (3) SA 155 (N).

administrative action or threatened unlawful action in the *Van Huyssteen*<sup>197</sup> case). These cases remain interesting because in the *Woodcarb* case, for example, the Minister's responsibility to take proactive steps to control air pollution<sup>198</sup> from scheduled processes was confirmed, rather than relying on the cumbersome, reactive procedure of criminal prosecution. Another excellent example of the granting of an interdict is *Die Vereniging van Advokate v Moskeplein (Edms) Bpk*,<sup>199</sup> where building operations caused such a noise and disturbance at the advocates' chambers that the group of advocates applied for an interdict prohibiting the builders from continuing with building operations during normal working hours.<sup>200</sup>

A mandamus, which is another mechanism or remedy by which administrative actions are controlled, is, as defined above, a legal process to compel an administrative organ to perform some or other statutory duty. It is in this respect that in *Transnet Beperk h/a Coach Express v Voorsitter Nasionale Vervoerkommissie*,<sup>201</sup> the court found that a mandatory interdict can be granted both where the permit was refused as a result of the disregard of the rules of natural justice, and where the permit was granted as the result of the disregard of these rules.<sup>202</sup> In *Wildlife Society of Southern Africa and Others v Minister of Environmental Affairs and Tourism of the RSA*,<sup>203</sup> the Wildlife Society applied for a mandamus to compel the Transkei Department to protect the Wild Coast against degradation caused by irresponsible development. The department was empowered by legislation to protect the coast but did not enforce its statutory powers. The court held that the department 'wasted valuable time while the degradation continued unabated' and instructed it to execute its statutory powers in this regard.

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<sup>197</sup> (1996) (1) SA 283 (C). The effect was the interpretation of the right of access to information as provided by section 23 of the South Africa's 1993 Constitution (section 32 of the 1996 Constitution).

<sup>198</sup> The defendant's unlicensed emission illegally interfered with the neighbours' constitutional right to a healthy environment contained into section 29 of the Interim Constitution 1993 (section 24 of the Final Constitution 1996).

<sup>199</sup> (1982) (3) SA 159 (T).

<sup>200</sup> Burns Y *op. cit.* (n 124) 301.

<sup>201</sup> (1995) (3) SA 844 (T).

<sup>202</sup> Burns Y *op. cit.* (n 124) 302.

<sup>203</sup> (1996) (3) SA 1095 (Tk).

#### 3.5.4.4 *Judicial review and statutory appeal*

Judicial review appears to be a potent instrument regarding decisions pertaining to the environment.<sup>204</sup> All administrative environmental decisions (actions) taken by the relevant officials or bodies are subject to judicial review by the High Court. The administrative justice clause in section 33 of the Bill of Rights offers potentially greater scope for challenging the merits of administrative decisions affecting the environment. Thus, in section 33 of the Constitution and in PAJA, the requirements of lawful, reasonable and procedurally fair administrative action are set out and given effect. The Act determines the grounds for judicial review and identifies the courts (including magistrates' courts) that will be responsible for judicial review.<sup>205</sup>

In analysing a statutory appeal one must note that in South Africa, courts do not have an inherent appeal jurisdiction.<sup>206</sup>

#### 3.5.4.5 *Statutory criminal sanctions*

Statutory sanctions are provided for in legislation and are also referred to as criminal penalties or sanctions. These sanctions are very important and sanctions in the case of the contravention of legal and administrative environmental provisions are extensively applied. Criminal sanctions can be used as a primary (or direct) sanction or as a subsidiary (or indirect) sanction in enforcement of environmental matters. Glazewski notes that the application of the criminal sanction as a primary sanction means that the environmentally harmful activity is outlawed directly, while its application as a subsidiary sanction occurs where reliance is based, in the first place, on administrative measures, such as a permit requirement. In fact, reliance on the criminal sanction as a subsidiary sanction is highly desirable as it anticipates environmental harm before it occurs.<sup>207</sup>

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<sup>204</sup> Glazewski *J op. cit.* (n 161) 123.

<sup>205</sup> Section 6 and 7 of PAJA.

<sup>206</sup> Burns *Y op. cit.* (n 124) 301.

<sup>207</sup> Glazewski *J op. cit.* (n 161) 118.

It has often been argued that criminal sanctions should act as a deterrent and to be an effective deterrent, there must be proper enforcement of the legislation and the sanction must be stringent enough to overcome the motive of economic gain. Big factories and industries with large profit margins, for instance, will not be deterred by a fine of R500 or R2000, but will simply regard such fines as ‘the cost of doing business.’ Such fines will neither force them to decrease their pollution levels nor improve their anti-pollution measures. In this regard, section 34 of NEMA on criminal proceedings has attempted to redress this issue. A court of law that has convicted a person of an offence listed in Schedule 3 of the Act may also take into account the cost incurred by the organs of state for rehabilitation and loss in those cases. This allows for the imposition of an increased penalty or fine on the guilty party.

### 3.5.5 Other mechanisms of protection and promotion of environmental rights in the Republic of South Africa

Among these mechanisms, one notes the parliamentary control of administrative action,<sup>208</sup> and control by public bodies (Public Protector, Human Rights Commission, Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, Commission for Gender Equality, Auditor-General, Electoral Commission).<sup>209</sup> In the light of section 184 of the Constitution, the Human Rights Commission exercises a ‘watchdog’ function with regard to the observance of fundamental rights (including environmental rights) by the administration. The main function of the Commission is to promote human rights via education and raising community awareness, making recommendations to Parliament, reviewing legislation and investigating alleged violations of fundamental rights and assisting aggrieved persons to secure redress for such violations.<sup>210</sup> Thus, each year, the Human Rights Commission must require relevant organs of state to provide it with information on the measures that

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<sup>208</sup> Section 92 of the Constitution.

<sup>209</sup> Section 181 of the Constitution.

<sup>210</sup> Burns *Y op. cit.* (n 124) 275.

they have taken towards the realisation of the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment.<sup>211</sup>

In its report of the 2002/2003 financial year, the Commission notes that the vision of translating the right to environment, as established by section 24 of the Constitution, to ensure the health and well-being of present and future generations into reality, has become increasingly complicated. One affirms that there is a gap between the policies, programmes and legislation that were developed and the actual realisation of the right as a result of the lack of a comprehensive monitoring and evaluation system which focuses on the impact of measures on the health and well-being of the people and on the protection of the environment. The problem relates to inadequate capacity and preparedness on the part of the national and provincial departments. There is an obligation on the state to put in place a national framework for realising the right to environment, which enables the obligations imposed to be met.<sup>212</sup> In addition, one may notice another disappointing fact highlighted by the Commission. Progress in the realisation of the right to environment had not been very well monitored and observed by the Commission during 2002/2003 because annual progress reports in terms of section 11 of NEMA<sup>213</sup> were inaccessible at the time of writing. In spite of that, the Commission did observe the growing influence of the Committee for Environmental Co-ordination and subsequent consolidation of environmental implementation plans and environmental management plans. Some Environmental Co-ordinating Committees were established at the provincial level, also for the purposes of alignment and co-operative governance. Another important aspect is that progress has been made, through the courts and other avenues, towards realising the procedural aspects of the right to environment (access to information, participation in judicial and administrative proceedings and adequate redress and remedies).<sup>214</sup>

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<sup>211</sup> Section 184 (3) of the Constitution.

<sup>212</sup> South African Human Rights Commission, *The right to a healthy environment: 5th Economic and Social Rights Report 2002/2003 financial year* (2004) at 50.

<sup>213</sup> Section of NEMA on environmental implementation plans and management plans.

<sup>214</sup> *Ibid.* at XXI.

### 3.6 Conclusion

An impressive array of environmental legislation, which gives effect to the environmental rights guaranteed by the Constitution exists in South Africa. A wide approach of *locus standi* has been endorsed through NEMA and PAJA. Any person or group of persons may now approach a court regarding an infringement or threatened infringement of any provision of the law concerned with the protection of the environment or the utilisation of natural resources. Any person may now institute proceedings in a court or tribunal for the judicial review of an administrative environmental action. An easier access to courts has been guaranteed by the Constitution through section 34. Everyone has the right to have any dispute (including a dispute in environmental matters) that can be resolved by the application of law decided in a fair public hearing before a court or another independent and impartial tribunal or forum.

The implementation and enforcement of the environmental legislation in RSA is ongoing despite some weaknesses, and various forms of control are exercised both within the administration of environmental matters and outside the administration (by the courts in the various forms of judicial control). Administrative and legal remedies (sanctions) are applied to restore the legal balance in each case. However, in spite of this legislation, the question arises, according to Glazewski,<sup>215</sup> as to why environmental degradation continues apace in South Africa? The gap between the policies, programmes and legislation and the realisation of the right to environment must be stopped with appropriate measures and strategies defined by the state. By doing so, the state and citizens will more easily fulfil their obligations towards the implementation and enforcement of environmental rights.

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<sup>215</sup> Glazewski *J op. cit.* (n 161) 117.



## CHAPTER 4: CHALLENGES AND RECOMMENDATIONS

In the light of the preceding chapters, one notes the different challenges facing both the DRC and the RSA on the road to realising the right to an environment that is not harmful to the health and well-being of people and to rights related to the protection of the environment. This chapter focuses on some of those challenges followed by recommendations.

### **4.1 Challenges and recommendations for the Democratic Republic of Congo**

Since the insertion of environmental rights in the DRC Constitution, serious challenges on environmental matters face the DRC. Some of them will be discussed and followed by recommendations.

#### 1. The incomplete nature and weakness of the DRC's environmental legislation

Legislation that should give effect to the right to environment entrenched in the Constitution must be put in place. Parliament must be put under pressure to fulfil its obligation as requested by the Constitution in terms of section 54.

It would be prudent to address the following aspects:

- Define the concept 'environment';
- Define the content and scope of a right to a healthy environment and mechanisms for its implementation and enforcement;
- The principle of sustainable development, which refers to meeting the basic needs of all, and extending to all the opportunity to satisfy their aspirations for a better life. Sustainable development includes important principles, namely: ecologically sustainable development that means using natural resources in a fair and sustainable manner for the benefit of present and future generations. The precautionary principle, which means that in

cases where there is a threat of environmental damage, environmental impact studies must be conducted before development plans are put into operation (pollution prevention). Decision-making must be transparent, in other words, there must be access to environmental information and the public must be encouraged to participate in the decision-making process and the intergenerational equity to protect the environment for future generations as well.

Conscious of the special nature of environmental rights, Metha notes that ‘the loss of natural resources cannot be replenished. It is easier to reform the malfunctioning of human institutions, and to provide redress for most injuries stemming therefrom, than to restore a polluted river or a denuded mountain to its pristine glory or to bring back the rain forests and rare species that have disappeared from many parts of the world’.<sup>216</sup> The principle of biological diversity and ecological integrity, and the polluter pays principle must also be considered.

- A clear definition of the responsibility of all organs of state (the legislature, the executive and the judiciary) on the implementation and enforcement of environmental rights, and, further, the duty of citizens to protect the environment. Judges must be conscious of the special nature of environmental rights by participating actively in the process of giving content to the right to environment (interpretation in court cases). To achieve this goal, the training of Congolese judges on environmental concerns appears to be a necessity because courts are established as custodians of environmental integrity.

The urgent need to improve the environmental regulatory framework in force deserves to be given priority by parliament and political leaders. There is nothing that can justify the delay of Parliament when lives are at stake.

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<sup>216</sup> Metha MC “Growth of environmental jurisprudence in India” (1999) *Acta Juridica* 71-79 at 79.

## 2. Information and education

Despite the fact that the right to information is guaranteed by the Constitution (Article 29) and the function performed by the Ministry of Human Rights, the dissemination of information on the environment to the public through the '*Official Journal*' remains poor. People do not have easy access to such a publication and significant number of Congolese people is illiterate. The gap between the right proclaimed by the Constitution and the reality is surprising. Winstanley notes that the right to information or the right to know and the right to environmental education are related: if one is ignorant of environmental matters one cannot make informed choices about state decisions concerning the environment.<sup>217</sup>

For the realisation of these rights, Government must set up the appropriate machinery. The legislation must be as clear as possible for the citizens to be able to understand and know their rights and duties. Education includes teaching people (and business and industry), and political officials as well, how to live in an environmentally friendly way, e.g. not to litter, not to waste or soil water, and to encourage responsible use of resources. Facing this challenge, the Indian Supreme Court in the case of *MC Metha v Union of India*,<sup>218</sup> went so far as to order the state to issue directives which would ensure a higher level of environmental awareness amongst Indians. These included, for example, directives to the Ministry of the Environment, and the public television and radio networks concerning the obligation to produce and to broadcast environmentally educational material, and stipulated as a requirement for the granting of cinema and video licences that licence holders be obliged to convey at least two messages (per show) concerning the environment to viewers.<sup>219</sup> A lot of information and education generated by non-governmental organisations and other community initiatives in the official and local languages throughout the country must complement the efforts of the Government. By so doing, a step will be taken in the right direction to develop an ethical vision of earth-human harmony for the benefit of present and future generations.

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<sup>217</sup> Winstanley T *op. cit.* (n 21) at 91.

<sup>218</sup> (1988) AIR 1037 (SC).

<sup>219</sup> Winstanley T *op. cit.* (n 21) at 91.

### 3. Creation of an independent institution for environmental rights protection

A creation of an independent institution to protect the right of citizens to a healthy environment instead of the Ministry of Human Rights, remains a necessity. It has been demonstrated that it may be difficult for the Ministry as a structure of government to control violations of human rights by administrative authorities. This institution, which could be called ‘Ombudsman’ or ‘Mediator’, could provide legal assistance, including legal representation, for the people whose fundamental rights (including environmental rights) have been infringed.

Independent specific courts or tribunals dealing with environmental matters must also be established. It has been proved that the ‘uniqueness of jurisdiction’, which characterises the Congolese judicial system, does not allow judges to specialise deeply on environmental concerns. Judgments offered by the courts or tribunals run the risk of becoming approximate.<sup>220</sup>

## 4.2 Challenges and recommendations for the Republic of South Africa

The challenges facing South Africa in terms of the realisation of the right to an environment that is not harmful to the health and well-being of people and the protection of the environment are significant in the light of the impressive array of legislation that governs the environment. Among these challenges, one must stress the need to allocate sufficient resources for progressive realisation of the right for the benefit of vulnerable groups; the education and training of communities; the guarantee of effective co-operative governance;<sup>221</sup> and the need to flesh out the content of the right to environment.

1. The allocation of sufficient resources for progressive realisation of the right for the benefit of vulnerable groups

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<sup>220</sup> Ngondankoy N *op. cit.* (n 138) 368.

<sup>221</sup> South African Human Rights Commission *op. cit.* (n 212) at XXII.

Having regard to the injustices and divisions of the past sustained by the apartheid regime, one shares the view that to comply with the requirements of environmental justice, government must integrate environmental considerations with social, political and economic justice and development in addressing the needs and rights of all communities, and individuals.<sup>222</sup> Environmental justice is to be interpreted within the ambit of the equality clause of the Constitution (section 9). Equitable access to environmental resources, benefits and services to meet basic human needs and ensure human well-being must be pursued and special measures may be taken to ensure access thereto by categories of persons disadvantaged by unfair discrimination.<sup>223</sup> Thus, to overcome the consequences of the apartheid regime, sufficient resources must be provided to communities or groups disadvantaged in the past. This remains an important issue and a living one that Government is called upon to deal with on a day-to-day basis.

## 2. The education and training of communities

Education is essential as far as human rights are concerned, since it liberates people from the bondage of ignorance, superstition and fear. It supports their dignity and self-confidence and is a basic human right, on which the realization of many other rights depend.<sup>224</sup> Communities need to be educated and to receive training on environmental management concerns. The community's access to information must not be neglected because it facilitates the realisation of their rights in relation to the environment. An effective right to information is indispensable for meaningful public participation and support for enlightened decision-making in regard to the environment.<sup>225</sup>

The challenge of educating and training communities and, further, of improving access to information, calls upon the state to set up appropriate structures involving Non-Governmental Organisations (NGOs) and Community-Based Organisations (CBOs) in management, monitoring and implementation plans. This will bring about a more

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<sup>222</sup> Henderson GP "Some thoughts on distinctive principles of South African environmental law" (2001) 8 *SAJELP* 139 - 184 at 164.

<sup>223</sup> Section 2 (4)(viii) (d) of NEMA.

<sup>224</sup> Devenish GE *op. cit.* (n 95) 153.

<sup>225</sup> *Ibid.* at 123.

effective effort towards realising the right to a healthy environment and will lighten the burden that the government is facing in this regard. Progress in the implementation and monitoring of the environment needs to be a combined effort, which will reflect the inputs of the public and the interests of affected parties<sup>226</sup> in the interest of the nation as a whole.

### 3. The guarantee of effective co-operative governance

It has not been easy to actually attain the envisaged co-operative governance in the management and protection of environmental rights. Therefore, the gap in co-operative governance remains a problem for proper implementation of environmental rights.<sup>227</sup> Thus, the development of an effective system of co-operative governance deserves to be put in place, possibly by a focus upon the facilitation work of provincial communities for environmental co-ordination.

### 4. The need to flesh out the content of the right to environment

For the purpose of the practical application of this right, the courts must determine its real content and scope through the interpretation of the law. To accomplish this mission, the training of judges on environmental matters is a necessity. By so doing, judges will be able to understand the special nature of environmental rights in achieving a better life. This approach will not be far from what the court observed in the case of *Minister of Health and Welfare v Woodcarb (Pty) Ltd.*<sup>228</sup> Where the judge held that ‘the defendant’s unlicensed emission illegally interfered with the neighbours’ constitutional right to a healthy environment.’ Permanent environmental tribunals or courts need to be established, although this seems to be a complex challenge.

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<sup>226</sup> South African Human Rights Commission *op. cit.* (n 212) at 66.

<sup>227</sup> *Ibid.* at 43.

<sup>228</sup> (1996) (3) SA 155 (N).

With this in mind, one shares the recommendation highlighted by the Commission.<sup>229</sup> While most policies and laws are in place or about to be instituted, there should be a quantum shift in focus towards the implementation of measures to further the right to environment for vulnerable groups in a more decentralised way. Provincial government and local government should concentrate their energies on implementation, in association with Community-Based Organisations (CBOs) that have already developed innovations to further the right. It would also be useful for environmental implementation plans and environmental management plans used in integrated environmental management to include a focus on the substantive aspects of the realisation of the right for vulnerable groups.

#### **4.3 Concluding remarks**

To give effect to international and regional instruments that elevate environmental protection to the status of a human right and recognize the inextricable relationship between human rights and the environment, both the Congolese and the South African legal systems define clearly the right to environment in their constitutions. This right is conceived and formulated as an individual right rather than a collective right. Its procedural character has served to articulate environmental progress by applying the human rights approach, namely giving individuals access to information, just administrative action and legal standing to challenge perceived violations.

The inception and recognition of the right to environment in the Constitution of the DRC is still in its infancy compared to the situation in South Africa. Its implementation and enforcement remains poor and needs important support from all organs of state (the judiciary playing a major role) and the citizens. The gap between the right guaranteed by the Constitution and the reality remains significant and disappointing. While the priorities on the agenda of the political leaders' do not reveal a real willingness to deal with this matter, in my opinion, 'time is up' and parliament must be put under pressure to pass legislation that gives effect to the right to environment and to improve the environmental

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<sup>229</sup> South African Human Rights Commission *op. cit.* (n 212) at XXII.

regulatory framework already in force. Otherwise, it will be difficult to overcome the increasing degradation of the environment, and the opportunity to preserve the right of present and future generations to a healthy environment will be lost or sacrificed. Certain guidance may be taken from the South African model in this regard, although the realisation of the right to environment in South Africa is also hampered by certain factors (such as inadequate information, reporting and monitoring systems) that impact on the degradation of the environment.

The time has come for the Congolese to use the law effectively for the defence of the environment. One shares the view of Metha<sup>230</sup> who considers that to achieve this goal, it is imperative that awareness of environmental law, constitutional rights and obligations to protect the environment be created at the grassroots level. The strong message is that the authorities will not protect the environment unless there is a strong peoples' movement supporting environmental issues. The use of law, environmental awareness and grassroots action in the DRC can, and should, play a pivotal role in the protection of the environment and human rights.

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<sup>230</sup> Metha MC *op. cit.* (n 216) at 79.



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