

**ENVIRONMENTAL AND DEVELOPMENTAL RIGHTS  
IN THE SOUTHERN AFRICAN DEVELOPMENT COMMUNITY  
WITH SPECIFIC REFERENCE TO THE DEMOCRATIC REPUBLIC  
OF CONGO AND THE REPUBLIC OF SOUTH AFRICA**

**by**

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**DECLARATION**Student Number: **3566-395-2**

I declare that **Environmental and Developmental Rights in the Southern African Development Community with specific reference to 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****KIHANGI Bindu**

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**DATE**

**LIST OF ABBREVIATIONS**

AU:	African Union
BCLR:	Butterworths Constitutional Law Reports (of the RSA)
CC:	Constitutional Court
DRC:	Democratic Republic of Congo
ICJ:	International Court of Justice
NEMA:	National Environmental Management Act
RSA:	Republic of South Africa
SA:	South Africa
SADC:	Southern African Development Community
UN:	United Nations

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## SUMMARY

This study examines the effectiveness of environmental and developmental rights within the SADC region, especially the status of their implementation and enforcement in the DRC and the RSA. The SADC Treaty recognizes implicitly the rights to environment and to development. Unfortunately, the unequivocal commitment to deal with human rights within the region is not translated with equal force into the normative framework established by the Treaty or into SADC's programmed activities. No institution has been established with the specific mandate to deal with human rights issues, neither are there any protocols or sectors especially entrusted with human rights protection and promotion. The SADC member States do not share the same understanding or agenda on matters pertaining to the respect for, and the promotion, protection and the fulfilment, of human rights at the regional level. The inception of environmental and developmental rights within the Constitution of the DRC is still in its infancy compared to the situation in South Africa. Implementation and enforcement remain poor and need important support from all organs of state and from the Congolese citizens. A strong regulatory framework pertaining to human rights (environmental and developmental rights) remains an urgent issue. Guidance may be found in the South African model for the implementation and enforcement of human rights, although the realization of the right to environment in South Africa is hampered by a number of factors that cause the degradation of the environment. Against South Africa's socio-economic and political background, the constitutionalization of the right to development remains of critical concern to a sustainable future for all. The Congolese and South African peoples need to be made aware of their constitutional rights, especially their environmental and development rights, and the institutions and the mechanisms available to enforce them. They need to be empowered to

demand justice as a right not as an act of charity. It is patently clear that the authorities will not protect the environment or tackle the development agenda unless there is a strong people's movement to challenge the State and other role players over environmental and development issues and ethics.

## **KEY TERMS**

Right to environment, right to development, human rights, environment, development, implementation and enforcement of human rights, Treaty of the Southern African Development Community, constitution, constitutionalization, environmental justice, human development, SADC, DRC, RSA.



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## CHAPTER 1:

# SCOPE OF THE STUDY AND THE INTERNATIONAL AND NATIONAL PERSPECTIVES ON ENVIRONMENT RIGHTS

## 1.1 Scope of the study

### 1.1.1 The research problem

The international recognition, protection and promotion of the fundamental rights to environment and to development, specifically in the Southern African Development Community (SADC), are much debated issues and remain prominent in the minds of the people of the Democratic Republic of Congo (DRC) and of the Republic of South Africa (RSA). This attitude of concern flows from the controversial preoccupation of most developing countries with the integration of environmental concerns with developmental needs. Many regard environmental considerations as a luxury,<sup>1</sup> but the reality is that the protection of the environment<sup>2</sup> is the basis for human survival and economic development<sup>3</sup> in many different sectors.

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<sup>1</sup> Maina PC “Taking the environment seriously: The African Charter on Human and Peoples’ Rights and the environment” in *Review of the African Commission on Human and Peoples’ Rights* (1993) 43 quoted by Ankumah Evelyn A *The African Commission on Human and Peoples’ Rights: Practice and procedures* (1996) Vol. 16 Martinus Nijhoff Publishers The Hague / London / Boston 169.

<sup>2</sup> Kiss and Shelton describe protection, a principle of Environmental Law, as the mindful abstention from activities detrimental to the environment integrated with aggressively prevention approach to environmental degradation. Protection means more than the conservation of natural resources, and embraces ecological planning, ecological management and the national implementation of institutions, procedures and regulations. See Kiss A and Shelton D *Manual of European Environmental Law* (1997) 2<sup>nd</sup> ed. Cambridge University Press UK 42.

<sup>3</sup> Giorgetta Sueli “The right to a healthy environment” in Nico Schrijver and Friedl Weiss (eds.) *International law and sustainable development: Principles and practice* (2004) Vol. 51 Martinus Nijhoff Publishers Leiden / Boston 382, 383.

This study starts on the premise that the management of the environment is a crucial issue considering its critical importance to uplift any developmental models. The crisis the world is experiencing today is to generate individual economic opportunities and national wealth necessary for economically healthy societies while, at the same time, lessening the environmental risks and social inequities that have accompanied past economic development.<sup>4</sup> If one is to ensure that the planet is not reduced to a polluted space of living there has to be a paradigm shift with regard to human behaviour. This shift will be reflected in effective legislation and policies at the international as well national levels.

There are various international and regional instruments, and national legislation, which guarantee and define the normative status of environmental and developmental rights. The recognition of the right to environment is unequivocal. The Declarations of Stockholm and Rio de Janeiro have elevated the protection of the environment to the status of a right<sup>5</sup> and, indeed, the protection of the environment is a vital part of the contemporary human rights doctrine, for it is a prerequisite for numerous human rights such as the right to health, the right to life and the right to development. Obviously, damage to the environment impairs and undermines all the human rights spoken of in the Universal Declaration of Human Rights and other similar human rights instruments.<sup>6</sup> Dinah Shelton points out that a fully fledged right to environment

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<sup>4</sup> Amy Ng Sing Fuay "A critique on the concept of sustainable development" (2001) Vol. 28 1/2 *Journal of Malaysian and Comparative Law* 115.

<sup>5</sup> Ouguergouz Fatsah *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 360.

<sup>6</sup> Opinion of the Vice-President Weeremantry in the case concerning the *Gabcikovo-Nagymaros Project (Hungary-Slovakia)* in the ICJ September 25, 1997. See Van der Vyver J "The criminalisation and prosecution of environmental malpractice in international law" (1998) 23 *South African Yearbook International Law* at 11; Cordonier Segger Marie Claire and Khalfan Ashfaq *Sustainable development law: Principles, practices, and prospects* (2004) Oxford New York IX; Kiss A and Shelton D *International environmental law* (2004) 3<sup>rd</sup> ed. Transnational Publishers New York 664.

establishes an individual right of action to conserve the environment and opens the door for the public to be informed of, and to participate in, decisions relating to the environment.<sup>7</sup> The African Charter on Human and Peoples' Rights of 1981 states that 'all peoples shall have the right to a general satisfactory environment favourable to their development.'<sup>8</sup> The need for environmental protection and the involvement of the people in the process of development through the guaranteed observance of democratic rights, human rights and the rule of law has been upheld in the SADC area.<sup>9</sup> It is owing to the influence of the international instruments that the right to environment has been entrenched in the Constitution of the Democratic Republic of Congo<sup>10</sup> and the South African Constitution.<sup>11</sup>

The UN Declaration on the Right to Development affirms that the right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.<sup>12</sup> The human person is the central subject of development and should be an active participant and beneficiary of the right to development.<sup>13</sup> Kéba Mbaye and Michel Virally note respectively that 'development is the right of all'; 'the right to development is both a human right and a right of peoples.'<sup>14</sup> Kéba Mbaye argued, further, that 'all fundamental rights and freedoms are necessarily linked to the right to

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<sup>7</sup> Shelton D "Human rights, environmental rights and the rights to the environment" (1991) 28 *Stanford Journal of International Law* 103 at 117.

<sup>8</sup> Article 24.

<sup>9</sup> Preamble, article 4(c) and 5(g) of the Constitutive Act of the SADC, Windhoek, 17 August 1992.

<sup>10</sup> Article 53 of the Constitution of the Democratic Republic of Congo of 18 February 2006 (In French: *Constitution de la République Démocratique du Congo du 18 Février 2006*).

<sup>11</sup> Section 24 of the Constitution of the Republic of South Africa of 1996.

<sup>12</sup> Article 1(1) of the UN Declaration of the Right to Development of 1986.

<sup>13</sup> Article 2(1) of the UN Declaration of the Right to Development of 1986.

<sup>14</sup> Kéba Mbaye and Michel Virally as quoted in Ouguergouz *F op. cit.* (n 5) 299.

existence, to an increasingly higher living standard, and, therefore, to development.’<sup>15</sup> The right to development is a human right, because without development man exists in hardship and danger.<sup>16</sup> The African Charter on Human and Peoples’ Rights guarantees the right to development:

1. All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.
2. States shall have the duty, individually and collectively, to ensure the exercise of the right to development.<sup>17</sup>

In this respect, 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> It is in keeping with this understanding of the right that the SADC would like to achieve development and economic growth, alleviate poverty, and enhance the standard and the quality of life of the people of Southern Africa.<sup>19</sup>

At the national level, contrary to numerous constitutions that do not explicitly mention the right to development, the DRC, in terms of article 58 of the Constitution,<sup>20</sup> guarantees the right to development:

All Congolese have the right to enjoy the national wealth. The State has the duty to equitably distribute the national wealth and guarantee the right to development.

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<sup>15</sup> Kéba Mbaye quoted in Van Reenen TP “The right to development in international and municipal law (1995) 10 *Suid Afrikaanse PubliekReg / Public Law* at 417.

<sup>16</sup> *Idem*.

<sup>17</sup> Article 22 of the African Charter of Human and Peoples’ Rights of 1981.

<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.

<sup>19</sup> Article 5(a) of the Constitutive Act of the SADC.

<sup>20</sup> Article 58 of the 2006 Constitution.

It is clear that environmental and developmental rights are human rights and should enjoy the same protection reserved for other human rights. However, it is distressing that the protection of the individual by the State, which is one of the principal aims of international human rights law, remains vulnerable to abuse all over the world, and Africa is no exception. All individuals are entitled to enjoy human rights by virtue of their humanity, regardless of race, colour, religion, sex, language, national origin or other typical 'reasons' for discrimination.

Against this background, constitutional provisions related to environmental and developmental rights should act as a powerful instrument for protecting the environment against all forms of degradation. Unfortunately, observation suggests that such provisions are underutilized in most African countries, including the DRC and to some extent in the RSA, because the recognition and entrenchment of environmental provisions have been made with different socio-economic and political motivations. In this vein, the questions of 'how' and 'why' African constitutional environmental (including developmental) provisions can and ought to be utilized to create, enforceable environmental and developmental rights, wait in the wings.<sup>21</sup>

It is common knowledge that in Africa the issue of the protection of human rights and fundamental freedoms has not been a priority, and the exclusive province of states. Until recently, African states have systematically taken refuge behind the principles of national sovereignty and non-interference in the internal affairs of their neighbours to avoid all challenging discussions of the human rights situation in their own and other territories.<sup>22</sup> In this regard, the

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<sup>21</sup> Kihangi Bindu 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 (2006) University of South Africa [Unpublished LLM dissertation] Pretoria 1.

<sup>22</sup> Ouguerouz F *op. cit.* (n 5) 2.

former UN Secretary-General Kofi Annan stressed the importance and universality of human rights by saying that:

...some Africans still view the concern for human rights as a rich man's luxury for which Africa is not ready, or even as a conspiracy imposed by the industrialized west. I find these thoughts demeaning – demeaning of the yearning for human dignity that resides in every African heart. Do not African mothers weep when their sons and daughters are killed or tortured by agents of oppressive rule? Do not African fathers suffer when their children are unjustly sent to jail? Is not Africa as a whole the poorer when just one of its voices is silenced? Human rights ... are African rights ... they belong to no government, they are limited to no continent, for they are fundamental to humankind itself and they are the concern of all levels and sectors of society.<sup>23</sup>

The primary obligations for realising a human right belong to the nation-states of which the individual right-holders are citizens.<sup>24</sup> Environmental and developmental rights form part of the so-called third generation of human rights,<sup>25</sup> and they too are African rights.

The analysis of the right to environment and the right to development, by their nature as individual and/or collective rights, has raised a lively discussion amongst academic scholars. There are several academic commentators who note that the right to development, if it exists at all, must be primarily or exclusively an individual right because the right of the state to development is a different kind of right. On the opposing side are academics who insist that the right to

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<sup>23</sup> Statement by Secretary-General Kofi Annan at the opening of the fifty-fourth session of the United Nations Commission on Human Rights in Geneva, Press Release SG/SM/6487HR/4355 16 March 1998.

<sup>24</sup> Sengupta Arjun "Implementing the right to development" in Nico Schrijver Friedl Weiss (eds.) *op. cit.* (n 3) 358.

<sup>25</sup> Kidd M *Environmental law* (2008) Juta Cape Town 19.

development is exclusively a collective right with the state as subject. Other authors argue that the concept of the right to development is both an individual and a collective right<sup>26</sup> similar to the right to environment.

Bearing this in mind, the state of effectiveness of the rights to environment and to development in the light of the Constitutive Act of the SADC, the Constitution of the Democratic Republic of Congo of 2006 and the Constitution of the Republic of South Africa of 1996 will be addressed through the following questions:

- Is the incorporation or the recognition of the rights to environment and to development at the international, as well as at the national levels, an opportunity for, or a guarantee of, enjoyment? Is it a positive or efficient way to conserve the environment and push forward the development of African countries? Does it ensure their implementation and enforcement?
- Are the mechanisms for the protection and promotion of these rights provided by the Constitutive Act of the SADC, and by the domestic legislation of the DRC and the RSA, adequate? What is the aim of the drafters in the constitutionalization of both the right to environment and the right to development in the Constitution of the DRC, and the right to environment in the Constitution of the RSA?
- How may the tension between the developing country's demand for development and the need to preserve and protect the environment be resolved?<sup>27</sup> In other words, can the ongoing process of development in

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<sup>26</sup> Paadi Ramoraka A critical analysis of the right to development as an individual and collective right (1996) University of South Africa Pretoria (Unpublished LLM dissertation) at 1.

<sup>27</sup> The lack of consensus on international environmental policies between developed and developing countries stem from their conflicting agendas. The developed nations focus on the maintenance of a stable ecology, while the developing nations are under pressure to stimulate

developing countries meet with success if they do not take into account the need for environmental protection? Sharing the view that environmental concerns constitute the backdrop or the key elements to developmental growth, the relationship between environmental rights and the right to development as human rights deserves to be demonstrated. At this point, we need to interrogate or identify the right-holders (active subjects) and the real right-bearers (passive subjects) of these rights.

- Are political leaders and people on the continent aware of the importance of the protection and promotion of these rights? If not, what should be done?

Indeed, the notion that the industrialization of the continent is necessary to sustain the process of development deserves to be reconciled with the requirements of environmental protection. Environmental impact assessment studies must be a prerequisite for all administrative decisions that permit the exploitation of natural resources or any activity that may adversely affect the natural or the built environment. It is in order to achieve sustainable development that environmental protection should constitute an integral part of the development process and it cannot be considered in isolation from it.<sup>28</sup> Are environmental and developmental rights protected in the process of environmental impact assessment studies in the DRC and the RSA?

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economic growth, raise the standard of living and eliminate poverty. The latter countries point out that the developed countries are the beneficiaries of centuries of exploitation of natural resources from the developing countries and, therefore, have a primary responsibility to alleviate historical environmental problems that are of their own making. See Kirby Ronald Vernon A comparative study of the enforcement of environmental law with regard to the conservation of fauna and flora in the RSA (2002) University of South Africa Pretoria [Unpublished LL D thesis] at 54.

<sup>28</sup> Principle 4 of the Rio Declaration on Environment and Development of 1992, adopted June 14, 1992 at Rio de Janeiro, UN Doc. A/CONF.151/5/Rev.1 (1992) 31 *International Legal Materials* 874.



In spite of the fact that the conceptualization, subjects and content of these rights are controversial, the right to environment and the right to development are intertwined, the link between the environment and development has been highlighted through the provisions of the Rio Declaration on Environment and Development which proclaim that ‘Human beings are at the centre of concerns for sustainable development’,<sup>29</sup> and ‘The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.’<sup>30</sup> Development has to be a people centred process. This is a vision which would be reached in a society where:

- everyone has the capacity to obtain all physical and human necessities, especially food, water, shelter, education, and health;
- everyone has a means to earn an adequate livelihood;
- all people have equal political, civil, social, and economic rights;
- wealth is distributed fairly;
- citizens participate in government, and the poor are able to take direct control over their lives;
- women have an equal status to men;
- the needs of the present can be met without compromising the ability of future generations to meet their needs in turn; and
- people are free from social dislocation, violence, and war.<sup>31</sup>

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<sup>29</sup> Principle 1 of the Rio Declaration on Environment and Development of 1992.

<sup>30</sup> Principle 3 of the Rio Declaration on Environment and Development of 1992.

<sup>31</sup> The Institute for Global Dialogue (IGD) *Guide to the Southern African Development Community* (2001) Institute for Global Dialogue 34.

### 1.1.2 Assumptions and hypotheses

In studying the rights to environment and to development in the SADC, with specific comparison between the DRC and the RSA, the author has identified the following assumptions and hypotheses:

- The rights to environment and to development as human rights are not mentioned explicitly in the Constitutive Act of the SADC. However, it can be assumed that there is a need to protect and promote human rights in the region, and member States are requested to adopt adequate measures to promote the achievement of the objectives of the SADC. The Preamble and Objectives of the Treaty of the SADC are very clear on these aspects.<sup>32</sup>
- The insertion of the fundamental right to a healthy environment and the right to development in the Constitution of the DRC and the right to a healthy environment in the Constitution of the RSA should be considered important guarantees that place a correlative obligation on the part of each country's government and all their citizens to give effect to those rights.
- The governments should be called upon to take steps to protect the environment and define adequate mechanisms to protect the environment and advance the process of development by means of appropriate legislative

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<sup>32</sup> "Preamble: Determined to ensure, through common action, the progress and well-being of the people of Southern Africa;

Conscious of our duty to promote the interdependence and integration of our national economies for the harmonious, balanced and equitable development of the region;

Mindful of the need to involve the people of the region centrally in the process of development and integration, particularly through the guarantee of democratic rights, observation of human rights and the rule of law ... "

Article 5: "The objectives of SADC shall be to: a) achieve development and economic growth, alleviate poverty, enhance the standard and quality of life of the people of Southern Africa and support the socially disadvantaged through regional integration; ... g) achieve sustainable utilization of natural resources and effective protection of the environment ... "

Article 6: "Member States undertake to adopt adequate measures to promote the achievement of the objectives of the SADC; and shall refrain from taking any measure likely to jeopardize the sustenance of its principles, the achievement of its objectives and the implementation of the provisions of this treaty."

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>33</sup>

- The DRC should review the incomplete nature of its environmental legislative and regulatory regimes to address environmental concerns to realise a better life for all. Legislative measures to give effect to the right to development that is entrenched in the Constitution should be taken urgently in order to alleviate poverty, and enhance the standard of living and the quality of life for the Congolese people. 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.
- The South African Bill of Rights does not explicitly mention the right to development. However, when interpreting the Bill of Rights, a court, tribunal or forum must consider international law. The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary international law or legislation, to the extent that they are consistent with the Bill of Rights.<sup>34</sup>
- Environmental education should be established as a goal in both the DRC and the RSA, as this goal already exists in the SADC in the form of its Environmental Educational Programme. Mandatory environmental education will foster public environmental consciousness and facilitate the

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<sup>33</sup> Bruch C, Coker W and Van Arsdale C "Breathing life into fundamental principles: Implementing constitutional protections in Africa" (2000) 7 *South African Journal of Environmental Law and Policy* at 23.

<sup>34</sup> Section 39 of the 1996 Constitution.

establishment of a framework of social norms that inculcate respect for the environment. International movement towards the protection of the environment by means of the constitutional entrenchment of fundamental rights is growing increasingly stronger and ever more essential.<sup>35</sup> 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 which various interests have to be (programmatically) balanced to realize safe and peaceful human coexistence with the environment.<sup>36</sup>

- The tension between the demand for development on the part of states and the protection and preservation of the environment is eased by the principle of sustainable development,<sup>37</sup> which forms the core of a new environmental ethic that attempts to create harmony between economic development and environmental conservation.<sup>38</sup> The protection of the environment provides the basis for development in various domains.
- Environmental and developmental rights are interrelated fundamental human rights. The relationship between the two phenomena is not a one way transaction, it is interactive: a degraded environment may cause economic under-development.<sup>39</sup> However, the right to environment may not be emphasized, for the developing countries in particular, at the expense of the right to development.<sup>40</sup> Thus, respect for human rights, environmental protection, and economic development are complementary rather than

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<sup>35</sup> See Glazewski Jan *Environmental law in South Africa* (2005) 2<sup>nd</sup> ed. Butterwoths Durban 67-71.

<sup>36</sup> Van Reenen TP “Constitutional protection of the environment: Fundamental (human) right or principle of state policy?” (1997) 4/2 *South African Journal of Environmental Law and Policy* at 288.

<sup>37</sup> Dugard J *International Law: A South African perspective* (2005) 3<sup>rd</sup> ed. Juta Cape Town 397.

<sup>38</sup> Kirby RV *op. cit.* (n 27) at 54.

<sup>39</sup> Ouguergouz F *op. cit.* (n 5) 362.

<sup>40</sup> Kamto M *Droit de l'environnement en Afrique* (1996) Edicef Paris 52.

unrelated or opposing objectives. In this respect, Giorgetta points out that environmental degradation threatens the complex structures that support human development and fundamental human rights, and that the concept of development has to integrate environmental protection and the protection of human rights to establish an interrelation among these three fields.<sup>41</sup> Measures to address them require balanced, integrated approaches. Sustainable development can provide solutions and guide relationships where the three systems intersect.<sup>42</sup>

- Good governance with sufficient separation of powers will certainly aid in undertaking any relevant programme related to a better management of the environment, keeping in mind the integrated approach. A simple observation reveals that a number of African countries have developed and/or drafted constitutions without practising constitutionalism. This process has given birth to weak states characterized by under-delivery of basic services.

### 1.1.3 Study objectives

Through this study the author would like to achieve the following objectives:

- to contribute to the debate related to the recognition, protection and promotion of environmental and developmental rights. These are fundamental human rights recognized and protected at the international and national levels.
- to present and underline the relationship that exists between the right to environment and the right to development keeping in mind the integrated approach. In the legal sense, the fourth element of the sustainable development principle underscores the commitment by the international

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<sup>41</sup> Giorgetta Sueli “The right to a healthy environment” in Nico Schrijver and Friedl Weiss (eds.) *op. cit.* (n 3) 381, 382.

<sup>42</sup> Cordonier Segger MC and Khalfan Ashfaq *op. cit.* (n 6) 1.

community to integrate environmental considerations into economic and other developments and also to take into consideration economic needs and other social developments. This should be done in applying and interpreting environmental rights and obligations.<sup>43</sup> The collection and dissemination of information will certainly allow people to care for the environment for the benefit of present and future generations. This remains a societal responsibility for the betterment of life.

- To sensitize Southern African political leaders, specifically Congolese and South African leaders, non governmental organisations and civil societies on their responsibilities to undertake action against the degradation of the environment. Through this process, one will be contributing to the promotion of human security and economic development. The fight against impunity and weak or corrupt governance are issues to be tackled urgently.
- Drawing lessons from the array of South African environmental legislation governing environmental rights, the author would like to raise the following disappointing fact: in spite of the inception of the rights to environment and to development within the Congolese Constitution, laws defining the contents and the mechanisms of implementation and enforcement of the above rights have not yet been adopted by the National Assembly. The respective duties of the state and the individual relating to the protection of the environment (article 53 of the Constitution) and to the equitable distribution of the national wealth (article 58 of Constitution) must be defined clearly through the Congolese regulatory framework law.
- To underline the crucial role that the judiciary is called upon to play in the enforcement of the rights to environment and to development in both the DRC and RSA. Suitable recommendations will be defined to overcome

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<sup>43</sup> Amy Ng Sing Fuay *op. cit.* (n 4) 129.

the challenges that DRC and RSA are facing in their effort to implement and enforce the rights to environment and to development.

#### 1.1.4 Research methodology

This study will rely mainly on the literature review method. The sources of relevant information are legislation, textbooks, judicial decisions, journal articles and electronic information. Historical method will serve to locate the debate that has been taking place on the recognition, implementation and enforcement of the rights to environment and to development at the international, regional and national levels. A legal historic research will be done throughout this study, therefore, questioning the major legal theoretical, practical and controversial ideas on environmental and developmental rights at the international and national levels. The different debates amongst scholars and political leaders on the above rights and their relationship have been very engaging in different countries. Therefore, to have a correct understanding, it will be helpful and more appropriate to scrutinize the effectiveness of the rights to environment and to development in the light of legal principles of different systems of law throughout the world, specifically within the Southern African Development Communities (DRC and RSA). These sources are relevant because they serve to unlock and identify the nature and scope of environmental and developmental rights in the international, regional and national context, and to determine the intention of the drafters in constitutionalizing these rights. The methods identified above will lead us, but we should bear in mind that the choice of these research methods is informed by the understanding that methods should not be an end in themselves but, rather should be used for the purpose of addressing questions of theory.<sup>44</sup> Data will come from different areas of

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<sup>44</sup> Said Nader Izzat *The construction of the right to development: The United Nations, human rights and economic development* (1992) Western Michigan University / Michigan at 10.

research, namely, documents, declarations, international instruments and archives from the UN and other related human rights organizations. The study will lead us to identify, to understand, and to assess what are or should be efficient and effective mechanisms for the implementation and enforcement in the SADC region, and specifically in the DRC and the RSA, of the fundamental rights to environment and to development. Is the relationship between the two a reality or a myth in these countries?

### 1.1.5 Division of work

This study consists of six chapters. Chapter 1 deals with the scope of the study and the international and national perspectives on environmental rights.<sup>45</sup> The second focuses on the general understanding of the right to development.<sup>46</sup> The

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<sup>45</sup> In this study, the right to ‘environment’ is mostly used to refer to the right of a person to an environment that is not harmful to health or well-being. The collective term of ‘environmental rights’ includes other rights which are related to the environment, for example, the procedural rights of access to information concerning the environment, to participate in the decision-making process relating to environmental issues and the right to have access to judicial and administrative proceedings, including redress and remedy, in matters affecting the environment. One should also add, to some extent, the relational character of ‘environmental rights’ that includes the right to food and clean water, the right to health, the right to an adequate standard living and the right to development. For more details, read for instance, Feris Loretta “Environmental rights and *locus standi*” in Paterson A and Kotzé JL (eds.) *Environmental compliance and enforcement in South Africa: Legal perspectives* (2009) Juta Cape Town 132-145; Glazewski J *op. cit.* (n 35) 67-102; South African Human Rights Commission *The right to a healthy environment: 5<sup>th</sup> Economic and Social Rights Report 2002/2003 Financial Year* (2004) 1-6.

<sup>46</sup> The right to ‘development’ is broadly referred to as an individual or collective right, as discussed. While the term ‘developmental/development rights’ points to the collective term of rights, including also those related to development, such as the right to have access to adequate housing, the right to education, the rights to health care, food, water and social security. It is in this respect that the UN Declaration on the Right to Development has defined the right to ‘development’ as a composite right, as a process where all human rights are realized. See for instance, Rosas A “The right to development” in Eide A, Krause C and Rosas A (eds.) *Economic, social and cultural rights: A text book* (2001) 2<sup>nd</sup> rev. ed. Martinus Nijhoff Publishers Dordrecht / Boston / London 119-130; Sengupta A “The right to food in the perspective of the right to development” in Wenche Barth Eide and Uwe Kracht (eds.) *Food and human rights in development* (2007) Vol. II Intersentia Oxford UK 107-136 and Ouguergouz F *op. cit.* (n 5) 297-320.



third examines the right to environment and the right to development in the SADC region and in the constitutions of the DRC and the RSA. The fourth deals with the implementation and enforcement of environmental and developmental rights in the SADC and the DRC. The fifth consists of the implementation and enforcement of the rights to environment and to development in the RSA. The sixth presents the challenges and recommendations.

## PERSPECTIVES ON THE RIGHT TO ENVIRONMENT

### **1.2 International perspective on the right to environment**

Over the last four decades, interest in the environment and, consequently, laws pertaining to it, have escalated at a tremendous rate, both on the international front and in municipal legal systems.<sup>47</sup> There has been worldwide recognition, and raised awareness, of the growing severity of global and local environmental problems, because the relationship between human beings and the planet on which we live has changed drastically.<sup>48</sup> The earth is moving towards a life-threatening degree of environmental destruction;<sup>49</sup> unsustainable economic development has all but exhausted the earth's finite natural resources. At the beginning of the 20<sup>th</sup> century, it was not possible for man and the technology upon which he relied to alter the environment as radically as now. By the end of the century, huge increases in scientific knowledge have given human beings the power to make almost irrevocable and negative changes to the planet. Thus, rapid population growth, and intensified social and economic activities have led to the deterioration of the environment, the destruction of animal habitats and a

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<sup>47</sup> Van der Vyver J *op.cit.* (n 6) at 1.

<sup>48</sup> If future generations are to inherit a world that is not depleted of natural resources and that can sustain life free of the dangerous consequences of pollution, then the protection of the environment needs the active support of every organ of state and of every citizen. See Adam Rogers *The earth summit: A planetary reckoning* (1993) 169.

<sup>49</sup> Kirby RV *op. cit.* (n 27) at 1.

depletion of the natural resources.<sup>50</sup> The current levels of damage to the environment are radical and life-threatening, and have caused the deforestation of the rain forests (an integral part of the earth's life support system) for financial gain, the hole in the ozone layer, climate change, erosion and pollution of the elements.<sup>51</sup> Although the need to deal with environmental matters features prominently on political agendas, and conservation and the protection of the environment is perceived as crucially important to the future of humankind, a real commitment to the protection of the environment, both internationally and nationally, remains debatable.

### 1.2.1 International environmental law<sup>52</sup>

The management of many environmental problems, such as global warming and air pollution, cannot be addressed nationally by one country alone. It requires the cooperation and participation of countries, continents or, indeed, the whole world. Thornton and Beckwith<sup>53</sup> note two reasons that justify why solving environmental problems often requires international cooperation. The first reason is that when pollution extends to the atmospheric or maritime environment, it does not respect boundaries and may involve the sovereign jurisdictions of more than one nation. The second reason is that environmental deterioration that begins in one country can have devastating effects on neighbouring countries. A prime example is Nepal, where deforestation has caused increased flooding in Bangladesh and India, and one must not forget the Chernobyl explosion near Kiev in 1986 which resulted in radioactive fallout that

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<sup>50</sup> Mekete BT and Ojwang JB "The right to a healthy environment: Possible juridical bases" (1996) 3 *South African Journal of Environmental Law and Policy* at 158.

<sup>51</sup> Thornton Justine and Beckwith Silas *Environmental law* (2004) 2<sup>nd</sup> ed. Sweet and Maxwell Thomson London 1.

<sup>52</sup> Devine DJ "International environmental law" in Strydom HA and King ND (eds.) *Environmental management in South Africa* (2009) 2<sup>nd</sup> ed. Juta Cape Town 129.

<sup>53</sup> Thornton J and Beckwith S *op. cit.* (n 51) 29.

reached beyond the borders of the Union Soviet Socialist Republics (USSR) to countries as near as Sweden and as distant as Japan.<sup>54</sup> In the same year, a fire in a warehouse in Switzerland released agricultural chemicals and mercury into the River Rhine. The fish population was severely affected and the drinking water of Germany and the Netherlands became unsafe.<sup>55</sup> Catastrophic situations such as these have inspired international cooperation within the realm of international environmental law<sup>56</sup> to resolve these cross-boundary problems, to control pollution and to protect and manage our shared environment.

### *1.2.1.1 Sources of international environmental law*

International environmental law is drawn from the same sources as international law. In terms of article 38 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>57</sup>

Although these sources are all relevant to international law, the first two, treaties<sup>58</sup> and customary law,<sup>59</sup> that make ‘hard law’ or binding obligations, are

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<sup>54</sup> Dugard J *op. cit.* (n 37) 391.

<sup>55</sup> Thornton J and Beckwith S *op. cit.* (n 51) 30.

<sup>56</sup> International law is the law of nations, also called public international law. It governs relations between international legal subjects (mainly states and international organizations). It is also referred to as interstate law, since it is primarily concerned with the rights and obligations of states. And international environmental law is that part of international law that deals with the conservation and management of the environment and the control of environmental pollution. Dugard J *op. cit.* (n 37) 1, 391. See Bray E *Environmental law: Study guide for LCP 407-P* (2003-2004) University of South Africa Pretoria 43, 47; Thornton J and Beckwith S *op. cit.* (n 51) 30; Birnie P, Boyle A and Redgwell C *International law and the environment* (2009) 3<sup>rd</sup> ed. Oxford University Press New York 2.

<sup>57</sup> Glazewski J *op. cit.* (n 35) 33.

generally recognized as primary sources of international law and they provide the substantive context of international environmental law<sup>60</sup> although no provision is made for a hierarchy of sources. On the other hand, 'soft law' consists of imprecise and non-binding standards generated by declarations adopted by diplomatic conferences or resolutions of international organizations and are intended to serve as guidelines for the conduct of states, but they lack the status of 'law'. Soft law is to be found in many branches of international law but there is no doubt that it plays a greater role in the development of international environmental law than any other branch of law.<sup>61</sup> One of the principal attributes of soft law that makes it so politically attractive to states, is its non-binding character. States are under no legal obligation to implement the specific actions set out by instruments. Their obligation rather lies at a moral and political level. Despite their voluntary nature, it would be wrong to classify these influential instruments as non-law.<sup>62</sup> Soft law sources, such as the landmark

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<sup>58</sup> Treaties, also referred to as conventions, accords, agreements and protocols, can be adopted bilaterally, regionally or globally. A treaty is defined by the 1969 Vienna Convention on the Law of Treaties as "an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation." The parties to a treaty are legally bound by the provisions of a treaty in accordance with the principle of *pacta sunt servanda*, which constitutes the cornerstone of international law. Today treaties govern a wide area of international life. See Dugard J *op. cit.* (n 37) 27, 406.

<sup>59</sup> The rules of customary international law arise where there is a general recognition among states that settled practices (*usus*) and norms of behaviour are obligatory. A practice must constitute 'constant and uniform usage' in order to qualify as custom. In international environmental law, customary rules generally play a subordinate role to the law contained in conventions, because their existence is difficult to establish. The so-called 'no-harm rule' is the most clearly established environmental rule that is related to the responsibilities of states to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states, or to the environment of areas where there is no national jurisdiction. The principle of *opinion juris sive necessitatis* is also relevant. This principle dictates that state practice can only be taken as evidence of a rule of customary international law if the reason the states engages in the practice is that they believe they are under a legal obligation to do so. See Thornton J and Beckwith S *op. cit.* (n 51) 32; Dugard J *op. cit.* (n 37) 27-33.

<sup>60</sup> Glazewski J *op. cit.* (n 35) 33.

<sup>61</sup> Dugard J *op. cit.* (n 37) 392.

<sup>62</sup> Olivier EM "Enforcement of international law" (2002) 9 *South African Journal of Environmental Law and Policy* at 151.

1972 Stockholm Declaration of the United Nations Conference on the Human Environment, and later the Rio Declaration on Environment and Development, have no power to bind states but they do possess the power of persuasion force. Agenda 21, likewise, contributed greatly to the development of international environmental law. It paved the way for cooperation among nations in the development of the concept of sustainable development.

### *1.2.1.2 Development of international environmental law*

It would be a mistake to think that international environmental law ‘began’ in 1972. There had been, prior to that point, a number of judicial pronouncements on environmental matters. In 1893 a dispute between the United States of America (USA) and Great Britain over the exploitation of seals for fur was submitted to international arbitration.<sup>63</sup> The finding of the tribunal established an important principle which is still significant today: ‘states did not have the right to assert jurisdiction over natural resources which are outside their territory in order to ensure their conservation.’ In 1941, the *Trail Smelter*<sup>64</sup> case arose. This case opposed Canada and the USA over the emission of sulphur fumes from Canadian smelting works which were causing damage to crops, trees and pasture in the USA. This led to what has been described as a ‘crystallizing moment for international environmental law’ and it has had a significant influence on subsequent developments.<sup>65</sup> The two states agreed to submit the matter to the tribunal which held that under international law:

... no state has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or

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<sup>63</sup> *The Pacific Fur Seals Arbitration* (1893) 1 *Moore’s International Arbitration Awards* 755. See Thornton J and Beckwith S *op. cit.* (n 51) 33.

<sup>64</sup> *United States v Canada* (1941) 3 *Reports of International Arbitral Awards* 1905.

<sup>65</sup> Kidd M. *op. cit.* (n 25) 48.

persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.<sup>66</sup>

At that moment, when the environment was of little consideration in national and international law, this judicial statement from the *Trail Smelter* case was an important indication of the emerging awareness of the international legal consequences of environmental damage. The *Trail Smelter* case is a classic example of one state (Canada) failing to prevent an activity within its jurisdiction from damaging the environment of another (the USA). It has been suggested that *Trail Smelter* reaffirmed the importance of the principle: *sic utere tuo ut alienum non laedas* (use your own property so as not to harm that of another).

Looking to the future development of environmental law, the ruling of the International Court of Justice (ICJ) in the *Corfu Channel*<sup>67</sup> case was a significant development of the ‘no harm’ rule, even though it did not concern an actual environmental harm. In this case, the court confirmed the principle that every state has an ‘obligation not to allow knowingly its territory to be used for acts contrary to the rights of other states.’ The court held that Albania was responsible in international law for failing to inform the United Kingdom of mines laid in its waters.<sup>68</sup> In the *Lac Lanoux*<sup>69</sup> arbitration, the court confirmed the limitations on the rights of states in the case of shared watercourses.

Although the environmental threats posed by population growth and industry were foreseen over a century ago, the environment was not part of the June 1945 agenda when the UN was born. There is no reference to the environment in the

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<sup>66</sup> *United States v Canada op. cit.* (n 64). See also Kidd M *op. cit.* (n 25) 48.

<sup>67</sup> *United Kingdom v Albania* (1949) ICJ Reports 244.

<sup>68</sup> French Duncan A “A reappraisal of sovereignty in the light of global environmental concerns” (2001) *Legal Studies* at 383.

<sup>69</sup> *France v Spain* (1957) 24 International Law Reports 101.

United Nations Charter. It is only in Stockholm, in June 1972, that the First United Nations Conference on Human Environment<sup>70</sup> was initiated. No doubt Sweden's consciousness had been stirred by the fact that their lakes suffered from acid rain drifting in from industrial Europe. At this first Environmental Conference, it was understood by all participants, except the Union of Soviet Socialist Republics (USSR) and its satellite states which stayed away, that protecting our environment was not just a campaign for sentimental nature lovers, but an essential basis for development, and for growth towards a better life.<sup>71</sup> It was affirmed that natural resources must be protected, shared and, where inherently feasible, renewed. This entails the idea of pollution control, not only where people live, but also in the oceans. Weapons of mass destruction must be eliminated. People are entitled to a decent environment as a human right, and it is not negotiable. This conference marked a turning point in the development of international environmental law. It produced a declaration of principles (the Stockholm Declaration<sup>72</sup>) that may be considered as the foundation of modern international environmental law.<sup>73</sup>

Principle 1 reads:

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

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<sup>70</sup> This conference was attended by 114 states as well as international institutions and non-governmental organisations. It produced a Declaration of twenty-six principles and an Action Plan of 109 recommendations. In contradiction to this information, Sands at 34; Birnie and Boyle at 45; Fuggle and Rabie at 178, Kiss and Shelton at 11 refer to only twenty-four principles. See Kidd M *op. cit.* (n 25) 49; Sands Philippe *Principles of international environmental law* (1995) Manchester University Press Manchester 34; Birnie Patricia W and Boyle A *International law and the environment* (1992) Clarendon Oxford 45; Fuggle RF and Rabie MA *Environmental concerns in South Africa: Technical and legal perspectives* (1983) Juta Cape Town 178, Kiss A and Shelton D *International environmental law* (1991) Graham and Trotman London 11.

<sup>71</sup> Bowles Newton R *The diplomacy of hope: The United Nations since the Cold War* (2004) London and New York 109.

<sup>72</sup> The Declaration of Principles for the Preservation and Enhancement of the Human Environment, June 16, 1972; (1972) 11 *International Legal Materials* 1416.

<sup>73</sup> Thornton J and Beckwith S *op. cit.* (n 51) 34.

and he bears a solemn responsibility to protect and improve the environment for present and future generations.

Principle 21, which still represents the cornerstone of international environmental law and is widely assumed to be part of customary international law,<sup>74</sup> states that:

States have, in accordance with the Charter of the United Nations and the principles of environmental law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction.

Principle 24 emphasizes the requirement for international cooperation to:

... effectively control, prevent, reduce and eliminate adverse environmental effects resulting from activities conducted in all spheres, in such a way that due account is taken of the sovereignty and interests of all states.

Coming out of Stockholm, the United Nations Environment Programme (UNEP) was created by the UN in 1972. UNEP has an important mission 'to provide leadership and encourage partnership in caring for the environment by inspiring, informing and enabling nations and peoples to improve their quality of life without compromising that of future generations.'<sup>75</sup>

Certainly, because of the nature and extent of the world's environmental problems in the 1970s and 1980s, the 1987 report of the World Commission on

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<sup>74</sup> Kidd M *op. cit.* (n 25) 49.

<sup>75</sup> United Nations Environment Programme (UNEP), Environment for Development. Available at: <http://www.unep.org> (visited 02/03/2006).



Environment and Development, known as the Brundtland Report,<sup>76</sup> pointed out that 1980s witnessed a dramatic increase in the number of global environmental crises such as the drought and subsequent famine in Africa, which put 35 million people at risk and took approximately one million lives. The report concluded that ‘if natural resources continued to be used at the current rate, if the plight of the poor was ignored, and if pollution and the waste of resources continued, the quality of life of the world’s population could be expected to deteriorate.’<sup>77</sup> The report called upon wealthy nations to change their lifestyles by recycling waste and conserving energy and land. It raised the profile of the concept of ‘sustainable development’ which has gradually come to underpin environmental law at an international level. The concluding remarks of the Report focused on sustainable development, population, food security, the loss of species and genetic resources, energy, industry and human settlements, and it became an important source of pressure for further international action on the environment, and eventually to the Rio Conference.<sup>78</sup>

Twenty years after the 1972 Stockholm Declaration, in 1992, the United Nations Conference on the Environment and Development (the so-called Earth Summit) was held in Rio de Janeiro, Brazil.<sup>79</sup> The emphasis was on development, advancement towards a better life, with the environment an organic part of that process. It was environmental concern that introduced the idea of sustainability:

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<sup>76</sup> Report of the World Commission on the Environment and Development: Our common future (1987).

<sup>77</sup> Thornton J and Beckwith S *op. cit* (n 51) 35.

<sup>78</sup> *Idem*. See also Department of Environmental Affairs and Tourism of the Republic of South Africa *South Africa environmental outlook: A report on the state of the environment* (2006) Pretoria 4.

<sup>79</sup> This truly representative conference was attended by 176 governments (over 100 heads of state), approximately 10,000 official delegates, 1,400 non-governmental organizations and 9,000 journalists. See Bowles Newton R *op. cit.* (n 68) 111; Dupuy PM *Droit international public* (2008) 9ème éd. Dalloz Paris 828.

‘don’t run down resources to zero.’<sup>80</sup> The concept of sustainable development was raised up. This noteworthy Earth Summit produced:

The Declaration on Environment and Development (the Rio Declaration);<sup>81</sup> the reaffirmation of the Stockholm principles and the ambitious Agenda 21 that is a global action plan for all states for development and the environment;<sup>82</sup> the Convention on Biological Diversity<sup>83</sup> and the UN Framework Convention on Climate Change.<sup>84</sup>

The Rio Declaration<sup>85</sup> is a compromise between environmental protection and development, and between the developed and developing world. Principle 3 acknowledges the right to development that the developing countries have been asking for,<sup>86</sup> whilst Principle 4 moves environmental protection to the core of developmental policies, and so reflects the wishes of the developed world.<sup>87</sup> Principle 7 introduces the important concept of the ‘common but differentiated responsibilities’ of developed and developing nations.<sup>88</sup>

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<sup>80</sup> Bowles Newton R *op. cit.* (n 71) 111.

<sup>81</sup> Rio de Janeiro Declaration on Environment and Development, June 16, 1992, UN Doc. A/CONF.151/5.

<sup>82</sup> Agenda 21 is a massive and complex blueprint and action plan for the whole international community. It links development and environmental action for the fulfilment of basic needs, improved living standards for all, better protected and managed ecosystems and a safer, more prosperous future.

<sup>83</sup> 5 June 1992 Rio de Janeiro, 31 *International Legal Materials* 822 (1992).

<sup>84</sup> 9 May 1992 New York 31 *International Legal Materials* 849 (1992).

<sup>85</sup> The Rio Declaration is a statement of twenty-seven principles, some of them restatements of the Stockholm principles setting out the basis on which states and individuals are to cooperate and further develop international law in the field of sustainable development. See Kidd M *Environmental law: A South African guide* (1997) Juta Cape Town 74.

<sup>86</sup> Principle 3 reads “The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.”

<sup>87</sup> Principle 4 provides “In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.”

<sup>88</sup> Principle 7 states “In view of their different contributions to global environmental degradation, states have common but differentiated responsibilities. The developed countries acknowledge the responsibilities that they have in the international pursuit of sustainable

In September 2000, at the UN Millennium Summit, government leaders reaffirmed their support for Agenda 21. In the Millennium Declaration, they stated that ‘we resolve ... to adopt in all our environmental actions a new ethic of conservation and stewardship.’<sup>89</sup> Thus, taking off from Rio, the World Summit on Sustainable Development was held in Johannesburg in September 2002.<sup>90</sup> The meeting did not produce any declarations of principles. The main focus was on the eradication of poverty, and specific actions were agreed to in respect of the environment, apart from a continued commitment to sustainable development.

From the above point of view, international environmental law has become well established over the last ten years in spite of the fact that its development is constrained by a number of factors such as the doctrine of sovereignty.<sup>91</sup> However, sovereignty is not the antithesis to environmental protection; far from it. It is through a nation state being sovereign, namely, being in a position to regulate internal matters and negotiate at an external level, that it can most appropriately seek to conserve both its own and the global environment. Sovereignty can no longer simply be about, if it ever was, protecting the national interest, but rather sovereignty is concerned with maintaining the existence of an

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development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.”

<sup>89</sup> Bowles Newton R *op. cit* (n 71) 112.

<sup>90</sup> More than 22,000 official delegates, with 10,000 representatives of 193 countries, including over 100 heads of state, and 8,096 individuals from 925 accredited civil society organizations attended the Summit and made a vibrant call for coherence between, and integration of, the three pillars of sustainable development, namely, social justice, economic growth and environmental protection. See Cordonier Segger Marie Claire and Khalfan Ashfaq *op. cit.* (n 6) 16.

<sup>91</sup> The definition of the concept of sovereignty has begun to evolve in order to incorporate the need to protect and to conserve the planetary environment which transcends man-made boundaries. Whether this gradual redefining of sovereignty will benefit environmental protection is not yet clear, and sovereignty remains a significant barrier to the realization of more detailed environmental obligations. Add to this the conflicting environmental priorities of North and South, and it becomes apparent why international environmental negotiations continue to fail at the point when rigorous environmental standards need to be enforced. For more comments, see Thornton J and Beckwith S *op. cit.* (n 51) 30.

active state within a relevant international community. Therefore, sovereignty must not be considered as a static, immovable fact, but rather as a flexible tool through which states can more effectively act in an increasingly interdependent global society.<sup>92</sup>

International humanitarian law, one of the branches of international law, experienced rapid development within the last decade, and has contributed largely to the development and protection of the environment in times of armed conflict.<sup>93</sup> One may find norms which anticipate the protection of the environment during war in general principles of humanitarian law that have been on the books since the turn of the century and earlier.<sup>94</sup> The 1868 Declaration of St Petersburg,<sup>95</sup> for instance, proclaimed ‘that the only legitimate object which states should endeavour to accomplish during war is to weaken the military force of the enemy’; and the standard-setting 1907 Hague Convention,<sup>96</sup> reminded belligerents that their right to adopt ways of injuring the enemy is not unlimited.<sup>97</sup> The first humanitarian law instrument to introduce environmental protection was the 1977 Additional Protocol I of the 1949 Geneva Conventions relating to the Protection of Victims of International Armed Conflicts. Article 35(3) of Additional Protocol I to the Convention reads:

It is prohibited to employ methods or means of warfare which are intended or may be expected to cause widespread, long-term and severe damage to the natural environment.

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<sup>92</sup> French Duncan A *op. cit.* (n 68) at 399.

<sup>93</sup> Van der Vyver J *op. cit.* (n 6) at 4.

<sup>94</sup> Gasser Hans Peter “For better protection of the natural environment in armed conflict: A proposal for actions” (1995) 89 *American Journal of International Law* at 637.

<sup>95</sup> Declaration of Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight 1868 reprinted in 1907 1 *American Journal of International Law* (supp) 95.

<sup>96</sup> Convention (No IV) respecting the Laws and Customs of War on Land, Annex 1907 36 Stat 2277 TS No 539 Bevans 631.

<sup>97</sup> *Id.* Article 22.

Article 5 of the same protocol places an emphasis on the health and survival of the people in the conflict area and beyond. It provides that:

1. Care should be taken in warfare to protect the natural environment against widespread, long-term and severe damage. The protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.
2. Attacks against the natural environment by way of reprisal are prohibited.

Article 15 of the 1977 Additional Protocol II to the Geneva Conventions of 1949 on the Protection of Victims of International Armed Conflicts also prohibits attacks against ‘dangerous installations’ which, when attacked, would have widespread environmental repercussions for the civilian population. Such installations include: dams, dykes, and nuclear reactors. Attacks on nuclear reactors, for instance, can cause irreparable environmental destruction over a large area.<sup>98</sup>

Despite the impressive development of rules of international environmental law, there is an almost complete absence of imaginative enforcement strategies for the protection and preservation of the environment in international conventions, including a reluctance to resort to the criminalization of acts that violate the norms enunciated in such conventions. Enforcement of environmental conventions does not appear to be a prime concern in the drafting of these conventions, because states parties prefer not to create legally binding instruments and so avoid any control by other parties over their own interests. To overcome the weaknesses observed in the area, the Draft Articles on State responsibility prepared by the International Law Commission<sup>99</sup> provide a broad

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<sup>98</sup> Mekete BT and Ojwang JB *op. cit.* (n 50) at 164.

<sup>99</sup> Dugard J *op. cit.* (n 37) 393.

framework for international environmental law. A state commits a wrongful act in terms of these Draft Articles when ‘conduct consisting of an action or omission is attributable to the state under international law’ and ‘that conduct constitutes a breach of an international obligation of the state.’<sup>100</sup> The injured state is entitled to obtain from the state that has committed an international wrongful act ‘full reparation in the form of restitution in kind, compensation, satisfaction and assurances and guarantees of non-repetition.’<sup>101</sup>

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

Scholars are opposed over the recognition of, and relationship between, human rights and the environment. One may argue that there is no general, comprehensive international treaty on human rights and the environment. Academics have been hesitant to recognize the link between human rights and the environment by the inherent limitations in a human rights based approach to environmental protection. Miller<sup>102</sup> strongly contests the idea that human rights may not be invoked for the protection of the environment. He argues that because human rights protect individuals, then it follows that a precondition for invoking human rights in environmental cases would be the harm caused to an individual. It can, of course, happen that environmental violations, for example, when pollution from industry and motor vehicles causes forests to perish, may not directly interfere with an individual’s right (at least, not immediately). It is also possible that the interests of individuals and the exercise of their human rights may be a source of environmental harm, for example, when the right to food of the Amazonian Indians leads to deforestation in order to make room for

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<sup>100</sup> Article 3.

<sup>101</sup> Article 42.

<sup>102</sup> Miller C “Environmental rights: Critical perspective” (1998) quoted by Thornton J and Beckwith *op. cit.* (n 51) 368.

agricultural land. Such short-sighted practices threaten the ecological balance of this region and impact negatively on the global environment. Miller notes that only the present generation is protected by human rights – an approach which is not easily translated into the kind of sustainable development that would preserve the environment for future generations. In the same vein, Shelton<sup>103</sup> points out that the enjoyment of the right to a name and the right to marry neither promotes nor harms the environmental agenda, so obviously not all human rights are relevant to the protection of the environment.

However, without undermining the foregoing arguments, the relationship between human rights and the protection of the environment should not be neglected. There exists a direct and undeniable functional relationship between the protection of the environment and the protection and promotion of human rights.<sup>104</sup> Yet, this relationship is a complex one that is often misunderstood, and, at times, misrepresented.<sup>105</sup> Since World War II, the concept of human rights has been the subject of scholarly reconsideration. Edel<sup>106</sup> classifies human rights according to their properties, and proposes the following criteria to determine whether or not they exist: generality, importance, endurance, and inalienability. He considers human rights to be general in their application and to cover all human beings. They are more basic and more fundamental than other rights; they have the capacity to endure even in changing circumstances; they represent the immutability of human values and of civilization itself. They are indispensable to the human personality; they must be rights of an inherent nature and their normative values should flow through and control the relations

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<sup>103</sup> Shelton D “Environmental rights” in Alston Philip (ed.) *Peoples’ rights* (2001) Vol. IX/2 Academy of European Law European University Institute Oxford University Press New York 190.

<sup>104</sup> *Id.* 189.

<sup>105</sup> Günther Handl “Human rights and protection of the environment” in Eide Asbjorn, Krause Catarina and Rosas Allan (eds.) *op. cit.* (n 46) 303.

<sup>106</sup> Edel quoted by Mekete BT and Ojwang JB *op. cit.* (n 50) at 156.

between a political society and its members. Keeping this in mind, the author notes, further, that such criteria must be taken into account when seeking out the place of juridical elements in the configuration of environmental interests. Such interests do bear a connection with the fundamental right to life. A healthy environment is vital to the quality of life for human beings. Physical existence and health, and the quality and dignity of that existence, do call for the safeguarding by the state of the health of the environment.<sup>107</sup> The recognition that human survival depends upon a safe and healthy environment places the claim of a right to environment fully on the human rights agenda.<sup>108</sup> Kiss and Shelton present four principal approaches to characterise the relationship between human rights and the environment:<sup>109</sup>

- International environmental law incorporates and utilises those human rights guarantees deemed necessary or important to ensuring effective environmental protection, including procedural rights such as freedom of association, the right of access to information concerning potential threats to the environment, etc.
- Human rights law re-casts or interprets internationally-guaranteed human rights to include an environmental dimension when environmental degradation prevents full enjoyment of the guaranteed rights. This approach is unreservedly anthropocentric and supported by indications of the public health impacts of environmental deterioration.<sup>110</sup>

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<sup>107</sup> Brown Weiss Edith (ed.) *Environmental change and international law: New challenges and dimensions* (1992) Tokyo United University Press 274; Kiss A and Shelton D *Guide to international environmental law* (2007) Martinus Nijhoff Publishers Leiden/Boston 237-241.

<sup>108</sup> Kiss A and Shelton D *International environmental law op. cit.* (n 6) 709.

<sup>109</sup> *Id.* 663.

<sup>110</sup> A scholarly survey carried out in 1998 uncovered the fact that 40% of all human deaths are a direct result of unsafe drinking water, caused by toxic wastes dumped into the river and lake systems. Waterborne diseases account for 80% of all human disease, and the health of 4 billion people is adversely affected by air pollution. Cases of human pesticide poisoning have increased to 3 million per year. See Pimental D "Ecology of increasing diseases: Population growth and environmental degradation" (Oct. 1998) *Bioscience* in Kiss A and Shelton D *International environmental law op. cit.* (n 6) 664.



The two above-mentioned approaches employ the existing human rights complaint procedures to challenge those countries with such poor environmental protection records that none of the guaranteed human rights are being upheld. The drawback with these approaches is that human rights are, by definition, anthropocentric and do not include the right to life of other species or the right of those species to their habitat. It also fails to acknowledge the need to protect ecological processes.<sup>111</sup> Consequently, there has been a search for better ways to deal with environmental rights.

- International environmental law and international human rights law elaborate a new substantive right to a safe and healthy environment. This approach tries to defend a new human right to an environment that is borne out of the purely anthropocentric perspective, an environment that is safe not only for humans, but one that is ecologically balanced and sustainable in the long-term.<sup>112</sup>
- International environmental law articulates the ethical and legal duties of individuals that include environmental protection and human rights. In this respect, environmental protection is addressed as a matter of human responsibilities rather than rights. A number of proponents of this approach posit ecological rights, or rights of nature, as a construct to balance human rights, and attempt to reconcile human rights and ecology by introducing ecological limitations on human rights. The objective of these limitations is to implement an eco-centric ethic in a manner which imposes responsibilities and duties upon humankind to take intrinsic values and the interests of the natural community into account when exercising its human rights.<sup>113</sup>

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<sup>111</sup> Kiss A and Shelton D *International environmental law op. cit.* (n 6) 665.

<sup>112</sup> *Idem.*

<sup>113</sup> Taylor Prudence “From environmental to ecological human rights: A new dynamic in international law” (1998) *International Environmental Law Review* 309, 310. See also Kiss A and Shelton D *International environmental law op. cit.* (n 6) 665.

Indeed, in the light of the terms of the UN Charter, human rights are one of the primary concerns of the UN. Article 1(3) of the UN Charter points out that one of its objectives is international cooperation to solve problems of an economic, social, cultural or humanitarian character which impede the scope for observance of human rights and fundamental freedoms. The three primary international human rights instruments, namely, the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights barely mention the relationship between human rights and the environment. The Universal Declaration of Human Rights<sup>114</sup> which is usually considered as the source of all current human rights instruments has adopted the UN Charter objective contained in its article 1(3). Though there are no specific environmental rights provisions in the Declaration, it is possible to understand article 3 on the right to life as an indirect acknowledgment of these rights.<sup>115</sup> The right to life is one of the most fundamental rights recognised under the International Covenant on Civil and Political Rights of 1966.<sup>116</sup> Mekete and Ojwang assert that ‘the concept of a healthy environment, as conceived under the 1972 Stockholm Declaration on the Human Environment, is inseparable from the right to life itself. The two are co-extensive, and operate as the most essential rights for the existence of humankind.’<sup>117</sup> Human rights law seeks to ensure that environmental conditions do not deteriorate to the point where the right to life, the right to health, the right to a family and private life, the right to culture, and other human rights are seriously impaired.<sup>118</sup> Human rights cannot be secured in a degraded or polluted environment. The fundamental right to life is threatened

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<sup>114</sup> Resolution 217 (III) of the General Assembly of the UN. See also Lauterpacht H “The Universal Declaration of Human Rights” (1948) 25 *British Yearbook of International Law* 354.

<sup>115</sup> Mekete BT and Ojwang JB *op. cit.* (n 50) 159.

<sup>116</sup> Article 6(1) of this Covenant guarantees the right to life.

<sup>117</sup> Mekete BT and Ojwang JB *op. cit.* (n 50) 159.

<sup>118</sup> Kiss A and Shelton D *International environmental law op. cit.* (n 6) 664.

by soil degradation and deforestation and by exposures to toxic chemicals, hazardous wastes and contaminated drinking water. Environmental conditions clearly help to determine the extent to which people enjoy their basic right to life, health, adequate food and housing, and traditional livelihood and culture. It appears that the time is ripe for the criminalization of pollution and its destructive effect on the environment (natural and built) as a human rights violation and a crime against the environment.<sup>119</sup>

Giorgetta emphasizes that ‘environmental degradation is in itself a serious threat to human survival, since it affects the living space needed to ensure the quality of life and health. And further, that respect for human rights is related to environmental protection, for human beings depend upon it to survive.’<sup>120</sup> We may also find some provisions related to the right to a healthy environment in the International Covenant on Economic, Social and Cultural Rights of 1966. Article 11(1) provides for the ‘right to an adequate standard of living ... and to the continuous improvement of living conditions.’ Article 12(1) entitles ‘everyone to the enjoyment of the highest attainable standard of physical and mental health, the attainment of which is subject to the improvement of all aspects of environment and industrial hygiene.’ These provisions clearly go beyond those of the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, in underlining environmental health as a major element in the protection of life. The goal of attaining the highest standard of physical and mental health, as envisaged by the

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<sup>119</sup> A community that fails to guarantee to its people a decent environment or which treats the environment negatively must be considered as committing an international crime. See Toepfer Klaus, Executive Director of the United Nations Environment Programme, Statement to the 57<sup>th</sup> Session of the UN Commission on Human Rights in 2001 in Kiss A and Shelton D *International environmental law op. cit.* (n 6) 664. See also Maina PC *Human rights in Tanzania: Selected cases and materials* (1997) Rüdiger Köppe Verlag, Köln 150.

<sup>120</sup> Giorgetta Sueli “The right to a healthy environment” in Nico Schrijver and Friedl Weiss (eds.) *op. cit.* (n 3) 382. See also Gormely Paul W “The right to a safe and decent environment” (1988) 28 *The Indiana Journal of International Law* 1-32.

International Covenant on Economic, Social and Cultural Rights, can hardly be realised except by avoiding or mitigating environmental degradation. The right to a healthy environment, as contemplated by the International Covenant on Economic, Social and Cultural Rights, would entitle individuals to exercise their rights against states which are parties to it. The provisions of articles 11 and 12 of this Covenant are apparently developed from article 25 of the Universal Declaration of Human Rights that provides for the right to ‘a standard of living adequate for the health and well-being ... including food, clothing, housing and medical care...’<sup>121</sup>

Other important international instruments recognize the right to environment and establish the relationship between human rights and the environment at the universal, regional and sub-regional levels. These will be touched upon in the following paragraphs, as indicated.

### **Universal level**

The landmark Stockholm Declaration on the Human Environment, albeit ‘soft law’, was adopted on 16 June 1972 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>122</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’, and in its first Principle states:

Man has a fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.

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<sup>121</sup> Mekete BT and Ojwang JB *op. cit.* (n 50) 159.

<sup>122</sup> Ouguergouz F *op. cit.* (n 5) 355.

Kiss and Shelton assert that this complex sentence stops short of proclaiming a right to environment, but it clearly links human rights and environmental protection. It sees human rights as a fundamental goal and environmental protection as an instrument to achieve the ‘adequate conditions’ for the guaranteed life of dignity and well-being.<sup>123</sup>

At the Rio summit in 1992, the link between the environment and human rights was reiterated but it found less acceptance. 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.’ Obviously, the impact of the Rio Declaration, with its emphasis on sustainable development, which was centred on the link between development and environmental protection, has tended to receive wide recognition. In fact, a distinct change of emphasis was evident in that the link between environmental concerns and the need for development was not only acknowledged but also prioritized.<sup>124</sup> Glazewski notes that further impetus for the recognition of the link between human rights and the environment was provided in the report of the World Commission on Environment and Development (WCED),<sup>125</sup> and its Summary of Proposed Legal Principles for Environmental Protection and Sustainable Development.<sup>126</sup>

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<sup>123</sup> Kiss A and Shelton D *International environmental law op. cit.* (n 6) 667.

<sup>124</sup> Cheadle MH, Davis DM, and Haysom NRL *South African constitutional law: The Bill of Rights* (2002) Butterworths Durban 412.

<sup>125</sup> *Our Common Future* World Commission on Environment and Development (“the Brundtland Report”) Oxford University Press 1987.

<sup>126</sup> This instrument includes the following clauses related to human rights: “All human beings have the fundamental right to an environment adequate for their health and well-being; States shall conserve and use the environment and natural resources for the benefit of present and future generations; States shall maintain ecosystems and ecological processes essential for the functioning of the biosphere, shall preserve biological diversity, and shall observe the

On a larger scale, the shift of emphasis apparent in the Rio Declaration continued at the 2002 UN World Summit on Sustainable Development held in Johannesburg. The Johannesburg Declaration on Sustainable Development makes oblique reference to ‘human dignity’, but otherwise focuses on sustainable development.<sup>127</sup> The Plan of Implementation of the World Summit on Sustainable Development (Johannesburg PoI) lays down targets for achieving human rights and development goals.<sup>128</sup> Other international initiatives that promote a global environmental human ethic exist. For instance, the United Nations Commission on Human Rights Sub-Commission on the Prevention of Discrimination and Protection of Minorities produced five reports on human rights and the environment that emphasizes the right to the highest standard of health, including its environmental aspects.<sup>129</sup> From this important background on the link between human rights and the environment, according to Thornton and Beckwith,<sup>130</sup> a substantive right to a healthy environment exists as a matter of international law. To the extent that such a right might be said to exist, it is perhaps, evidenced by the elements of the Rio Declaration which deal with the procedural aspects of environmental protection. It is from this perspective that Principle 10 of the Rio Declaration has proved to be of particular importance in

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principle of optimum sustainable yield in the use of living natural resources and ecosystems and others.” See Glazewski *J op. cit.* (n 35) 68.

<sup>127</sup> Thornton J and Beckwith *op. cit.* (n 51) 388.

<sup>128</sup> Report of the World Summit on Sustainable Development, Johannesburg, South Africa, 26 August – 4 September 2002, UN Doc. A/Conf. 199/20 and Pallemerts “International law and sustainable development: Any progress in Johannesburg?” (2003) 12 *Review of European Community and International Environmental Law* 1-11. See also Glazewski *J op. cit.* (n 35) 69.

<sup>129</sup> United Nations, Economic and Social Council Commission and Human Rights, Sub-Commission on Prevention of Discrimination and Protection of Minorities *Human Rights and the Environment*. The reports, known as the Ksentini Reports, after the Commission’s Rapporteur, Mrs Fatma Zohra Ksentini, are: E/CN4/sub2/1991/8/ dated 2 August 1991; E/CN4/sub2/1992/7 dated 2 July 1992; E/CN4/sub22/1992/7/ add1 dated 14 August 1992; E/CN4/sub2/1993/7 dated 2 August 1991; E/CN4/sub2/1992/7 dated 2 July 1992; E/CN4/sub22/1992/7add1 dated 14 August 1992; E/CN4/sub2/1993/7 dated 26 July 1993 and E/CN4/sub2/1994/9 dated 6 July 1994. See also Glazewski *J op. cit.* (n 35) 69.

<sup>130</sup> Thornton J and Beckwith S *op. cit.* (n 51) 388.

enabling concerned individuals and groups to take action for environmental protection. This Principle provides that:

Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in the decision-making process. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.

### **Regional level**

At regional level, environmental rights have been recognized in different instruments:

#### *American initiatives*

The Organization of American States (OAS) recognizes the right to a healthy environment. The General Assembly of the Organization of American States passed a resolution adopting the Additional Protocol to the American Convention on Human Rights in the Areas of Economic, Social and Cultural Rights (1988).<sup>131</sup> In terms of its article 11, entitled ‘Right to a healthy environment’, the Protocol recognises 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.

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<sup>131</sup> AG/Res 907 (xviii-O/88) of the Organization of American States, on Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights [Protocol of San Salvador] of November 17, 1988.

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

However, this article 11(1) is clearly viewed as an individual right. The Inter-American Human Rights System, in relation to the application of the right to a healthy environment, is quite clearly concerned with ‘individual rights’. Giorgetta<sup>132</sup> compares article 24 of the African Charter dealing with the right to a general satisfactory environment with the Inter-American Court and Inter-American Commission systems, and concludes that they are more effectively structured to deal with human rights violations of scale. Furthermore, the Commission may proactively undertake country studies and site investigations and so is not weakened by the need for permission or a petition before it may act. The Inter-American Human Rights system is therefore a force to be reckoned with.

### *European initiatives*

In Europe, neither the European Convention for the Protection of Human Rights and Fundamental Freedoms,<sup>133</sup> nor the European Social Charter<sup>134</sup> contains a right to environmental quality nor did the former European Commission on Human Rights hold that such a right can be directly inferred from the Convention.<sup>135</sup> However, the European Social Charter, which is the counterpart of the European Convention on Human Rights in the sphere of economic and

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<sup>132</sup> Giorgetta Sueli “The right to a healthy environment” in Nico Schrijver and Friedl Weiss (eds.) *op. cit.* (n 3) 388.

<sup>133</sup> November 4, 1950.

<sup>134</sup> October 18, 1961.

<sup>135</sup> Kiss A and Shelton D *International environmental law op. cit.* (n 6) 713; See also Malgosia Fitzmaurice and Jill Marshall “The human right to a clean environment - phantom or reality? The European Court of Human Rights and English Courts perspective on balancing rights in environmental cases” (2007) Vol. 76 No. 2-3 *Nordic Journal of International Law* Martinus Nijhoff Publishers 113.



social rights, is an additional legal instrument to enhance human rights protection in the member States of the Council. The Social Charter provides for economic and social rights which, to some extent, are concerned with environmental goals.<sup>136</sup> The very first treaty to recognize the individual right to a healthy environment was the Convention on the Protection of the Environment between Denmark, Finland, Norway and Sweden<sup>137</sup> of 1974 which entered into force on 5 October 1976.<sup>138</sup> Article 3 of the Convention guarantees individuals in the contracting states the right to seek damages for environmental nuisance, and the right to appeal against any decision of the court or administrative authority of the state in which the environmentally harmful activities are being conducted. In 1964, the Council of Europe convened a conference on air pollution to examine methods of dealing with the causes of air pollution and its effects on the health of individuals.<sup>139</sup> In 1970, the Council organised another conference that declared 1970 as the European Conservation year.<sup>140</sup> The conference is believed to have enhanced the sensitization of the European public and influenced world opinion positively.<sup>141</sup>

The real foundations of growing recognition for environmental rights in Europe are traceable to the 1970s.<sup>142</sup> In those years environmental movements in Europe

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<sup>136</sup> Mekete BT and Ojwang JB *op. cit.* (n 50) 163.

<sup>137</sup> Commonly referred to as the Nordic Environmental Protection Convention.

<sup>138</sup> Kiss A (ed.) *Selected multilateral treaties in the field of the environment* (1983) 403.

<sup>139</sup> Gormley WP *Human rights and environment: The need for international co-operation* (1976) Leyden Sijthoff 75. See also Mekete BT and Ojwang JB *op. cit.* (n 50) 163.

<sup>140</sup> *Id.* at 376.

<sup>141</sup> *Idem.*

<sup>142</sup> The development of a system of international norms for the preservation and protection of the environment more or less coincides 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 1970s environmental rights came to be identified as part of the so-called “third generation” of human rights. 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

were actively involved in enhancing environmental awareness. In the early 1970s environmental parties were operating alongside political parties, notably in Belgium and the then Federal Republic of Germany. The notion of the individual right to a healthy environment, in this period, was initially clearly propounded.<sup>143</sup>

The European Court of Human Rights has recently recognized the human 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 founded this right was article 8 on the respect for private life and the home. Two important cases may be cited. In the *Lopez Ostra* case, the court held that there was 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 private and family life adversely, without, however, seriously endangering their health...’<sup>144</sup> Additionally, in the case of *Anna Maria 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>145</sup> A

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Vasak’s address was ‘For the third generation of human rights: The right to solidarity.’ See Van der Vyver J *op. cit.* (n 6) at 8.

<sup>143</sup> Mekete BT and Ojwang JB *op. cit.* (n 50) 163.

<sup>144</sup> The court upheld that “pollution does not have to cause serious damage to human health, but rather must be “severe” in order to give rise to a cause of action and that a privately owned facility’s nuisance may be attributed to the State.” Most importantly, this was the first case in which the Court clearly recognized environmental issues within the human rights structure and that, even in the absence of an explicit environmental right in the European Convention on Human Rights (ECHR), it found that Article 8 constitutes a proper and sufficient link to connect the two: human rights and the environment. It was also the first time that the Court had given a green “slant” to its decisions while weighing the interests of the public and economy against the environmental complaint of the individual. *Lopez Ostra v Spain* of 9 December 1994, Series A no 303-C Paragraph 51, European Court of Human Rights. See Malgosia Fitzmaurice and Jill Marshall *op. cit.* (n 135) at 117. See also Ouguergouz F *op. cit.* (n 5) 360.

<sup>145</sup> *Guerra and 39 Others*, Reports 1998 - I. See also Ouguergouz F *op. cit.* (n 5) 360. For further analysis on the development of the Court’s jurisprudence on the matters of human rights and the environment, one may rely on three important cases: *Hatton et al. v United*

violation of article 8 was again alleged in the case of *Hatton and Others v the United Kingdom*. In this case,<sup>146</sup> the applicants complained of the increase in the level of noise caused in their homes by aircraft using Heathrow Airport at night. The European Court upheld that overnight flights at airports violated the residents' basic human rights, and that the United Kingdom failed to strike a fair balance between its economic well-being and the applicants' right to the effective enjoyment of their homes and respect for their private and family lives.<sup>147</sup>

### *African initiatives*

In compliance with international instruments pertaining to the protection of the environment, ratified by an important number of African states,<sup>148</sup> numerous regional and sub-regional instruments recognize and guarantee the right to a healthy environment in Africa.

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*Kingdom* 2 October 2001 Judgment of the Chamber (hereafter '*the first Hatton case*'); *Hatton et al. v United Kingdom* 8 July 2003 Grand Chamber (hereafter '*the second Hatton case*'). See on the first *Hatton* case some clarification on the 'indirect' individual right to a healthy environment. Smith R. '*Hatton v United Kingdom*' (2002) 96 *AJIL* 692 - 699. On the second *Hatton* case Miller C. "Environmental rights in a welfare State? - A comment on de Merieux" (2003) 23 *Oxford Journal of Legal Studies* 111-125. Finally, the case of *Fadeyeva v. Russia* 9 June 2005. See Leach "stay inside when the wind blows your way – engaging environmental rights with human rights" (2005) 4 *Environmental Liability* 91-97.

<sup>146</sup> *Hatton v United Kingdom op. cit.* (n 145).

<sup>147</sup> As discussed by Giorgetta Sueli "The right to healthy environment" in Nico Schrijver and Friedl Weiss (eds.) *op. cit.* (n 3) 389.

<sup>148</sup> It must be mentioned that the African continent played a pioneer role in the environment protection domain. The excellent illustration remains the Convention on Nature and Natural Resources of 1968 which was signed in Alger. In addition, the headquarters of the United Nations Environmental Programme (UNEP) is located in Nairobi/Kenya (African country) since 1972. It is also in Africa, in the Democratic Republic of Congo (the former Zaïre), that the 1975 initiative of the World Charter on Nature was launched and approved by the United Nations General Assembly on October 28, 1982. See Kamto M *Droit de l'environnement en Afrique op. cit.* (n 40) 13.

The Lagos Plan of Action (1980),<sup>149</sup> which is a major policy and planning document of the Organization of African Unity (OAU),<sup>150</sup> carries a chapter on ‘Environment and Development’. This chapter contains several important recommendations on environmental protection. Some of its recommendations deal with the protection of human life and the improvement of the environment. The plan encapsulates different aspects of the right to a healthy environment, namely, safe drinking water supply; improvement of human settlements; environmental sanitation and health; control of air pollution; and environmental education and training. The recommendations were intended to lead towards sustainable development at regional and national levels. African states were urged to give fulfilment to the objectives of the Plan of Action through national legislation.<sup>151</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.’ Despite the significance of the Charter as the first international instrument to recognize the right to the environment<sup>152</sup> and to proclaim it as a collective right, its formulation has been the subject of criticism. There are latent ambiguities<sup>153</sup> concerning the meaning and scope<sup>154</sup> of the right.

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<sup>149</sup> Organization of African Unity (OAU) *The Lagos Plan of Action for the Economic Development of Africa 1980-2000* (1981) Chapter IX para 266(a).

<sup>150</sup> The Organization of African Unity (OAU), created in 1963 in Addis Ababa, is currently known as the African Union (AU). The Constitutive Act of the AU was adopted in Lomé (Togo) on 11<sup>th</sup> July 2000. However, the Organisation was established in 2002 in Addis Ababa, Ethiopia. See Badejo Diedre L. *Global Organizations: The African Union* (2008) Infobase Publishing New York 12.

<sup>151</sup> OAU *op. cit.* (n 149) paras 267(h) 269, 270.

<sup>152</sup> Feris L and Tladi D “Environmental rights” in Brand D and Heyns C (eds.) *Socio-economic rights in South Africa* (2005) Pretoria University Law Press PULP Cape Town 256. See also Van der Linde “African responses to environmental protection” (2002) 35 *Comparative and International Law Journal of Southern Africa* at 99.

<sup>153</sup> Due to the definitional vagueness of, for instance, the key term ‘people’, see Kiwanuka RN “The meaning of ‘people’ in the African Charter of Human and Peoples’ Rights” (1988) Vol.

One of ambiguities stems from the inherent potential for conflict between environmental protection and development objectives.<sup>155</sup> It has been indicated that, operationally, the right is conceptualized not as a programmatic entitlement, but as one that would be effective immediately upon entry into force of the Charter.<sup>156</sup>

In 1985 a significant environmental initiative was released at the first African Ministerial Conference on the Environment (AMCEN), which was held in Cairo from 16-18 December. The Conference adopted a resolution on ‘Environmental Co-operation in Africa.’<sup>157</sup> African States were urged through the Conference to co-operate in the cause of environmental protection, in the ‘design and implementation of regional cooperation programmes to combat desertification in the regions covered by the permanent Inter-state Committee on Drought Control in the Sahel, the Maghreb, the member States of the Economic Community of West African States; Egypt, the Sudan ... and also in the horn of Africa, the Kalahari Region and Central Africa’.<sup>158</sup>

In 1991, the Bamako Convention on the Ban of the Import of Hazardous Wastes into Africa and on the Control of their Transboundary Movements within Africa was adopted by African states. This Convention was initiated as a counter-

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82 *American Journal of International Law* at 100-101; Kiwanuka RN “The meaning of ‘People’ in the African Charter on Human and Peoples’ Rights” (1988) 82 *American Journal of International Law* 80 in Heyns and Steffiszyn (eds.) *Human rights, peace and justice in Africa: A reader* (2006) Pretoria University Law Press PULP 62; Anthony “Beyond the paper tiger: The challenge of a human rights court in Africa” (1997) *Texas International Law Journal* at 515.

<sup>154</sup> Günther Handl “Human rights and protection of the environment” in Eide Asbjorn, Krause Catarina and Rosas Allan *op. cit.* (n 46) 309.

<sup>155</sup> In the African Charter, the right to environment is grounded in concerns for development: economic, social and personal development. See Shelton D “Environmental rights” in Alston Philip (ed.) *op. cit.* (n 103) 234.

<sup>156</sup> Article 1 of the Charter.

<sup>157</sup> UNEP/AEC 1/2 *First African Conference on the Environment: Report of the Conference* (1985).

<sup>158</sup> *Idem.*

measure to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal in 1989 that, according to the Organization of African Unity, was out of harmony with Africa's best interests – as it still allowed the transboundary movement of hazardous wastes. Mekete and Ojwang<sup>159</sup> note that this Convention recently addressed the said criticism, when at its second Conference of the Parties, held in March 1994, it was decided that an immediate prohibition be imposed on all transboundary movements of hazardous wastes from the Organization for Economic Cooperation and Development (OECD) countries, destined for final disposal in non-OECD countries. The Organization of African Unity (now the AU) does not favour the importation of hazardous wastes into Africa, and it has called upon all member States to prohibit such transfers of wastes:

All parties shall take appropriate legal, administrative and other measures within the area under their jurisdiction to prohibit the import of all hazardous wastes for any reason, into Africa from any non-contracting Parties. Such import shall be deemed illegal and a criminal act.<sup>160</sup>

Another initiative on the commitment of African states to enhance the protection of the environment is the Abuja Treaty Establishing the African Economic Community in 1991. Members of the Community agreed to 'take necessary measures to accelerate the reform and innovation process leading to ecologically sound and socially acceptable development policies and programmes.'<sup>161</sup> It is in this respect that the AU 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>162</sup>

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<sup>159</sup> Mekete BT and Ojwang JB *op. cit.* (n 50) at 161.

<sup>160</sup> Article 4 of the Bamako Convention has been incorporated into article 55 of the Constitution of the Democratic Republic of Congo of 18 February 2006.

<sup>161</sup> Article 58(2) of the Abuja Treaty.

<sup>162</sup> Article 3 (h) of the Constitutive Act of the African Union adopted in Lomé (Togo) on 11<sup>th</sup> July 2000.

With the intention to eradicate poverty and to place their countries, both individually and collectively, on the path to sustainable growth and development, heads of states and governments have agreed to insert an environmental component in the realization of the New Partnership for Africa's Development (NEPAD). It has been recognized that a healthy and productive environment is a prerequisite for the New Partnership for Africa's Development, that the range of issues necessary to nurture this environmental base is vast and complex, and that a systematic combination of initiatives is necessary to develop a coherent environmental programme.<sup>163</sup> An important process towards a specific New Partnership for Africa's Development Environmental Action Plan commenced early on in the NEPAD initiative and a framework for the action plan was endorsed by the African Ministerial Conference on the Environment (AMCEN) in 2002 and by the AU in the same year. The environmental Action Plan is underpinned by the notion of sustainable development in that it takes economic growth, income distribution, poverty eradication, social equity and better governance into consideration.<sup>164</sup>

### **Sub-regional level**

In the light of the terms of the Memorandum of Understanding between Kenya, Tanzania and Uganda for Cooperation on Environment Management of October 22, 1998, the three states agreed to cooperate to develop, enact and harmonize their national environmental laws on the rights of their peoples to a clean, decent and healthy environment.<sup>165</sup>

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<sup>163</sup> Preamble to Chapter 8 of the New Partnership for Africa's Development documentation titled 'The environmental initiative'. See Van der Linde *op. cit.* (n 152) 99; Glazewski J *op. cit.* (n 35) 33.

<sup>164</sup> Ako Amadi *NEPAD and the environment* (2002) Global Okologi 1; Glazewski J *idem*.

<sup>165</sup> Kiss A and Shelton D *International environmental law op. cit.* (n 6) 713.

In 1992, the Treaty on the creation of the SADC entered into force. Amongst its objectives, the Organization aims to 'achieve development and economic growth, alleviate poverty, enhance the standard and quality of life of the peoples of Southern Africa and support the socially disadvantaged through regional integration'.<sup>166</sup> Member states are committed to 'coordinate, harmonize, and rationalize their policies and strategies for sustainable development in all areas of human endeavour ...',<sup>167</sup> and agree to co-operate in the areas of natural resources and the environment.<sup>168</sup> Since 1993, the SADC Environment and Land Management Sector (ELMS) has launched a programme to support environmental education processes within the region. This Environmental Education Programme, that is now a project of the SADC Food, Agriculture and Natural Resources (FANR) Directorate, enables environmental education practitioners in the SADC region, and strengthens environmental education processes for equitable and sustainable environmental management choices.<sup>169</sup> It is believed that this will be achieved through enhanced and strengthened environmental education policy, networking, availability of resource materials and training capacity.

It has been said that the African Commission on Human and Peoples' Rights was the first international human rights body to decide a contentious case involving violation of the right to a general satisfactory environment. Acting on a petition filed by two non-governmental organisations on behalf of the people of Ogoniland, Nigeria, the African Commission on Human and Peoples' Rights found Nigeria had breached its obligations to respect, protect, promote, and

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<sup>166</sup> Article 5(1) (a) of the Treaty.

<sup>167</sup> Preamble of the Treaty.

<sup>168</sup> Article 21(3) (e) of the Treaty.

<sup>169</sup> SADC Regional Environmental Educational Programme. Available at: [http://www.environment.gov.za/ProjProg/2003SADC/capacity-building\\_sadc\\_21052003.html](http://www.environment.gov.za/ProjProg/2003SADC/capacity-building_sadc_21052003.html) (visited 02/03/2007).



fulfil the rights guaranteed by the African Charter on Human and Peoples' Rights.<sup>170</sup>

In concluding the discussions of the recognition of the right to environment and the relationship between human rights and the environment, 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>171</sup> Arguably, there is an unequivocal recognition of an environmental right in international law.<sup>172</sup> Human rights depend upon environmental protection, and environmental protection depends upon the exercise of existing human rights such as the right to have access to information and the right to political participation. The view defended by Kiss and Shelton that mankind is part of a global system may reconcile the aims of human rights and environmental protection, since both ultimately seek to achieve the highest quality of sustainable life for humanity within the existing global ecosystem. Potentially conflicting differences of emphasis still exist; however, the essential concern of human rights law is to protect the individuals and groups alive today within a given society, while the purpose of environmental law is to sustain life globally by balancing the needs

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<sup>170</sup> Decision regarding Communication 155/96 (*Social and Economic Rights Action Centre/ Centre for Economic and Social Rights v Nigeria*), Case No ACHPR/COMM/A044/1 (African Commission on Human and Peoples' Rights. May 27, 2002). Available at <http://www.umn.edu/humanrts/africa/comcases/allcases.html> (visited 02/07/2009). The Commission held that Nigeria had violated the right of the Ogoni people to enjoy Charter-guaranteed rights and freedoms without discrimination (Article 2), the right to life (Article 4), the right to property (Article 14), the right to health (Article 16), the right to housing (Article 18(1)), the right to food (implicit in articles 4, 16 and 22), the right of peoples to freely dispose of their wealth and natural resources (Article 21), and the right of the people to a general satisfactory environment favourable to their development (Article 24). See also Kiss A and Shelton D *International environmental law op. cit.* (n 6) 715.

<sup>171</sup> Ouguergouz F *op. cit.* (n 5) 360.

<sup>172</sup> Feris L and Tladi D "Environmental rights" in Brand D and Heyns C (eds.) *op. cit.* (n 152) 264.

and capacities of the present generations of all species with those of the future. The broad protection of nature may at times conflict with the preservation of individual rights. It is not surprising, then, that international environmental law and international human rights law have placed the emphasis on different components of environmental protection.<sup>173</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 human rights and an ecologically sound environment, sustainable development and peace to be interdependent and indivisible.<sup>174</sup> In a similar vein, Judge Weeramantry states that environmental rights are human rights.<sup>175</sup> Irrespective of how a substantive environmental human right is conceptualized,<sup>176</sup> or the endorsement of the individual procedural rights approach as essential tools for the protection and conservation of the environment,<sup>177</sup> support for an international environmental human right admittedly cuts across a wide spectrum of international public opinion and is driven by the belief that a human rights approach would significantly strengthen the cause of environmental protection and conservation.<sup>178</sup>

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<sup>173</sup> Kiss A and Shelton D *International environmental law op. cit.* (n 6) 730.

<sup>174</sup> Winstanley T “Entrenching environmental protection in the new Constitution” (1995) 1 *South African Journal of Environmental Law and Policy* at 86.

<sup>175</sup> Günther Handl “Human rights and protection of the environment” in Eide Asbjorn, Krause Catarina and Rosas Allan (eds.) *op. cit.* (n 46) 303.

<sup>176</sup> Neither as an entitlement that might be immediately enforceable as a legal right nor as a right to be realised progressively over time, or as a solidarity right.

<sup>177</sup> On this point, one may refer to the statement made by Anderson who asserts that ‘such tensions cannot be wished away, despite the fashionable view that human rights and environmental protection are interdependent, complementary, and indivisible’. He acknowledges the fact that ‘while the interdependence argument obviously works in many circumstances, it sometimes serves as a moral comforter which temporarily cloaks the extremely difficult questions which must be faced’. See Anderson M. “Human rights approaches to environmental protection: An overview” in Boyle A. and Anderson M. (eds.) *Human rights approaches to environmental protection* (1996) 3. See also Günther Handl “Human rights and protection of the environment” in Eide Asbjorn, Krause Catarina and Rosas Allan (eds.) *op. cit.* (n 46) 304, 305.

<sup>178</sup> Günther Handl “Human rights and protection of the environment” in Eide Asbjorn, Krause Catarina and Rosas Allan (eds.) *idem.*

### 1.3 The national perspective and the constitutionalization of environmental rights

To have a correct understanding of environmental rights from a national perspective, and of the *'raison d'être'* for its introduction into the constitution, it seems useful to define the concept environment. The scope and sources of environmental law deserve also to be scrutinized.

#### 1.3.1 The concept of 'environment'

Much debate surrounds the real meaning and content of the concept 'environment'. Einstein believes that 'the environment is everything that isn't me'.<sup>179</sup> Kirby points out that the word 'environment' is a relational concept which indicates an interrelationship between humankind and its surroundings. Furthermore, that meaning depends on how extensive this interrelationship is perceived to be, how it is understood, in which context it is being used and the concerns and interests of the person using the word. In this respect, 'environment' will mean different things to different people.<sup>180</sup> For instance, to a conservationist, 'environment' may mean the natural living and non-living surroundings of persons; to the architect, the built environment; while to the social worker 'environment' will be the circumstances in which people live.<sup>181</sup> Thus, different perceptions of the concept 'environment' are formed and influenced by cultural, political, religious and educational differences.

The English-language term 'environment' is borrowed from an ancient French word *'environner'*, meaning to encircle. Most languages had to borrow or invent new terms when concern emerged about the potential destruction of natural

<sup>179</sup> Thornton J and Beckwith S *op. cit.* (n 51) 4.

<sup>180</sup> Kirby RV *op. cit.* (n 27) 5; Nel JG and Kotzé JL "Environmental management: An introduction" in Strydom HA and King ND (eds.) *op. cit.* (n 52) 1.

<sup>181</sup> Bates GM *Environmental law in Australia* (1987) 2<sup>nd</sup> ed. Butterworths Sydney 1.

resources and processes on which life depends.<sup>182</sup> *Webster's Dictionary* begins with a general definition of the environment, reflecting the original French meaning: 'the circumstances, objects, or conditions by which one is surrounded.' In other words, 'the complex of physical, chemical, and biotic factors (such as climate, soil, and living things) that act upon an organism or an ecological community and ultimately determine its form and survival' to which it adds 'the aggregate of social and cultural conditions that influence the life of an individual or community.'<sup>183</sup> *The Concise Oxford Dictionary* defines the concept 'environment' as follows:

1. physical surroundings and conditions, especially as affecting people's lives;
2. conditions or circumstances of living;
3. ecological external conditions affecting the growth of plants and animals;
4. a structure designed to be experienced from inside as a work of art.<sup>184</sup>

Against this background, different approaches to identifying the concept 'environment' have been highlighted: the extensive or wide, and the limited or narrow, approaches.

### *1.3.1.1 Extensive approach*

The extensive approach considers the 'environment' as a concept that embraces numerous elements including the natural environment, spatial environment and social environment. Rabie notes that the natural environment pertains to the

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<sup>182</sup> New words have emerged in many languages to express the concept of environment: "Umwelt" (German), "milieu" (Dutch), "medio ambiente" (Spanish), "meio ambiente" (Portuguese), "al'biah" (Arabic), "okruzhauchhaia sreda" (Russian) and "kankyo" (Japanese). See Kiss A and Shelton D *International environmental law op. cit.* (n 6) 2.

<sup>183</sup> This definition of "Environment" is taken from *Webster's Ninth New Collegiate Dictionary* (1983). Kiss A and Shelton D *International environmental law op. cit.* (n 6) 2.

<sup>184</sup> Allen, RE *Concise Oxford dictionary of current English* (1990) 8<sup>th</sup> ed. Clarendon Press Oxford 392.

created environment in its pure state or to renewable and non-renewable natural resources such as air, water, soil, plants and animals. Spatial environment refers to human-made and natural areas such as a suburb, town, city, rivers or forests, while sociological or social environment refers to groups of people such as a family or community.<sup>185</sup> Different legal definitions which seem to be more circumscribed may be classified under the extensive or wide approach.

The European Community Treaty indicates that the scope of the 'environment' extends to human beings, natural resources, land use, town and country planning, waste and water.<sup>186</sup> Clearly, this includes just about all areas of the environment, in particular, fauna and flora which are part of 'natural resources' and climate. The incorporation of town and country planning amongst the elements which compose the environment underlines the fact that the concept of environment includes man-made, as well as natural, elements. The Treaty does, however, draw a distinction between 'environment' and 'working environment health'. Laws pertaining to the latter, which concern conditions in the workplace, are traditionally regarded as part of a separate discipline, sometimes called 'environmental health law'.<sup>187</sup>

In terms of the European Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment, the concept 'environment' includes 'natural resources both abiotic and biotic, such as air, water, soil, fauna and flora and the interaction between the same factors; property which forms part of the cultural heritage; and the characteristic aspects of the landscape.'<sup>188</sup> The International Court of Justice defines the 'environment' so as to include a

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<sup>185</sup> Rabie André "Environmental law in search of an identity" (1991) Vol. 2 No. 2 *Stellenbosch Law Review* at 204.

<sup>186</sup> Articles 174(1) and 175(2).

<sup>187</sup> Thornton J and Beckwith S *op. cit.* (n 51) 4.

<sup>188</sup> Lugano, 21 June 1993.

social dimension, stating 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.’<sup>189</sup> Although the 1972 Stockholm Declaration does not expressly include a definition of the environment, its Principle 2 refers to the natural resources of the earth as including ‘air, water, land, flora and fauna and natural ecosystems.’

### *1.3.1.2. Limited approach*

In the light of the limited approach, ‘environment’ would be more narrowly construed as pertaining to only certain components such as the natural environment or nature. The natural environment in this perspective is opposite to the ‘human-made’ environment that refers to the social, cultural, spatial and economic environment. Nature in its narrowest sense refers to indigenous wild animals and plants as well as freshwater fish.<sup>190</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. Bray considers that, in the final instance, the legislature or the Constitutional Court should determine the parameters of ‘environment.’<sup>191</sup> 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

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<sup>189</sup> *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 International Court of Justice. Rep. 241-242 Para. 29. See also Kiss A and Shelton D *International environmental law op. cit.* (n 6) 3.

<sup>190</sup> Rabie André *op. cit.* (n 185) at 207. See also Kirby RV *op. cit.* (n 27) 14.

<sup>191</sup> Bray E “Fragmentation of the environment: Another opportunity lost for a nationally coordinated approach?” (1995) 10 *Suid Afrikaanse Reg / Public Law* at 178.

law environmental law.<sup>192</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 the wide and narrow approaches. This perspective seems to be realistic by the fact that account is taken not only of the natural environment in its pure state, but also of modifications imposed on it by humans.<sup>193</sup> Any attempt to define the concept ‘environment’ should consider the integrated approach as it has been reflected in the definition adopted, for instance, in the National Environmental Management Act (NEMA) 107 of 1998 of the RSA.<sup>194</sup>

... 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.

### 1.3.2 Scope and sources of environmental law

An environmental law norm is one that relates to the environment,<sup>195</sup> a cross-divisional field of law in the sense that it incorporates norms and principles of public law, private law and international law. Kiss and Shelton assert that the broad definitions and the fact that all human activities have an impact on the environment make it difficult to establish the limits of environmental law as an

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<sup>192</sup> Rabie quoted by Glazewski J *op. cit.* (n 35) 9; Cheadle MH, Davis DM and Haysom NRL *op. cit.* (n 124) 410.

<sup>193</sup> Rabie André *op. cit.* (n 185) at 209.

<sup>194</sup> Section 1 of the National Environmental Management Act; See also Kotzé JL “Environmental governance” in Paterson A and Kotzé JL (eds.) *op. cit.* (n 45) 107.

<sup>195</sup> Rabie André *op. cit.* (n 185) at 215.

independent legal field. Indeed, they imply the integration of environmental protection into all areas of law and policy.<sup>196</sup> 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>197</sup> Environmental law, which has come of age, is a relatively modern branch of law. It originated as a collection of rules that grew as a haphazard and piecemeal response to specific environmental problems, but has now achieved a certain amount of coherence, in the sense that it has a clear and unified philosophical foundation.<sup>198</sup> 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>199</sup> One of the many challenges facing the discipline is to define its specific parameters more clearly. According to Glazewski,<sup>200</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 international 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.

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<sup>196</sup> Kiss A and Shelton D *International environmental law op. cit.* (n 6) 3.

<sup>197</sup> Glazewski J *op. cit.* (n 35) 11.

<sup>198</sup> Thornton J and Beckwith S *op. cit.* (n 51) 6. Nowadays, environmental law is based mainly on an anthropocentric philosophy which considers that mankind is inherently separate from the rest of nature, and that natural resources are to be exploited for the benefit of mankind. Therefore, the welfare of mankind should be accorded primary importance in any regime for environmental protection. Conservation of natural resources and environmental amenities is justified on the basis of 'stewardship'. The conservation of flora and fauna is justified on the basis of the scientific and aesthetic benefit which it brings to mankind.

<sup>199</sup> Cowen DV "Towards distinctive principles of South African environmental law: Some jurisprudential perspectives and a role for legislation" (1989) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* at 3.

<sup>200</sup> Glazewski J *op. cit.* (n 35) 10. See also Kamto M *op. cit.* (n 30) 21.



### 1.3.3 Introduction of rights related to environment in national constitutions

Currently, more than 100 constitutions across the world have incorporated rights to environment in their constitutions, including a right to a clean, healthy environment, imposing a duty on the state to prevent environmental harm, or mention the protection of the environment or natural resources.<sup>201</sup> For instance, article 41 of the Constitution of Argentina provides:

All residents enjoy the right to a healthy, balanced environment which is fit for human development ...

The Brazilian Constitution states that:

All persons are entitled to an ecologically balanced environment, which is an asset for the people's common use and is essential to healthy life, it being the duty of the Government and of the Community to defend and preserve it for present and future generations.<sup>202</sup>

Rights related to the environment (broadly referred to as environmental rights) are provided for in almost all the post-Stockholm national constitutions, either as a human right, or as a state responsibility, or both,<sup>203</sup> and, in some cases, where national courts throughout the world have made some relevant judicial decisions related to it. The Spanish and Portuguese Constitutions provide for state obligations to protect the natural environment, and at the same time entitle individuals to a healthy environment.<sup>204</sup> At the judicial level, one notes the Colombian case *Fundepublico v. Mayor of Bugalagrande and Others*<sup>205</sup> in

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<sup>201</sup> Kiss A and Shelton D *International environmental law op. cit.* (n 6) 711. See also Winstanley T *op. cit.* (n 174) at 87; Thornton J and Beckwith S *op. cit.* (n 51) 389.

<sup>202</sup> Article 225 (0).

<sup>203</sup> Kiss A and Shelton D *International environmental law op. cit.* (n 70) 22-23.

<sup>204</sup> Respectively articles 66 and 45 of the Constitutions of Portugal and Spain.

<sup>205</sup> *Fundepublico v. Mayor of Bugalagrande and Others* in Giorgetta Sueli "The right to a healthy environment" in Nico Schrijver and Friedl Weiss (eds.) *op. cit.* (n 3) 390.

which the Constitutional Court ruled in favour of granting protection to a healthy environment. In its conclusions, it upheld that there was a threat to a fundamental right recognized by the national constitution. The constitutional doctrine laid down in this case is compulsory for the Colombian authorities in all similar situations in which there is a threat of contamination of the environment and where environmental impact studies and/or operating permits are lacking.

The introduction of environment rights into national constitutions throughout the world is 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 half of them have incorporated environmental provisions in their constitutions.<sup>206</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>207</sup> The latter is illustrated in the case of the Constitution of Malawi<sup>208</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;

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<sup>206</sup> Mohamed AL “Le droit à 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>207</sup> Bruch C, Coker W and Van Arsdale C *op. cit.* (n 33) at 34.

<sup>208</sup> Constitution of Malawi of 1994.

- (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 recognise 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, articles 53 of the 1998 Constitution and 54 of the Transitional Constitution of 2003, after the 1994 Transitional Constitution, sets forth the environmental rights and duties of citizens and State.

The constitutionalization<sup>209</sup> of environmental rights remains an important step in the process of their protection, as the link between environmental rights and human rights is highlighted, but equally important, as the protection of the environment against all forms of degradation. According to Koppen and Ladeur,<sup>210</sup> there are many ways in which environmental rights can be provided for in modern constitutions. The most common situation is where the State assumes the obligation to protect the environment. The second is to guarantee individual rights to a healthy and balanced environment. The third situation is the imposition of a duty on the individual to protect the environment. In

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<sup>209</sup> Constitutionalization means the recognition and introduction of, for example, the right to environment in the constitution.

<sup>210</sup> Koppen Ida and Ladeur Karl-Heinz "Environmental rights" in Cassese Antonio *et al.* (eds.) *Human rights and the European Community: The substantive law* (1991) 21-27. See also Mekete BT and Ojwang JB *op. cit.* (n 50) at 169.

constitutional law, environmental rights and duties are usually interlinked. Mekete and Ojwang<sup>211</sup> point out that the object of such interlinkage is to create a basis for efficacy in the operations of law. Certainly, the efficacy will depend on the degree of sophistication and practicality of the legal system in a given country. It is unfortunate to note that most of the environmental rights provisions in many national constitutions are only programmatic declarations rather than enforceable commitments on the part of the state. 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>212</sup>

- it elevates 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;

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<sup>211</sup> Mekete BT and Ojwang JB *op. cit* (n 50) at 170.

<sup>212</sup> Constitutional implementation enables environmental protection to achieve the highest rank among legal norms, a level at which a given value trumps every statute, administrative rule or court decisions. In addition, addressing environmental concerns at the constitutional level means that environmental protection needs not depend on narrow majorities in the legislative bodies. Rather, environmental protection is more firmly rooted in the legal order because constitutional provisions ordinarily may be altered only pursuant to elaborate procedures by a special majority, if at all. See Brandl Ernst and Hartwin Bungert “Constitutional entrenchment of environmental protection: A comparative analysis of experiences abroad” (1992) 16 *Harvard Environmental Law Review* 1 at 3-6. See also Van Reenen TP “Constitutional protection of the environment: Fundamental (human) right or principle of state policy?” *op. cit.* (n 36) at 269; Charu Sharma “Human rights and environmental wrongs: Integrating the right to environment and developmental justice in the Indian Constitution” in Raj Kumar C and Chockalingam K (eds.) *Human rights, justice, and constitutional empowerment* (2007) Oxford University Press New Delhi 317; Kamto Maurice “Charte Africaine, instruments internationaux de protection des droits de l’homme, constitutions nationales: Articulations respectives” in Flauss Jean François and Lambert-Abdelgawad Elisabeth (s/dir.) *Application nationale de la Charte Africaine des Droits de L’Homme et de Peuples* (2004) Institut International des Droits de l’Homme Bruylant Bruxelles 36.

- 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,<sup>213</sup> 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 emphasizes 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 most of these rights are not self-executing, but that they require legislation to implement them, set their scope and provide the means to exercise them.<sup>214</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 constitutionalization has become a ‘buzzword’, which in many countries all over the world is being used to conceal the ineffectual position on human rights protection and the promotion of democracy. Admittedly, if the constitutionalization of environmental rights has become a

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<sup>213</sup> Constitutionalism is a dynamic, complex and rich concept. Rosenfeld considers constitutionalism as ‘a three-faceted concept’ that embodies three general features, namely limited government, adherence to the rule of law and the protection of human rights. See Rosenfeld M “Modern constitutionalism as interplay between identity and diversity” in Rosenfeld M (ed.) *Constitutionalism, identity, difference and legitimacy* (1994) Duke University Press Durham 3, 27-28; Devenish G E *The South African Constitution* (2005) Butterwoths Durban 33.

<sup>214</sup> Bruch C *et al. op. cit.* (n 33) at 27.

real political priority to ensure a better life for all, its effectiveness remains questionable in many jurisdictions.

It is also important to recognise the fact that environmental rights, in some instances, are provided for in national statutes or in codes of national environmental laws. Separate national environmental enactments and regulations that provide for environmental rights are found in both developed<sup>215</sup> and developing countries. In the latter case, the Environment Management Act 1996 of Malawi provides that:

- (1) Every person shall have a right to a clean and healthy environment.
- (2) For purposes of enforcing the right referred to in subsection (1), any person may bring an action in the High Court
  - (a) to prevent or stop any act or omission which is deleterious or injurious to any segment of the environment or likely to accelerate unsustainable depletion of natural resources.
  - (b) to procure any public officer to take measures to prevent or stop any act or omission which is deleterious to any segment of the environment for which the public officer is responsible under any written law;
  - (c) to require that any on-going project or other activity be subject to an environmental audit in accordance with this Act.
- (3) Any person who has reason to believe that his or her right to a clean or healthy environment has been violated by any person may, instead of proceeding under subsection (2), file a written complaint to the Minister outlining the nature of his or her complaint and particulars, and the Minister shall, within thirty days from the date of the complaint, institute an investigation into the activity or matter complained about and shall give a

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<sup>215</sup> For instance, the 1969 US Federal Legislation, National Environment Policy Act (NEPA). Section 101 of the Statute states that ‘a healthful environment is a necessary condition for the maintenance of environmental quality and the overall welfare of man.’

written response to the complainant indicating what action the Minister has taken or shall take to restore the claimant's right to a clean and healthy environment, including instructing the Attorney General to take such legal action on behalf of the Government as the Attorney General may deem appropriate.

(4) Subsection (3) shall not be construed as limiting the right of the complainant to commence an action under subsection (2); provided that an action shall not be commenced before the Minister has responded in writing to the complainant or where the Attorney General has commenced an action in court against any person on the basis of a complaint made to the Minister.

The concept of environmental rights as discussed below remains a 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 core attitudes and approaches.<sup>216</sup>

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<sup>216</sup> Theron C "Environmental rights: An overview of interpretations" (1997) 4 *South African Journal of Environmental Law and Policy* at 23.

## 1.4 Interpretation of environmental rights

Several approaches to the concept of environmental rights<sup>217</sup> have been pointed out. Feris and Tladi<sup>218</sup> present three main human rights approaches to the environment. The first approach views the right to environment as equally an individual human right and a collective human right. This distinct right to the environment approach is recognized and highlighted in terms of the Principle 2 of the Draft Principles on Human Rights and the Environment adopted by the UN Commission on Human Rights which provides that ‘all persons have the right to a secure, healthy and ecologically sound environment.’ Furthermore, The Draft Convention on Environment and Development of the World Commission on Environment and Development (WCED) Expert Group on Environmental Law provides in Principle 1 that ‘all human beings have the fundamental right to an environment adequate for their health and well-being.’

The second approach does not recognize a specific right to the environment but sees a potential for protecting the environment under already existing and recognized human rights, such as the rights to life, health and dignity. In this respect, these existing rights are interpreted to give effect to environmental protection.

The third approach pertains to procedural rights. It admits the existence of a right to a healthy environment, deriving its existence from other human rights,

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<sup>217</sup> The expressions “environmental rights”, “right to a satisfactory environment”, “right to a healthy environment” may be used interchangeably. There is no agreement on the proper descriptive adjective: some of the adjectives employed by various authors and instruments include: healthy, healthful, adequate, satisfactory, decent, clean, natural, pure, ecologically sound, ecologically balanced and viable. This study will not indulge in the semantic debate, and employs the various qualitative adjectives interchangeably to denote an environment conducive to human health. Kaniye Ebeku SA “The right to a satisfactory environment and the African Commission” (2003) 3 *African Human Rights Law Journal* at 150.

<sup>218</sup> Feris L and Tladi D in Brand D and Heyns C (eds.) *op. cit.* (n 152) 250.



such as the right to life, the right to health and the right to information.<sup>219</sup> Procedural rights have been said to be the key to environmental rights. The strong idea behind this approach is that if principles of democratic governance such as openness, accountability and civic participation are adhered to, then environmental standards will be maintained, or at least improved.<sup>220</sup>

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>221</sup> This latter idea does not appear, unfortunately, to have found official favour anywhere in the world. Theron, on the other hand, offers a comprehensive consideration of environmental rights as procedural rights, as rights of future generations, human rights and rights of the environment,<sup>222</sup> see the discussion that follows.

#### 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 recognises 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

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<sup>219</sup> Giorgetta Sueli “The right to a healthy environment” in Nico Schrijver and Friedl Weiss (eds.) *op. cit.* (n 3) 382. See also Malgosia Fitzmaurice “The right of the child to a clean environment” (1999) 23 *Southern Illinois University Law Journal* at 611-656.

<sup>220</sup> Feris L and Tladi D “Environmental rights” in Brand D and Heyns C (eds.) *op. cit.* (152) 250, 251.

<sup>221</sup> Kidd M *op. cit.* (n 25) 19; Stone C “Should trees have standing? – Towards legal rights for natural objects” (1972) *Southern California Law Review* 450.

<sup>222</sup> Theron C *op. cit.* (n 216) at 24.

environmental interests. Accordingly, the Rio Declaration<sup>223</sup> recognizes the procedural side of environmental rights, including public participation in environmental decision-making, access to information concerning the management of the environment, effective access to judicial and administrative proceedings and adequate redress and remedies.<sup>224</sup> In spite of the lack of an operative definition of substantive environmental rights,<sup>225</sup> their procedural aspects have been clarified through jurisprudence. Some national and international court cases show that environmental rights are being litigated through the recognition of standing, access to information and due process of law.<sup>226</sup> Thus, the procedural character of environmental rights has been recognized not only by international instruments,<sup>227</sup> but also significantly by the courts. For instance, the Supreme Court of Peru recognized 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 undetermined (classes) of persons.’<sup>228</sup>

Obviously, the procedural character of environmental rights seems to avoid anthropocentrism because rights can be exercised on behalf of the environment

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<sup>223</sup> Rio Declaration on Environment and Development (1992) 31 *International Legal Materials* 876.

<sup>224</sup> Aguilar AB and Popovic NAF “Lawmaking in the United Nations: The UN study on human rights and the environment” (1994) 3 *Review of European Community and International Environmental Law (RECIEL)* 201 ff.

<sup>225</sup> The content of environmental rights is derived from the existing universally recognized rights, both with regard to procedural rights (namely access to information and due process of law) and substantive rights (such as the rights to life, health and privacy). See Tomasevski Katarina “Environmental rights” in Eide A, Krause C and Rosas A (eds.) *op. cit.* (n 46) 257.

<sup>226</sup> *Id.* at 261; See also Malgosia Fitzmaurice and Jill Marshall *op. cit.* (n 135) at 104.

<sup>227</sup> The Preamble of the United Nations General Resolution on a World Charter for Nature (1982) 22 *International Legal Materials* 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>228</sup> *Proterra v Ferroaleaciones San Roman SA y Ostros*, Tribunal Supreme, Expediente no. 1156-90 (decision of 18 November 1992) in Aguilar AF “Enforcing the right to a healthy environment in Latin America” (1994) 3 *Review of European Community and International Environmental Law (RECIEL)* 215-223. See also Theron C *op. cit.* (n 216) at 26.

as a whole or on behalf of its non-human components, and it does not guarantee any substantive improvement of the environment. This type of approach does not envisage any particular kind or quality of environment.<sup>229</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.<sup>230</sup> The Supreme Court of the Philippines<sup>231</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<sup>232</sup> constitutional right and, secondly, it rendered operational the concept of intergenerational equity by recognizing 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>233</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. For example, 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 such a way as to prejudice his neighbours or the community in which he lives, and that he holds the land in trust for future

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<sup>229</sup> Theron C *idem*.

<sup>230</sup> These are rights held by generations as groups in relation to other generations (past, present and future).

<sup>231</sup> *Minors Oposa v Secretary of the Environment* (1994) 33 *International Legal Materials* 173.

<sup>232</sup> *Self-executionary* simply means that the article in the constitution can be invoked to question acts or omissions by branches of government. It is as self-implementing as the right to speech or other rights found in a bill of rights. It is independent of specific legal rights. Dugard J *op. cit.* (n 37) 62.

<sup>233</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 124) 425.

generations.<sup>234</sup> This approach has found support from Aguilar<sup>235</sup> who notes, firstly, that it is apparent that the principle of sustainable development by definition implies both intragenerational equity and intergenerational equity,<sup>236</sup> because the needs of the present generation must be met without jeopardising the needs of future generations to develop. This understanding means the inclusion of the protection of the rights of generations to come. Secondly, the legal actions used in Latin America to protect environmental rights seek preventive measures, not only compensation for environmental damage. Therefore, present and future generations are being protected.<sup>237</sup> D'Amato suggests that the notion of obligation to future generations starts with the claim that human rights are more important than any other value in international law, including the rights of states. Thus, the interpretation of this right is essentially anthropocentric by affirming that mankind is to be valued by man more highly than other things in nature.<sup>238</sup> According to Gundling, the obligation to act responsibly to future generations is a question of both morals and law. Steps should be taken to develop this duty to protect the interests of future generations by developing an international treaty to ensure this.<sup>239</sup> Weiss acknowledges that morality is not enough.<sup>240</sup> In fact, the idea is that the present generation should ensure that the health, diversity and productivity of the environment is

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<sup>234</sup> *King v Dykes* (1971) 3 SA 540 (RA) at 545. See Cheadle MH *et al. op. cit.* (n 124) 426.

<sup>235</sup> Aguilar AF *op. cit.* (n 228) 215-223.

<sup>236</sup> Intergenerational equity calls for equality among generations in the sense that each generation is entitled to inherit a robust planet that, on balance, is at least as good as that of previous generations. A theory of intergenerational equity among generations carries an intragenerational dimension. Certain rights and obligations to use and care for the planet can be enforced against one another within the same generation, and when future generations become living generations. See Weiss Brown E "Our rights and obligations to future generations for the environment" (1990) 84 *American Journal of International Law* 198-312.

<sup>237</sup> Aguilar AF *op. cit.* (n 228) at 220.

<sup>238</sup> D'Amato A quoted in Theron C. *op. cit.* (n 216) at 28.

<sup>239</sup> Gundling quoted in Theron C *op. cit.* (n 216) at 28.

<sup>240</sup> Future generations also have a human right, the right to inherit the environment no worse than the one we enjoy. Weiss quoted by Theron C *op. cit.* (n 216) at 28; See also d'Amato A, Weiss EB and Gundling L "Agora: What obligation does our generation owe to the next? An approach to global environmental responsibility" (1990) 84 *American Journal of International Law* at 190.

maintained or enhanced for the benefit of future generations in order to uphold the principle of intergenerational equity.

Against this general background of a ‘right of future generations’ approach, it can be seen that this approach emphasises the protection of the environment for the benefit of future generations, but it does not address the issue of implementing this right; for instance, whether it should be a human right, practical and enforceable, and whether it should exist at national or international level. This approach fails also to demonstrate how one should value the environment for the purpose of determining whether future generations will be worse off; neither does it address how the benefits and burden should be shared within each generation.<sup>241</sup>

#### 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 times 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>242</sup>

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<sup>241</sup> Symonides J “The human right to a clean, balanced and protected environment” (1992) 20 *International Journal of Legal Information* at 24 - 40. See also Theron C *op. cit.* (n 216) at 29.

<sup>242</sup> Cranston M quoted in Theron C *op. cit.* (n 216) at 32; See also Mubangizi John “Poverty production and human rights in the African context” (2007) Vol. 11 (1) *Law, Democracy and Development* at 2. Human rights are fundamental rights traditionally known as “natural rights”. These rights are primordial rights necessary for the development of human personality that enable man to chalk out its own life in the manner he likes best. The political implication of the theory of natural rights is that these rights, being inherent in humankind, existed prior to the birth of the state itself and cannot, therefore, be violated by the state. See Church Joan, Schulze Christian

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 health and food.<sup>243</sup> At this stage, the concept of environmental rights deserves to be circumscribed and understood properly to avoid the ambiguity that can lead to environmental degradation. The implementation of environmental rights as human rights raises generally the issue of what type of human rights these rights should be classified as.

Kidd<sup>244</sup> points out those human rights which are classified in three different categories or ‘generations’:

First generation rights, called fundamental rights, ‘legal’ or ‘blue’ rights, are the 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, freedom of association, and the prohibition of the arbitrary arrest of people.

Second generation, ‘programmatically’ or ‘red’ rights, are positive rights in that they represent claims for government intervention on behalf of the individual.<sup>245</sup> These rights include social, economic and cultural rights.

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and Strydom Hennie *Human rights from a comparative and international perspective* (2007) 1<sup>st</sup> ed. University of South Africa Press Pretoria 113.

<sup>243</sup> Theron C *op. cit.* (n 216) at 30.

<sup>244</sup> Kidd M *op. cit.* (n 25) 19. See also Shivji G. Issa *et al.* (eds.) *Constitutional and legal system of Tanzania: A civics sourcebook* (2004) Mkuki na Nyota Publishers Ltd Dar Es Salaam 78. One needs to keep in mind that human rights are not static. They are dynamic in the sense that emphasis on certain categories of rights depends on time and period and also the level of the development of the society in question.

Third generation, or ‘green’ rights, have been referred to as ‘people’s or solidarity rights.’<sup>246</sup> These rights include environmental rights, the right to development, the right to peace, the right to common heritage, the right to communication and humanitarian assistance,<sup>247</sup> and are usually exercised as group rights. In other words, they are the rights of the public at large, rather than the rights of specific individuals. Indeed, the right to environment assumes solidarity with mankind.

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. Flinterman has already observed that the notion of ‘generations’ of human rights is, to some extent, misleading<sup>248</sup> and unhelpful,<sup>249</sup> as it may give the impression that each ‘generation’ has validity only for a time, and is then replaced by another generation of human rights. The author maintains that the current position is that each generation passes some of its characteristics to the succeeding generation, even as the fundamental principles carried by the earlier generation continue to hold validity as an aspect of the human rights law. All generations of human rights exist at the same time and many aspects of these overlap and function by a process of interaction.<sup>250</sup> On the same path, Mangu notes that the so-called three generations of rights are

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<sup>245</sup> Glazewski J “Environmental provisions in a new South African Bill of Rights” (1993) *Journal of African Law* 177-184 at 181. See also Theron C *op. cit.* (n 216) at 33.

<sup>246</sup> Glazewski J “The environment, human rights and a new South African Constitution” (1991) 7 *South African Journal on Human Rights* at 172. See also Alston “A third generation of solidarity rights: Progressive development or obfuscation of international human rights law” (1982) 29 *Netherlands International Law Review* at 307.

<sup>247</sup> McClymonds JT “The human right to a healthy environment: An international legal perspective” (1992) 37 *New York Law School Law Review* 583.

<sup>248</sup> Flinterman C “Three generations of human rights” in Bertin J *et al.* (eds.) *Human rights in a pluralist world: Individuals and collectives* (1990) 75. See also Mekete BT and Ojwang JB *op. cit.* (n 50) at 157.

<sup>249</sup> Alston Philip “Making space for the new human rights: The case of the right to development” (1988) Vol. 1 *Harvard Human Rights Yearbook* at 3.

<sup>250</sup> As noted by Flinterman in Mekete BT and Ojwang JB *op. cit.* (n 50) at 157.

intertwined, and should not be isolated from each other, but considered as a whole.<sup>251</sup> Furthermore, the South African Constitutional Court in *Government of RSA and Others v Grootboom and Others*,<sup>252</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.<sup>253</sup> 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. 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>254</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

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<sup>251</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 LL.D thesis] 145. See also Feris Loretta “Environmental rights and locus standi” in Paterson A and Kotzé JL *op. cit* (n 45) 143.

<sup>252</sup> 2000 (11) SA BCLR (CC) paragraphs 23, 24.

<sup>253</sup> In his paper “Should trees have standing? – Toward legal rights for natural objects” Christopher Stone drew attention to the issue of giving legal rights to “forests, oceans, rivers and so called natural objects” in the environment. Christopher Stone as quoted in Theron C. *op. cit.* (n 216) at 36.

<sup>254</sup> Naess “The deep ecological movement: Some philosophical aspects” in Sessions George (ed.) *Deep ecology for the 21<sup>st</sup> Century* (1995) at 64. See also Theron C. *op. cit.* (n 216) at 42.



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>255</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. In fact, Naess gives eight points which he suggests as basic to deep ecology:

- The well-being and flourishing of human and non-human life on earth have value in themselves. These values are independent of the usefulness of the non-human world for human purposes.
- Richness and diversity of life forms contribute to the realisation of these values and are also values in themselves.
- Humans have no right to reduce this richness and diversity except to satisfy vital needs.
- The flourishing of human life requires a smaller human population.
- Present human interference with the non-human world is excessive, and the situation is rapidly worsening.
- Policies must therefore be changed. These policies affect basic economic, technological and ideological structures. The resulting state of affairs will be deeply different from the present.
- The ideological change will be mainly that of appreciating life quality rather than adhering to increasingly higher material standards of living. There will be a profound awareness of the difference between bigness and greatness.

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<sup>255</sup> Fritjof C “Deep ecology: A new paradigm” in Sessions George (ed.) *Deep ecology for the 21<sup>st</sup> Century id.* at 19-25.

- Those who subscribe to the foregoing points have an obligation directly or indirectly to implement the necessary changes.<sup>256</sup>

In fact, from the interpretations of environmental rights, flow three theories developed by Colleen Theron:<sup>257</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. Humans are considered to be the central component of the planet. They are also viewed as stewards of the ecosystem. This view is rooted in the biblical injunction which exhorts humans to subdue the earth and to rule over living creatures.<sup>258</sup> This anthropocentric approach is reflected in the National Environmental Management Act (NEMA) 107 of 1998 of the Republic of South Africa, which in terms of section 2(2) provides that:

environmental management must place people and their needs at the forefront of its concern, and serve their physical, psychological, developmental, cultural, and social interests equitably.

- Ecocentric or deep ecology philosophy does not start with the premise that humans are in a position of dominance in which ‘rights are given and sympathies extended.’ It asserts that humans are no more and no less than an integral part of the environment along with all other organisms. In the way, a deeper more spiritual and holistic approach to nature is sustained.

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<sup>256</sup> Naess as quoted in Theron *C op. cit.* (n 213) at 42.

<sup>257</sup> *Id.* at 24-25.

<sup>258</sup> Glazewski J *op. cit.* (n 35) 7. See also Kiss A and Shelton *D op. cit.* (n 6) 11-14. Bible Society of South Africa *Good News Bible: Today's English version* (2004) 5<sup>th</sup> South African ed. Genesis 1:28.

From my point of view, the deep ecology constitutes a better foundation to the relationship between human rights and the right to environmental integrity. For example, in its *Advisory Opinion on the Legality of the Threats or Use of Nuclear Weapons*,<sup>259</sup> the International Court of Justice 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.’ 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>259</sup> 1996) ICJ Reports, 241-242, paragraph 29. See also Thornton J and Beckwith S *op. cit.* (n 51) 42-43; Cowen DV “The new South African Constitution and opportunities for environmental justice in a democratic South Africa” (1999) *Acta juridica* at 138.

## 1.5 Conclusion

The right to environment is recognized and protected in both international and national law.<sup>260</sup> The focus of the distinction between any substantive and procedural human right to a clean environment (i.e. right to environmental information, the participation in environmental decision-making and access to environmental justice) has shifted from the issue of the very existence of such a right to the more practical problems of the distinction.<sup>261</sup> A close relationship between human rights and the environment is highlighted through international instruments and national constitutions. International human rights bodies have placed human rights and the environment on their agenda, but have not moved much further than affirming the inextricable relationship between human rights and the environment, and recognizing the need to identify new trends in international law relating to the human rights dimensions of environmental protection<sup>262</sup> such as the ‘environmental refugees’ phenomena which is increasing in many parts of the world, particularly in the developing countries. For instance, out of some 20 million refugees in Africa, just over half are ‘environmental refugees’, within their countries. Due to drought, soil erosion, desertification and other situations of environmental change or degradation, Africa has been the scene of environmental migration for some decades.<sup>263</sup> Despite the lack of effective guarantees of environmental rights, human rights have become an important method for claiming and obtaining the fundamental aims embodied in environmental rights.<sup>264</sup> The constitutionalization of environmental and other rights related to the environment remains an efficient

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<sup>260</sup> Prieur Michel *Droit de l'environnement* (2004) 5ème éd. Dalloz Paris 58.

<sup>261</sup> Malgosia Fitzmaurice and Jill Marshall *op. cit.* (n 135) at 104.

<sup>262</sup> Tomasevski Katarina “Environmental rights” in Eide A, Krause C and Rosas A (eds.) *op. cit.* (n 46) 259.

<sup>263</sup> Mekete BT and Ojwang JB *op. cit.* (n 50) at 165-166.

<sup>264</sup> Tomasevski Katarina “Environmental rights” in Eide A, Krause C and Rosas A (eds.) *op. cit.* (n 46) 257.

way to ensure their protection, because the constitution is in most cases 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. The next chapter examines different perspectives on the right to development.

## CHAPTER 2:

### **GENERAL UNDERSTANDING OF THE RIGHT TO DEVELOPMENT**

Drawing upon the lessons taken from the provisions of the United Nations Declaration on the Right to Development,<sup>1</sup> it will be helpful to ‘unpack’ the general understanding of the right to development at the international and national levels.

#### **2.1 The international perspective on the right to development**

The origin, formal recognition and protection of the right to development at the international and national levels have, for many years, been swathed in controversy. Contrary opinions as to the meaning, nature and extent of development as a human right abound. According to Boko,<sup>2</sup> the economically advanced countries of the northern hemisphere have been reluctant to associate themselves with this right for fear of claims for aid from the economically weaker countries of the southern hemisphere. The countries of the south have, for their part, articulated the need for a New International Economic Order (NIEO)<sup>3</sup> animated by the entrenchment of the right to development. According

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<sup>1</sup> Adopted by General Assembly Resolution 41/128 of 4 December 1986.

<sup>2</sup> Boko Duma Gideon “Retrieving the right to development from the region of myth and fable” in University of Namibia *Human rights and democracy in Southern Africa, papers presented at the Conference: Cultivating co-operation amongst human rights institutions in the UNITWIN Network in Southern Africa* (1998) New Namibia 40.

<sup>3</sup> The Declaration on the Establishment of a New International Economic Order, adopted on the 1<sup>st</sup> May 1974 at the Sixth Special Session of the United Nations General Assembly, proclaimed solemnly the “united determination” of the Members of the UN to work urgently for the establishment of a New International Economic Order based on equity, sovereign equality, interdependence, common interest and cooperation among all States, irrespective of their economic and social systems which shall correct inequalities and redress existing injustices, make it possible to eliminate the widening gap between the developed and the developing countries and ensure steadily accelerating economic and social development and peace and justice for present and future generations. See Bulajić Milan *Principles of international development law* (1993) 2<sup>nd</sup> rev. ed. Martinus Nijhoff Publishers Dordrecht / Boston / London 105.

to the United Nations General Assembly, the New International Economic Order should be founded on full respect for certain principles, namely:

developing countries must have access to the achievements of modern science and technology, promotion of the transfer of technology and the creation of indigenous technology for the benefit of the developing countries in forms and in accordance with procedures which are suited to their economies; the need for all states to put an end to the waste of natural resources including food products; the need for developing countries to concentrate all their resources for the cause of development; the strengthening through individual and collective actions, of mutual economic, trade, financial and technical cooperation amongst the developing countries, mainly on a preferential basis; facilitating the role which producers' associations may play within the framework of international cooperation and, in pursuance of their aims, *inter alia* assisting in the promotion of sustained growth of the world economy and accelerating the development of developing countries.<sup>4</sup>

Okafor<sup>5</sup> considers that we have moved beyond the question: 'Is international law, law?' We should rather ask: 'Is international law fair?' This leads us to question the content, existence and effect of an international legal right of poor peoples to development in the often unfair socio-economic context of today's world. A 'global neighbourhood'<sup>6</sup> in which approximately 20% of the population (the "North") control and enjoy 80% of its resources, while the remaining 80% of the population (the "South") control and enjoy less than 20%

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<sup>4</sup>*Id.* at 107.

<sup>5</sup> Okafor Obiora Chinedu "The status and effect of the right to development in contemporary international law: Towards a South-North 'entente' " (1995) Vol. 7 *African Journal of International and Comparative Law* at 865.

<sup>6</sup> The expression is borrowed from the title of the report of the Commission on Global Governance. See *Our Global Neighbourhood: The Report of the Commission on Global Governance* (1995) in Okafor Obiora Chinedu *op. cit.* (n 5) at 865.

of the said resources.<sup>7</sup> This is certainly an important reality that international development law, as a branch of international law needs to address.

### 2.1.1 International law of development

The international law of development represents a new wing, and stage, of general international law and it overlaps with, and forms part of, international economic law because all the principles and norms that pertain to economic development (one aspect of the law of development) are part of international economic law. The scope of the law of development goes beyond purely economic growth to include social, cultural and political development as well. The concept of the ‘international law of development’ is both a new discipline and a meaningful juridical technique of norms with which to combat underdevelopment. The characteristics of international development law are determined by its assigned purpose or mission. The recognition accorded to the international law of development demonstrates support for the law as an instrument of social transformation, and an effective tool in the struggle against global poverty, dependence and ignorance. Thus, the international law of development is not merely a collection of norms relating to development, but a juridical system designed to enable and hasten development.<sup>8</sup>

The law of development shares its sources with those of international law as defined by article 38 of the Statute of the International Court of Justice. The

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<sup>7</sup> NEPAD recommends that the debt of \$200 billion owed by the African continent to the international community be reduced or waived, as the annual repayments of \$14 billion severely hamper Africa’s efforts to develop economically. Badejo Diedre J. *Global organization: The African Union* (2008) Infobase Publishing New York 67; Rubin SJ “Economic and Social Human Rights and the New International Economic Order” (1986) 67 *American University Journal of International Law and Policy* at 75. See also Okafor *op. cit.* (n 5) at 865.

<sup>8</sup> Espiell Gros Hector “The right to development as a human right” (1981) Vol. 16 *Texas International Law Journal* at 190, 191.



New International Economic Order is partly based on the traditional sources of international law, but much of the effort to establish this new order is embodied in UN General Assembly resolutions on this matter. These resolutions may indeed play a more influential part in the creation of new principles and rules of international law in terms of the New International Economic Order than the part played by traditional sources. Resolutions have proved to be flexible instruments for the development of progressive international law.<sup>9</sup> Jean Rivero has pointed out how the international law of development has taken on life and form thanks to the various resolutions and recommendations evoked from international organizations in response to being forced to consider the right to development.<sup>10</sup>

### 2.1.2 Principles of the international law of development

A number of important principles of international development law have emerged since its acceptance as a new branch of international law. As law that regulates relations amongst sovereign, but economically unequal states, the existing principles of the international law of development have adapted to the new realities of the world community. While classic international law is based on the principle of sovereign equality, the international law of development proceeds from the premise that conditions of economic inequality is amount, in reality, to a form of sovereign inequality. Thus, the formal notion of the equality of states may progress to true equality when, as a fundamental principle of the process of international cooperation, even the poorest nations may participate as equal partners in a civilised world community.<sup>11</sup> Considering the fact that sovereignty is no longer a bulwark of passive defence, but is instead becoming a principle for action to achieve the right of equality and opportunities for

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<sup>9</sup> Bulajić M *op. cit.* (n 3) 62, 63.

<sup>10</sup> *Id.* at 66.

<sup>11</sup> Bulajić M *op. cit.* (n 3) 43.

economic development, the principles of the international law of development related to the New International Economic Order are listed as follows:

- The principle of equality and solidarity, including the entitlement of developing countries to development assistance;
- The principle of the right to economic self-determination and permanent sovereignty over natural resources;
- The principle of preferential, non-reciprocal and non-discriminatory treatment of developing countries in all fields of international economic relations;
- The right of every state to benefit from science and technology;
- The duty of states to cooperate with one another for development;
- The participatory equality of developing countries in international economic relations;
- The common heritage of mankind;
- The right to development as an inalienable human right.<sup>12</sup>

These principles are relevant to the international law of development as a branch of international (economic) law, and to the right to development, as a synthesis of all human rights. They reflect the need to integrate and/or co-ordinate the body of rights and duties of states and human rights (and duties) in so far as to elaborate article 28 of the Universal Declaration of Human Rights.<sup>13</sup> One may attest that it was on this understanding that the establishment of a New International Economic Order was mentioned in the Preamble of the Declaration on the Right to Development so that ‘efforts to promote and protect human rights at the international level should be accompanied by efforts to establish a new international economic order.’

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<sup>12</sup> *Id.* at 248.

<sup>13</sup> Bulajić M. *op. cit.* (n 3) 237. Article 28 of the Universal Declaration of Human Rights reads: “Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.”

### 2.1.3 Background and recognition of the right to development as a human right

It was not until 1960 that the UN began to devote attention to the concept of development,<sup>14</sup> defined as a process which, from one point of time to another,<sup>15</sup> was intended to better socio-economic conditions and to contribute to human dignity. The development process had to generate an environment that would empower rather than marginalizes people. Priority had to be given to the poor, to enlarge their choices and opportunities and to provide for their participation in decisions that affect their lives.<sup>16</sup> For a long period of time, the issue of development has thus been dominated by an economic emphasis.<sup>17</sup> However, Sengupta<sup>18</sup> has observed a change in development practice over the past 25 years. The focus has shifted away from the promotion of economic growth to the realization that human well-being is the true purpose of development. While economic growth is integral to sustainable development, it is not the sole guarantee of human well-being, and this paradigm shift can be attributed to the understanding that human development and human rights are connected.<sup>19</sup>

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<sup>14</sup> Espiell Gros H *op. cit.* (n 8) at 190.

<sup>15</sup> Baehr, Sadiwa Lalaine *et al.* (eds.) *Human rights in developing countries: Yearbook* (1996) Kluwer Law International Nordic Human Rights Publications Oslo 10.

<sup>16</sup> United Nations Development Programme (UNDP) (1994) Human Development Report 1994 at iv.

<sup>17</sup> Economic development embodies a certain level of modern infrastructure that must include public transport, broadcasting over television and radio, telephonic communication and Internet access, and a highly skilled civil service. See Udombana NJ “The Third World and the right to development: Agenda for the next millennium” (August 2000) Vol. 22 No. 3 *Human Rights Quarterly* 756.

<sup>18</sup> Sengupta Arjun “The right to development and its implications for governance reform in India” in Raj Kumar C and Chockalingam K (eds.) *Human rights, justice and constitutional empowerment* (2007) Oxford University Press New York 185.

<sup>19</sup> Over time, a growing trend in development thinking has become visible. Traditionally, development was thought to be about economic growth and that economic development could be distinguished from and treated apart from, among other things, human rights. The contemporary view takes a more holistic approach to development, and views it as a cohesive process of “economic, social, cultural, political and environmental” change. See Baehr Peter, Sadiwa Lalaine *et al. op. cit.* (n 15) 6; Bradlow Daniel “Differing conceptions of development and the content of international development law” (2005) *South African Journal on Human*

Ouguerouz<sup>20</sup> and Kamto<sup>21</sup> believe that the concept of the right to development is African in origin. The phrase ‘right to development’ was probably first uttered in Algiers, in October 1967, at the Economic Conference of the Group of 77.<sup>22</sup> Doudou Thiam pointed out that ‘the old colonial past, of which the present is merely an extension, should be denounced in favour of a new right ... Just as, in the developed nations, the right to education, health, employment has been proclaimed for individuals, we must here proclaim, loud and clear, the right to

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*Rights* at 47; Aguirre D *The human right to development in a globalized world* (2008) Ashgate Publ. Ltd. UK / USA 67.

<sup>20</sup> Ouguerouz Fatsah *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 298; Ouguerouz Fatsah *La Charte Africaine des Droits de l’Homme et des Peuples: Historique, portée juridique et contribution à la protection des droits de l’homme en Afrique* (1991) Université de Genève Institut Universitaire des Hautes Etudes Internationales Thèse Genève 215.

<sup>21</sup> Kamto Maurice *Droit de l’environnement en Afrique* (1996) Edicef Paris 52.

<sup>22</sup> State members of the world community are grouped on a regional basis within the UN system: Group A – Asian and African countries, Group B – industrialized countries with a market economy (USA, Japan, etc.), Group C – Latin American countries, and Group D – the industrially developed socialist states of Eastern Europe. The developing countries from Asia, Africa and Latin America have merged Group A and C into the Group of 77. Negotiations are currently carried out on a regional basis between the Group of 77, Group B – the industrialized market economy countries, and Group D – the industrialized East European socialist countries. This negotiating set-up corresponds to the popular concept of three Worlds – the First World of industrialised market economy countries, the Second World of industrialized socialist States, and the Third World of the developing countries. As the First and Second Worlds are in the northern hemisphere and the developing countries in the southern hemisphere, it has become customary to speak of North-South relations. Thus, the term “Third World” can be defined from the political perspective as – a group of states attached either to the capitalist camp or to the communist bloc – non aligned countries. It may also be defined from the economic perspective. In this order, it means countries with the common characteristics of underdevelopment. A classification of the “Third World” developing countries have been made by some academics into two groups: the first group consists of the low-income developing countries. These are largely made up of African countries, especially sub-Saharan African states; South Africa is excluded. This group includes also Latin American states. The second is made up of the middle-to-high-income “Third World” countries. It consists of the high performing Asian economies led by Japan. It includes the so-called “four tigers” – Hong Kong, the Republic of Korea, Singapore, and Taiwan. It also includes the newly industrializing economies of Indonesia, Malaysia, and Thailand. See Milan Bulajić *op. cit.* (n 3) 54; Mohammed Bedjaoui *Towards a New International Economic Order* 25 (1979) Unesco; Yemi Osinbajo and Olukonyinsola Ajayi “Human rights and economic development in developing countries” (1994) *International Lawyer* 727, 730; Udombana N.J. *op. cit.* (n 17) at 754-755.

development for the nations of the Third World.’<sup>23</sup> The first formulation of the concept ‘right to development’ as a human right dates from 1972. This was done after a lecture given by the former First President of the Supreme Court of Senegal, Judge Kéba Mbaye<sup>24</sup> in 1972 to the International Institute of Human Rights that the right to development and the demand for a New International Economic Order, began to attract interest in academic and political circles. Judge Mbaye argued that ‘development is the right of all’, that development concerns ‘all men’, ‘every man’ and ‘all of man.’ Each man has the right to live, and the right to live better.<sup>25</sup> It is a needless digression, he believes, to seek to establish whether the right to development is an individual or a collective right.<sup>26</sup> Michel Virally states that the right to development is both a human right *and* a right of peoples.<sup>27</sup> Juan Antonio Carrillo Salcedo asserts that:

... the right of development is a human right and a right of peoples, which brings as a corollary the inference that all men and all peoples, without distinction, must contribute to this common purpose of mankind. Development and the right of development as a human right – understood as growth plus change – constitutes a revolutionary aspect in the old structure of public international law which, in its process of socialization and democratization, does nothing more than become more free and more humane ... the right of development as a right of states and peoples must unavoidably be founded on the recognition of the right of every man to a free and worthy life in his community. Every human being has the right to live, which implies the right to aspire to an increasingly better existence. This right to a full individual development – which has made it possible to consider the right of development

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<sup>23</sup> Thiam Doudou “L’Afrique demande un droit international [d’un] nouveau” (1968) 1 *Verfassung und Recht in Ubersee* at 54.

<sup>24</sup> Kéba Mbaye “Le droit au développement comme un droit de l’homme”, Inaugural Lecture, Third Teaching Session, International Institute of Human Rights, Strasbourg, 3-21 July 1972, text in (1972) V (2-3) *Revue des Droits de l’Homme* at 505-534. See also Ouguergouz *op. cit.* (n 20) 298; Kamto M *op. cit.* (n 21) 53.

<sup>25</sup> Espiell Gros H. *op. cit.* (n 8) 192.

<sup>26</sup> Kéba Mbaye *op. cit.* (n 24) 515, 529 and 532; Ouguergouz F *op. cit.* (n 20) 299.

<sup>27</sup> Virally Michel quoted by Ouguergouz *op. cit.* (n 20) 299.

as an essential human right – serves as a foundation of, and implies also, the right of peoples and underdeveloped nations to development. Their progress is only justified as long as development serves to improve the economic, social and cultural level of every human person.<sup>28</sup>

Vasak<sup>29</sup> defined development as a third generation human right, together with, amongst others, the right to peace, the right to a healthy and ecologically balanced environment, and the right to own the common heritage of mankind. Bedjaoui<sup>30</sup> claims that the right to development is entirely justified by the interdependence of nations. The duties of states to pursue peaceful coexistence, security and cooperation in the international sphere provides the conceptual basis for the right to development and the strong moral foundation beneath its evolution from a *de lege ferenda* to a *de lege lata* principle of international law.<sup>31</sup> It is in this context that Alston<sup>32</sup> has proposed the substantive and procedural criteria that a human right must satisfy in order to qualify as a human right in terms of international law. A proposed human right should:

- reflect a fundamentally important social value relevant throughout, and in spite of, a world of diverse social values;

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<sup>28</sup> Espiell Gros H. *op. cit.* (n 8) at 193.

<sup>29</sup> Vasak K “A 30-year struggle: The sustained efforts to give force of law to the Universal Declaration of Human Rights” (Nov 1977) *UNESCO Courier* 29. See also Espiell G. H. *op. cit.* (n 8) at 191; Donnelly J “In search of the unicorn: The jurisprudence and politics of the right to development” (1985) Vol. 15 *California Western International Law Journal* at 474-478; Bulajić M. *op. cit.* (n 3) 362.

<sup>30</sup> Bedjaoui M “Some unorthodox reflections on the ‘right to development’ ” in Snyder Francis G and Slinn Peter (eds.) *International law of development: Comparative perspectives* (1987) 87 Abingdon at 93-94.

<sup>31</sup> Alston P “A third generation of solidarity rights: Progressive development or obfuscation of international human rights law?” (1982) 29 *Netherlands International Law Review* 307 at 312; Alston P. “The shortcomings of a ‘Garfield the cat’ approach to the right to development” (1985) 15 *California Western International Law Journal* 510 at 512-514.

<sup>32</sup> Alston P “Conjuring up new human rights: A proposal for quality control” (1984) 78 *American Journal of International Law* 607 at 615, 617.

- be eligible for recognition on the grounds that it embodies a recognition of the UN Charter obligations, a reflection of customary international law rules, or a formulation that is declaratory of general principles of law;
- be consistent with, but not merely repetitive of, the existing body of international human rights law;
- be capable of winning a very high degree of international consensus;
- be compatible, or at least not clearly incompatible, with the general practice of states and obligations.

Jacobs<sup>33</sup> puts forward other criteria. The right must be fundamental, universal and widely recognized and guaranteed to everyone. It must be capable of sufficiently precise formulation so as to give rise to legal obligations on the part of the state rather than merely setting a standard. In Van Reenen's<sup>34</sup> assessment their application is inevitably a political rather than a legal, technical or scientific exercise. It could therefore be argued that to apply a formal list of substantive requirements is an unworkable approach. To be at all useful, a degree of rationality and objectivity in the selection and formulation of rights foreign to the approach followed by the UN would be implied. Van Reenen notes further that a right is an international human right if the UN General Assembly decides that it is, and that its normative validity cannot be made dependent on its validity in terms of philosophical or any other supposedly objective criteria.<sup>35</sup> In 1977, the UN Commission on Human Rights adopted Resolution 4(XXXIII) which recommended to the Economic and Social Council that, in cooperation with the United Nations Educational, Scientific and Cultural Organisation (UNESCO) and other competent specialized institutions, the Secretary General should be invited to investigate 'the international dimensions

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<sup>33</sup> Jacobs FG "The extension of the European Convention on Human Rights to include economic, social and cultural rights" (1978) 3 *Human Rights Review* 166 at 177.

<sup>34</sup> Van Reenen TP "The right to development in international and municipal law" (1995) 10 *Suid-Afrikaanse Publikereg / Public Law* at 420.

<sup>35</sup> *Idem*.

of the right to development as a human right, in relation with other human rights based on international cooperation, including the right to peace, taking into account the requirements of the New International Economic Order and fundamental human needs.’<sup>36</sup> The Secretary General’s Report served as an important tool to the formulation of the human right to development at the international level. It was only in 1986, within the structure of modern international human rights law, that the United Nations Declaration on the Right to Development was adopted.<sup>37</sup>

### *2.1.3.1 Normative status of the right to development at the universal level*

The normative status of the right to development derives from the fact that it represents a legally recognizable and protectable interest. The right was originally conceived as a right within the international sphere, that is, a right of political communities, states and peoples subjugated to foreign and colonial domination. Later, it was encompassed by domestic law and expressly should extend to the communities whose existence was regulated by municipal law.<sup>38</sup> The concept of the right to development is considered to be a synthesis of a collection of instruments referred to as the ‘International Bill of Human Rights’,<sup>39</sup> and, as the sum total of the means available to effect economic and

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<sup>36</sup> After investigation, the report of the United Nations Secretary General entitled “The international dimension of the right to development as a human right, in relation with other human rights based on international cooperation, including the right to peace taking into account the requirements of the New International Economic Order and the Fundamental Needs” was published in 1979. Espiell Gros H *op. cit.* (n 8) at 194–195.

<sup>37</sup> UN GA Res. 41/128 adopted on 4 December 1986.

<sup>38</sup> Gros Espiell Hector *op. cit.* (n 8) at 191.

<sup>39</sup> The International Bill of Human Rights (IBHR) consists of the United Nations Charter; the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights and is considered as the principal legal source of the right to development. One must avoid any confusion between the IBHR and the so-called ‘code of international law’ which in addition to the instruments contained in the IBHR, includes the European Convention for the Protection of Human Rights and Fundamental Freedoms, the American Convention on Human Rights, and



social rights for the masses of the people who are grievously deprived of them.<sup>40</sup> In spite of the fact that none of these instruments explicitly mentioned the right to development, its existence was implied in the overarching collective scope and intent of the instruments.<sup>41</sup> In this regard, one may mention article 55 of the UN Charter that imposes a legal duty on the UN to promote high standards of living and full employment; article 56 which binds all member states to take joint and separate action in cooperation with the UN; article 1(1) of both the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights which deals with the right to self-determination by virtue of which everyone can freely pursue his or her economic, social and cultural development, and article 28 of the Universal Declaration of Human Rights (UDHR) dealing with the right of everyone to a social and international order in which his or her rights and freedoms as set forth in the Declaration can be fully realised.<sup>42</sup> The primary and current international law source for the right to development is the UN Declaration on the Right to Development which declares that:

The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled to participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized.<sup>43</sup>

Article 1(1) above contains three principles upon which the other articles and paragraphs of the Declaration elaborate. Sengupta describes them as follows:

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the African Charter on Human and Peoples' Rights. See also Van Reenen TP *op. cit.* (n 34) at 421; Donnelly Jack *op. cit.* (n 29) at 482.

<sup>40</sup> Paadi Ramoraka Daniel A critical discussion / analysis of the right to development as an individual and collective right (1996) University of South Africa [Unpublished LLM dissertation] at 23.

<sup>41</sup> Van Reenen TP *op. cit.* (34) at 420.

<sup>42</sup> *Id.* at 421.

<sup>43</sup> Article 1(1) of the United Nations Declaration on the Right to Development of 1986.

- a) There is an inalienable human right that is called the right to development;
- b) There is a particular process of economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized; and
- c) The right to development is a human right by virtue of which every human person and all peoples are entitled to participate in, contribute to and enjoy that particular process of development.<sup>44</sup>

Ouguegouz<sup>45</sup> asserts that the right to development is conceived as an individual right which may yet be exercised collectively. This is a positive international legal right. There is no doubt that the right to development is universally recognized as a human right that enjoys international legal status similar to other human rights.<sup>46</sup> The 1986 Seoul Declaration of the International Law Association considers the right to development as a principle of public international law, in general, and of human rights law, in particular, and is based on the right to self-determination of peoples.<sup>47</sup> Nayak points out that the right to development is based on the metamorphosis of international law from a law of co-existence into a law of cooperation, and the advancement of mankind as a proper subject of international law. He views further the duty of states to cooperate for the furtherance of world peace, progress, prosperity and solidarity, as the fundamental source of the right to development.<sup>48</sup> Principle 3 of the Rio Declaration states that ‘the right to development must be fulfilled so as to

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<sup>44</sup> Sengupta A quoted by Kirchmeier Felix *The right to development – Where do we stand? State of the debate on the right to development* (July 2006) No 23 Occasional Papers, Dialogue on Globalization, Friedrich – Ebert – Stiftung, Geneva at 9.

<sup>45</sup> Ouguegouz F *op. cit.* (n 20) 302.

<sup>46</sup> Paadi R *op. cit.* (n 40) at 24.

<sup>47</sup> Principle 6 Paragraph 1, 1986 International Law Association Declaration on the Progressive Development of Principles of Public International Law relating to a New International Economic Order, ILA Report of the sixty-second Conference, Seoul 1986 pp. 2-12.

<sup>48</sup> Nayak quoted by Hilderling Antoinette “The right of access to freshwater resources” in Nico Schrijver and Friedl Weiss (eds.) *International law and sustainable development: Principles and practice* (2004) Martinus Nijhoff Publishers Leiden / Boston 415.

equitably meet developmental and ecological needs of present and future generations.’ While, there is no common model of development universally applicable to all cultures and peoples, certainly, all development models must conform to international human rights standards.<sup>49</sup>

### *2.1.3.2 Normative status of the right to development at the regional level*

Various states have undertaken initiatives at regional level to emphasize the normative status of the right to development through several important instruments. America, Europe and Africa have adopted regional human rights conventions that complement and reinforce the universal human rights instruments. According to Dugard, these conventions are likely to be more successful than their universal counterparts because political and cultural homogeneity and shared judicial traditions and institutions within a region provide the basis for confidence in the system and which is necessary for its effective implementation.<sup>50</sup> Asia is apart in this regard, because to date it has no similar regional instruments in existence. This lack is due to political factors and to the fact that Asia lacks cultural homogeneity.<sup>51</sup> According to Tomuschat, there is not the slightest prospect that an Asian convention on human rights that reflects a common Asian civilization will see the light of day.<sup>52</sup>

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<sup>49</sup> Mansell and Scott “Why bother about a right to development” (1994) 21 *Journal of Law and Society* at 187.

<sup>50</sup> Dugard John *International law: A South African Perspective* (2005) 3<sup>rd</sup> ed. Juta Cape Town 330.

<sup>51</sup> Thakur, “Global Norms and International Humanitarian Law: An Asia perspective” (2001) 83 (841) *International Review of the Red Cross (IRRC)* 19 at 20.

<sup>52</sup> Tomuschat Christian *Human rights: Between idealism and realism* (2003) Academy of European Law / European University Institute / Oxford University Press New York 34.

*American initiatives*

The American Convention on Human Rights does not enumerate the economic, social and cultural rights of individuals, but article 26 does provide as follows:

The States parties undertake to adopt measures, both internally and through international cooperation, especially those of an economic and technical nature, with a view to achieving progressively, by legislation or other appropriate means, the full realization of the rights implicit in the economic, social, educational, scientific, and cultural standards set forth in the Charter of the Organization of American States as amended by the Protocol of Buenos Aires.<sup>53</sup>

The Charter of the Organization of American States (OAS), as amended by the Protocol of Buenos Aires, mentions expressly the right to development as an individual right:

The Member States, convinced that man can only achieve the full realization of his aspirations within a just social order, along with economic development and true peace, agree to dedicate every effort to the application of the following principles and mechanisms:

- a. All human beings, without distinction as to race, sex, nationality, creed, or social condition, have a right to material well-being and to their spiritual development, under circumstances of liberty, dignity, equality of opportunity, and economic security.

Article 45 further provides:

The Member States will give primary importance within their development plans to the encouragement of education, science, and culture, oriented towards

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<sup>53</sup> American Convention on Human Rights signed on 22 November 1969 and entered into force on 18 July 1978, O.A.S.T.S No. 36 at 1, O.A.S Official Records OEA/ser.K./XVI/1.1, Doc. 65, Rev. 1, Corr. 2(1970), reprinted in 9 *International Legal Materials (ILM)* 673 (1970); See also Espiell Gros H. *op. cit.* (n 8) at 198.

the overall improvement of the individual, and as a foundation for democracy, social justice, and progress.<sup>54</sup>

### *European initiatives*

The European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in 1950 and which entered into force in 1953, is a relevant instrument within the context of international human rights. It was the first comprehensive treaty ever to establish an international complaints procedure and an international court for the determination of human rights matters.<sup>55</sup> Considering the fact that there were several outstanding proposals on which final agreement could not be reached when the convention was adopted in 1950, it was agreed to adopt later protocols containing additional provisions. Thus, since 1952 more than 10 protocols have been adopted, specifically devoted to procedural matters and to the recognition of additional rights such as the right to property and the right to education. Despite the fact that European instruments on human rights do not explicitly mention the right to development, one notes that there is a need to observe and protect all human rights. Furthermore, an important number of European countries are parties to international instruments which take into consideration the right to development, namely: the UN Charter;<sup>56</sup> the Universal Declaration of Human Rights<sup>57</sup>; the International

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<sup>54</sup> Charter of the Organization of American States (1967) OAS. Official Records OEA/Ser.A/2 [Engl] Rev. at 12; See also Espiell Gros H. *op. cit.* (n 8) at 204.

<sup>55</sup> Steiner Henry J and Alston Philip *International human rights in context: Law, politics, morals* (1996) Clarendon Press Oxford 571.

<sup>56</sup> Article 55 of the United Nations Charter reads as follows:

“With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

- a. higher standards of living, full employment, and conditions of economic and social progress and development.
- b. solutions of international economic, social, health and related problems; and international cultural and educational co-operation; and

Covenant on Economic, Social and Cultural Rights; and the International Covenant on Civil and Political Rights. In this regard, the Preambles of the European Social Charter, revised in 1996, and the Charter of Fundamental rights of the European Union of 2000 stress the need to further realise human rights and fundamental freedoms; to preserve the indivisible nature of all human rights, be they civil, political, economic, social or cultural in order to improve the standard of living and social well-being of all populations. It is important and necessary to strengthen the protection of fundamental rights by placing individuals at the heart of the activities of the European Union.

### *African initiatives*

The African Charter on Human and Peoples' Rights<sup>58</sup> explicitly mentions the right to development in article 22 as follows:

1. All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.
2. States shall have the duty, individually and collectively, to ensure the exercise of the right to development.

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c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.”

Article 56 provides that “all Members pledge themselves to take joint and separate action in cooperation with the organization for the achievement of the purpose set forth in Article 55.”

<sup>57</sup> Article 25 provides that:

“1. Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

2. Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.”

<sup>58</sup> Referred to as the Banjul Charter, Organization of the African Unity Doc. CAB/LEG/67/3/Rev. 3, 27 June 1981. The Charter entered into force on 21<sup>st</sup> October 1986.

The African Charter on Human and Peoples' Rights has been praised for its explicit recognition of the right to development as a human right,<sup>59</sup> and, it has served as a source of inspiration for the newly initiated preparations for a universal instrument on the right to development.<sup>60</sup> In the light of article 22, it may be deduced that the Charter sees the right to development as a collective right. Kéba Mbaye considers this a 'hasty conclusion' which he does not share.<sup>61</sup> Wolfgang is of a similar opinion and found in the African Charter proof of the existence of an implicit right of the individual to development.<sup>62</sup> One should bear in mind that the right to development has an inevitable individual dimension and to deny this would be to fail to recognize that both individual and collective rights strive towards the same goal: respect for human dignity in its two expressions – that of individual human beings and that of human communities.<sup>63</sup> The African Charter views individual and peoples' rights (collective rights) as interlinked. The uniqueness of the African Charter lies in the African philosophy of existence: 'I am because we are and since we are therefore I am'.<sup>64</sup> Ankumah emphasises that living in Africa means 'abandoning the right to be an individual, particular, competing, selfish, aggressive, conquering being in order to be with others, in peace and harmony with the living and the dead, with the natural environment and the spirit that people is or give life to it.'<sup>65</sup> The term 'peoples' contained in article 22 of the Charter needs

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<sup>59</sup> Kéba Mbaye *Les droits de l'homme en Afrique* (2002) 2eme ed. A. Pedone Paris 210.

<sup>60</sup> Allan Rosas "The right to development" in Eide Asbjorn, Krause Catarina and Rosas Allan *Economic, social and cultural rights: A text book* (2001) 2<sup>nd</sup> rev. ed. Martinus Nijhoff Publishers Dordrecht / Boston / London 123.

<sup>61</sup> Kéba Mbaye as mentioned in Ouguergouz F *op. cit.* (n 20) 304-305

<sup>62</sup> *Idem.*

<sup>63</sup> Ouguergouz *op. cit.* (n 20) at 306.

<sup>64</sup> Mbiti JS *African religions and philosophy* (1970) 144 in Ankumah Evelyn A *The African Commission on Human and Peoples' Rights: Practice and procedures* (1996) Vol. 16 Martinus Nijhoff Publishers The Hague London Boston 159.

<sup>65</sup> Keba M'baye and Birame Ndiaye *The Organization of African Unity, the international dimension of human rights* (1982) Vol. 2 583 quoted by Ankumah Evelyn A *op. cit.* (n 64) 160. In traditional Africa the community's interest was always supreme even though this was thought to be complementary to, rather than in competition with, individual rights. Individual

to be understood and defined in compliance with the letter and spirit of the Charter as rooted in the values of African civilization.<sup>66</sup>

Article 3 of the Constitutive Act of the African Union includes in its objectives the promotion and protection of human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other human rights instruments.

The New Partnership for Africa's Development (NEPAD)<sup>67</sup> Policy Document also makes reference to the right to development. Its paragraph 43 reads as follows:

The new phase of globalization coincided with the reshaping of international relations in the aftermath of the Cold War. This is associated with the emergence of new concepts of security and self-interest, which encompass the right to development and the eradication of poverty. Democracy and State legitimacy have been redefined to include accountable government, a culture of human rights and popular participation as central elements.

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is considered to be 'part and parcel' of a group. The complexity of rights and duties in African societies has been characterized under four Rs: "Respect, Restraint, Responsibility and Reciprocity."

<sup>66</sup> Ankumah Evelyn A *op. cit.* (n 64) 161.

<sup>67</sup>The foundation document that outlines NEPAD's vision, principles and priorities was adopted in July 2001 by the 37<sup>th</sup> session of the Organization of African Unity (OAU), now the African Union (AU), Assembly of Heads of State and Government in Lusaka, Zambia. The key NEPAD principles and messages are: African ownership and responsibility for the continent's development; the promotion and advancement of democracy, human rights, good governance and accountable leadership; self-reliant development to reduce dependency on aid; building capacity in African institutions; promoting intra-Africa trade and investment; accelerating regional economic integration; advocating women; strengthening Africa's voice in international forums; and forging partnerships with African civil society, the private sector, other African countries and the international community. Nkuhlu *The New Partnership for Africa's Development: The journey so far: NEPAD* (2005) South Africa 2; See also Omphemetse Sibanda "Integrating Africa into the World Trade Organization and challenges facing the African Union and the New Partnership for Africa's Development (NEPAD)" (2004) Vol. 45 No. 1 *Codicillus* at 53.



Thus, under the New Partnership for Africa's Development (NEPAD), the development of the African continent remains largely dependent on international cooperation. NEPAD is particularly important because it recognizes that development cannot exist without democracy and respect for human rights.<sup>68</sup> One of the counterparts of the effective implementation of the right of the African peoples to development will therefore be the duty of the States parties to the African Charter to honour their commitments under NEPAD.

## **2.2 The national perspective and constitutionalization of the right to development**

Taking into consideration the United Nations Declaration on the Right to Development,<sup>69</sup> the Seoul Declaration on the progressive development of principles of public international law relating to a new international economic order<sup>70</sup> and other relevant international instruments that recognize the right to development, state members have undertaken responsibilities at national level for all the necessary measures to realize the right to development through their national legislation and/or development policies. This right would ensure equality of opportunity for all and access to basic resources: education, health

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<sup>68</sup> NEPAD has emphasised the necessity of good governance and democracy as a condition for economic growth. Africa has failed to grow economically because of the lack of sound democracy, peace and security, and honest and strong governments. It is certainly difficult to attract investors where there is corruption and civil war. Badejo Diedre J. *op. cit.* (n 7); Murray Rachel *Human rights in Africa* (2004) Cambridge University Press UK 38.

<sup>69</sup> UNGA res. 41/128 of 4 December 1986, adopted by 146 votes to 1 (US) with 8 abstentions (Denmark, FRG, Finland, Iceland, Israel, Japan, Sweden and UK).

<sup>70</sup> Resolutions 34/150 of 17 December 1979 and 35/166 of 15 December 1980 were entitled "consolidation and progressive development of the principles and norms of international economic law relating in particular to the legal aspects of the new international economic order." Since 1981, the pertinent resolutions, amongst which resolution 40/67 of 11 December 1985, are entitled "Progressive development of the principles and norms of international law relating to the new international economic order." See De Waart Paul, Peter Paul and Denters Erik (eds.) *International law and development* (1988) Martinus Nijhoff Publishers London 410.

services, food, housing, employment and the fair distribution of income.<sup>71</sup> The Seoul Declaration emphasizes that the right to development as a principle of public international law implies the cooperation of states for the elaboration of civil, cultural, economic, political and social standards, embodied in the Charter of the United Nations and the International Bill of Rights. These standards which are based upon a common understanding of the generally recognized human rights and of the principles of public international law concerning friendly relations and cooperation amongst states should be taken into account by states in the formulation, adoption and implementation of administrative, legislative, policy and other measures for the realization of the right to development at both national and international levels.<sup>72</sup> Dupuy points out that ‘in reality, the state will be the first debtor of the people, who will be able to invoke against it its own right to development if the state does not see to the implementation of the right both through its domestic policy and its foreign relations policy.’<sup>73</sup> The author states further that ‘while the individual state is no longer the sole actor in the development, each state continues to bear primary responsibility for its own development. Whether expressed as a responsibility of states or as a right of peoples, development requires competent governmental leadership, coherent national policies and strong popular commitment.’<sup>74</sup> However, one may rely upon the action of the international community in cases where a nation state is too weak or unwilling to fulfil its duties, or where the power to do so is beyond its reach.<sup>75</sup>

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<sup>71</sup> Article 8(1) of the Declaration on the Right to Development.

<sup>72</sup> Article 6.3 of the Seoul Declaration: Declaration on the progressive development of principles of public international law relating to a new international economic order.

<sup>73</sup> Dupuy R J quoted by Ouguergouz F *op. cit* (n 20) at 319.

<sup>74</sup> Dupuy RJ quoted by Ouguergouz F *idem*.

<sup>75</sup> Developing countries claim that the international economic and political order constitutes an obstacle to the enjoyment of the right to development for their citizens. They therefore see a need for action in the international dimension of the right to development. They consider that they are able to provide the necessary basis for the enjoyment of the right to development

The right to development as provided by the African Charter on Human and Peoples' Rights,<sup>76</sup> is central to the African understanding of human rights in general, and has drawn from the words of Senghor who asserted that

‘our overall conception of human rights is remarked by the right to development since it integrates all economic, social and cultural rights, and, also civil and political rights. Development is first and foremost a change of the quality of life and not only economic growth acquired at any cost, particularly in the blind repression of individuals and peoples. It means the full development of every man in his community.’<sup>77</sup>

At this stage, it is important to highlight the fact that not all academics share the above so-called African understanding of the right to development. The controversy is significant and opens the door to a number of difficulties pertaining to the scope, substance, and realization of the right to development, and, further, the very nature of rights as vehicles for the attainment of certain functional goals in society.<sup>78</sup> These are important aspects of the right to development that need to be highlighted and scrutinized before an analysis can be made of the constitutional entrenchment of the right within certain countries.

### 2.2.1 Elements of the right to development

Any recognized right carries three necessary components, namely: a holder upon whom it confers a power, a determinate content defining what the power consists of and one or more people on whom it imposes either a positive

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only if the international order becomes more conducive to the economic development of developing countries in general. See Kirchmeier Felix *op. cit.* (n 44) 12.

<sup>76</sup> Article 22.

<sup>77</sup> Senghor quoted in Maina PC *Human rights in Africa: A comparative study of the African Human and Peoples' Rights Charter and the new Tanzania Bill of Rights* (1990) Greenwood Press New York / London 62.

<sup>78</sup> Boko Duma Gideon *op. cit.* (n 2) at 40.

obligation to satisfy the demands of the holder of the right, or a negative obligation to abstain from interfering in the exercise of the right.<sup>79</sup> A systematic analysis of the foregoing points should be done in the light of the right to development. To avoid any confusion on the understanding of the nature and content of the right to development, the concept ‘development’ needs to be defined.

### *2.2.1.1 The concept ‘development’*

The concept ‘development’ is controversial. Development is a multi-faceted process.<sup>80</sup> Espiell presents four observations related to the concept ‘development’ as follows.<sup>81</sup>

a) Development is a relative and dynamic concept. It is relative because there is not and there cannot be a unique and absolute model of development. Promotion of development does not necessitate that countries and individuals follow a given model of development whether it be capitalism and a free market economy or socialism and a centrally planned economy. In promoting its citizens’ free will, each state should select and execute its own model of development. The concept of ‘development’ is dynamic because each epoch views development differently. The changing conception is due not only to the fact that in each and every historical stage the possibilities of development are determined by the existent ideologies and by the economic possibilities allowed by contemporary scientific and technological progress, but also by the fact that each development formula generates a modification of the original model.

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<sup>79</sup> Rivero Jean quoted by Espiell Gros H *op. cit.* (n 8) at 194.

<sup>80</sup> Udombana NJ *op. cit.* (n 17) at 755.

<sup>81</sup> Espiell Gros H *op. cit.* (n 8) at 200-203.

b) Development cannot be viewed as a synonym of economic growth. The notion of development encompasses a multiple and complex content that implies economic, social, cultural and even political progress. Kéba Mbaye has mentioned that:

‘economic growth must be accompanied by social and cultural progress; ... it must be accorded a human dimension. The increase in per capita GNP is of no avail if it does not at the same time take into account educational and cultural progress, and in a general manner, if it does not observe and develop the values of civilisation of the group and their participation in universal civilisation.’<sup>82</sup>

Udombana<sup>83</sup> advises against taking a monolithic view of development as it contains so many dimensions, including economic and technological dimensions, and the satisfaction of human needs to their fullest degree and to the benefit of human beings as a whole.

Sengupta makes the telling point that development is not merely an expansion of the GDP or job creation. It is a process that must ensure it will not entrench existing inequalities and that will share the benefits of economic development equitably regardless of such differences as gender, religion ... etc. Decision-making should be truly participatory and profit-sharing should be transparent for development efforts to succeed and to maintain their integrity.<sup>84</sup>

Taking again position, Kéba Mbaye underlines the fact that

Spiritual development should coincide with material and physical development. Human development should coincide with technical development, theoretical development with practical development; both activities should maintain a

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<sup>82</sup> Kéba Mbaye “Le droit au développement comme un droit de l’homme” *op cit.* (n 24) at 512-513 ; Espiell HG *op. cit.* (n 8) 202.

<sup>83</sup> Udombana NJ *op. cit.* (n 17) at 757.

<sup>84</sup> Sengupta A “The right to development and its implications for governance reform” *in India* in Raj Kumar C and Chockalingam K (eds.) *op. cit.* (n 18) 190.

dialectic communication that stimulates one another as pronounced by Leopold Sédar Senghor. It is because of this reciprocating action that man has developed himself, little by little, and thus succeeds in distancing himself from animal nature. To develop is to improve human life first in quantity, but ultimately in quality... Development ... is a form of humanism. It is an intellectual and spiritual fact as well as a material and spiritual one. It is an expression that the integrity of man corresponds to his material needs (food, lodging and clothing). It is man's expressiveness in its grandeur and in its weakness that pushes him further without ever assuring definitely the redemption of his errors and his follies.<sup>85</sup>

c) Collective development promotes individual development and vice versa. The development of the state and its communities or collective entities is a prerequisite for individual development; however, individual development is essential for true community development. Udombana<sup>86</sup> states that at the individual level, development implies increased skill and capacity. It implies greater freedom, creativity, self-discipline, responsibility, and material well-being. The achievement of these aspects of personal development relies more heavily upon the state. In terms of social groups, development involves a progressive ability to regulate internal and external relations. Economically, development embraces a people's vision for a better life, and indeed a more prosperous, modern and technologically advanced way of life and the various ways in which this better life can become a reality.<sup>87</sup>

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<sup>85</sup> Kéba Mbaye "Le Droit au développement comme un droit de l'homme" *op. cit.* (n 24) at 512-513 ; Espiell Gros H. *op. cit.* (n 8) at 202.

<sup>86</sup> Udombana N.J. *op. cit.* (n 17) at 755; See also Dennis Goulet "Development: Creator and destroyer of values" in Kathleen E Mahoney and Paul Mahoney (eds.) *Human rights in the twenty-first century: A global challenge* (1993) Martinus Nijhoff Publishers Dordrecht / Boston / London 689.

<sup>87</sup> *Idem.*

d) Purely collective development at the expense of the individual is self-defeating. Haroub Othman gives a relevant anecdote on this subject: An African representative was overheard to ask: ‘Do you want us to pay our debts at the expense of our dying children?’, to which the World Bank / International Monetary Fund (IMF) representative replied, ‘The question has been answered in practice. And the answer is, yes, you pay your debt at the expense of dying children.’<sup>88</sup> This can hardly be described as development or a moral way of giving aid.

Clearly, it is important to understand the multi-dimensional concept of ‘development’. Yes, it is a legal concept which the law may treat as a process, an effort or an outcome. Further, it encompasses ethical, political, economic, social and cultural aspects, all of which contribute to realizing the right to development.<sup>89</sup> This study takes its understanding of development from the UN Declaration on the Right to Development of 1986, which states: ‘development is a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom.’<sup>90</sup> This high-level recognition of development as a human right entitles individuals and peoples to the individual and collective benefits of their states’ implementation

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<sup>88</sup> Haroub Othman “Political and economic empowerment as prerequisites for the full enjoyment of human rights” in University of Namibia *Human rights and democracy in Southern Africa: Papers presented at the Conference: Cultivating cooperation amongst human rights institutions in the UNITWIN Network in Southern Africa* (1998) New Namibia Books 46.

<sup>89</sup> Mavungu Jean Pierre “The right to development as a human right” in International Commission of Jurists *Report of a regional seminar on economic, social and cultural rights* (9-12 March 1998) Abidjan Côte d’Ivoire 39.

<sup>90</sup> Paragraph 2 of the Preamble of the United Nations Declaration on the Right to Development of 1986.

of articles 55 and 56 of the UN Charter.<sup>91</sup> The provisions of the UN Declaration on the Right to Development view developmental matters very much from the economic perspective, and so it is not far from the Covenant. According to Ramcharan,<sup>92</sup> the substantive articles of the International Covenant on Economic, Social and Cultural Rights outline the concept of development as performing as follows:

- Development is close to being recognized as an explicit right in article 11 of the Covenant, which refers to the right of everyone to an adequate standard of living that includes adequate food, clothing and housing, and the continuous improvement of living conditions.

- Development is cast, in some instances, as a derivative of a recognized right. Article 1(1) of the Covenant, after stating that all people have the right to self-determination, proceeds to add that ‘by virtue of that right’ they may fully pursue their economic, social and cultural development.

- Development is in other instances viewed as a goal to be pursued in order to realize a right recognized in the Covenant, for example, article 15 asserts the right to take part in cultural life. The steps to be taken by the States Parties to the Covenant shall include ‘the development and the diffusion of science and culture’.

- Article 12 casts development in the role of a guide to the implementation of the right to the enjoyment of the highest attainable standard of physical and

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<sup>91</sup> De Waart Paul J.I.M. “Introductory reflections upon international law and development” in De Waart Paul, Peters Paul and Denters Erik *op. cit.* (n 70) xxiii.

<sup>92</sup> Ramcharan BG “The role of the development concept in the UN Declaration on the right to development and in the UN Covenant” in De Waart Paul, Peters Paul and Denters Paul *op. cit.* (n 70) 298.



mental health conditions, and requires States Parties to take steps ‘for the healthy development of the child.’ Furthermore, article 13, after recognizing the right of everyone to education, adds that ‘education shall be directed to the full development of the human personality.’

- The concept of development finds further expression in the Covenant as a means to realize rights recognized in the Covenant. This may be seen through article 6, which recognizes the right to work and then specifies that State Party should undertake ‘policies and techniques to achieve steady economic, social and cultural development.’

- Finally, the concept of development is a factor which may be taken into account in determining the extent of the obligations of a State Party to guarantee economic rights recognized in the Covenants to non-nationals.

Ultimately, man’s well-being remains the object, purpose and justification for development based on the recognition of the right of every man to a free and worthy life within the community. The right to development is a consequence of mankind’s unanimous acceptance of the right to live; it is the basis and the condition for the collective right of the states and other communities to development. It is only when the right to development is simultaneously considered as a collective and individual right that the idea of development acquires its true and fullest meaning.

#### *2.2.1.2 Collective or individual right?*

The recognition of the right to development as a collective as opposed to an individual right has been intensively debated by scholars. Bedjaoui classifies the right to development primarily as a right of states and/or peoples and argues that

its conceptualization as an individual right only serves to obscure fundamental international legal problems pertaining to its formulation and operation.<sup>93</sup> Abi-Saab points out that it is ‘very difficult, [if not] impossible’, to conceive of a general individual right to development and, it must be viewed as a collective right.<sup>94</sup> Along the same lines, Sanson refers to the right to development as ‘the analog, for peoples, of human rights, for individuals.’<sup>95</sup> Donnelly comments that ‘the main thrust of the right to development is collective and dynamic, emphasizing the struggles of peoples, nations and states for the elimination of obstacles which impede development’; it is ‘a collective right of sovereign states or peoples fighting for their independence’; ‘a profound human right which goes beyond mere individual rights.’<sup>96</sup>

One has to ask if it is truly incompatible for a right to be simultaneously considered as a collective right, whose active subjects are collective persons of international or municipal law, and an individual right, belonging only to human beings.<sup>97</sup> Espiell questions the traditional view that a right cannot be simultaneously collective and individual and argues that ‘for an adequate protection of the individual, of the human person, it is necessary to declare and proclaim the essential rights which recognize as subjects those collective entities which the individuals are able to utilize in order to fully satisfy their personal lives.’<sup>98</sup> He sees the right to development as almost equally an individual and a collective right. Jean Rivero brings clarity to this issue when he points out that:

the dilemma is without doubt a false one. In fact, collective rights (e.g., the right to meet, to strike, to unionize) are individual rights – they belong to each

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<sup>93</sup> Bedjaoui M “Some unorthodox reflections on the ‘right to development’ ” in Snyder Francis G and Slinn Peter *op. cit.* (n 30) at 89-93.

<sup>94</sup> Abi-Saab quoted by Donnelly J *op. cit.* (n 29) at 495.

<sup>95</sup> Sanson quoted by Donnelly J *idem.*

<sup>96</sup> *Idem.*

<sup>97</sup> Espiell Gros H *op. cit.* (n 8) at 195.

<sup>98</sup> *Id.* at 196.

person (*homme*) – and are distinguished from other rights in that they cannot be implemented except by the agreement of many wills. The right to development could be placed among these rights. It seems indeed essential in this respect, to give proper attention to this double – individual and collective – aspect. To ignore the first, and to make a collective right out of the right to develop, would be like imposing on those members in the name of development, the most cumbersome servitude. At the very least, there would be individual enhancement but not development: development implies a collective effort. From the point of view of the holder of the right, the right to develop would not pose a particular problem: it would be an individual right in its beginning and its end, and a collective right in its implementation.<sup>99</sup>

This makes perfect sense, and indeed all human rights need substantial collective action if they are to be fully realized for all.<sup>100</sup> The freedoms of speech, press, religion and assembly, for example, can no more be fully realized in the absence of collective social action than can the rights to education or social security.

In its report, the UN Secretary General stated, in 1979, that the enjoyment of the right to development involves the careful balancing of the interests of the collectivities on one hand, and those of the individual on the other. It would be a

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<sup>99</sup> Rivero J quoted by Espiell Gros H. *op. cit.* (n 8) at 195; translation from French language by the *Texas International Law Journal*. French version “Le dilemme est sans doute un faux dilemme. En effet, les droits collectifs, (ex.: droit de réunion, de grève, d’association ... ) sont des droits individuels – ils appartiennent à chaque homme – qui se distingue des autres en ce qu’ils ne peuvent être mis en oeuvre que par l’accord de plusieurs volontés. Le droit au développement pourrait trouver sa place dans ce groupe. Il apparaît essentiel, en effet, d’affirmer à son propos le double aspect individuel et collectif. Méconnaître le premier, et faire, du droit au développement un droit du groupe, ce serait permettre à celui-ci d’imposer à ses membres, au nom du développement, les plus lourdes servitudes. Au défaut, il peut y avoir promotion individuelle, il n’y a pas développement: le développement implique une montée collective. Du point de vue du titulaire, le droit au développement ne poserait donc pas un problème particulier: ce serait un droit individuel dans son principe et sa finalité, collectif dans sa mise en oeuvre.”

<sup>100</sup> Donnelly J *op. cit.* (n 29) at 496.

mistake to regard the right to development as applying exclusively at one level.<sup>101</sup> The creditors of the right to development are individuals, peoples and states.<sup>102</sup> Makarczyk states that ‘the right to development as a human right means that all individuals and all peoples should freely partake of the fruits of their toil both, individually and in common, through the state, in order to implement the provisions of articles 55 and 56 of the UN Charter.’<sup>103</sup>

It needs to be said that the full realization of the right of peoples to self-determination<sup>104</sup> is the forerunner to the right to development.<sup>105</sup> Bedjaoui argues convincingly that the right to development flows from the right to self-determination and is of the same kind. Thus, the right to development is one of the collective rights belonging to individuals and all peoples.<sup>106</sup> As a human right, the right to development must include the right of every individual to benefit fairly from the perpetual and comprehensive development of their society.<sup>107</sup> The right requires action taken in a spirit of solidarity.<sup>108</sup> An individual person should be seen as a subject of the right to development under international law, otherwise, the right to development could be regarded merely as a collective right of a people (nation) or state, and the individual as the object of the right.<sup>109</sup> The author emphasizes, further, that the right to development is an independent human right and it is a prerequisite for the enjoyment of other rights, and inevitably it involves, for both individuals and states, the right of

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<sup>101</sup> UN Secretary-General’s Report on the Study of the International Dimension of the Right of Development as a Human Right of the Individual in Relation with other Human Rights based on International Cooperation, including the Right to Peace, UN Doc. E/CN 4/1334 of January 1979. See also Paadi R *op. cit.* (n 40) at 12.

<sup>102</sup> Paadi R *op. cit.* (n 40) at 12.

<sup>103</sup> *Id.* at 14.

<sup>104</sup> Article 2 of the UN Declaration of Development of 1986.

<sup>105</sup> Bulajić M *op. cit.* (n 3) 94.

<sup>106</sup> Paadi Ramoraka D *op. cit.* (n 40) at 15.

<sup>107</sup> Bulajić M. *op. cit.* (n 3) 374.

<sup>108</sup> *Id.* at 373.

<sup>109</sup> Paadi R *op. cit.* (n 40) at 16.

access to the means necessary to realize the human rights defined in international instruments. It is an individual, collective right of peoples as well as a collective right of states.<sup>110</sup>

### *2.2.1.3 Scope, nature and content of the right to development*

It is important at the outset to know that the scope and content of the right to development have not yet been determined conclusively in either international or municipal law. The content of third generation rights in general, specifically the right to development, remains controversial amongst scholars. At first glance, it is more difficult to have a clear picture of their contents because all of them are extremely wide in their scope. Tomuschat<sup>111</sup> notes that there are no defined specific measures and steps that must be followed by states or governments their goals. One may only come across general comprehensive goals. Therefore, development has a variety of components and constitutes an ideal situation that rests on a multitude of factual and legal elements many of which are not under the control of governments alone. According to Van Reenen,<sup>112</sup> the main characteristics of the right to development can be described as follows:

- It has a strong moral and reactionary basis.<sup>113</sup>
- There is a shift away from the economic emphasis so as to embrace social, cultural and political progress and interaction. The right to development embodies the entire spectrum of human rights.
- The right to development is procedural rather than substantive in nature. Development is not an end in itself but a process that leads toward a goal.

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<sup>110</sup> *Idem.*

<sup>111</sup> Tomuschat Christian *op. cit.* (n 52) 51.

<sup>112</sup> Van Reenen TP *op. cit.* (n 34) at 434.

<sup>113</sup> Donnelly J *op. cit.* (n 29) at 489-494.

This implies that the right to development is only a right to pursue development, and, therefore, substantively considered, its recognition as a right serves no real purpose.<sup>114</sup>

- The right to development fits coherently into, and is interdependent with, all other international human rights, especially to the right to life, peace, security, freedom, justice and a healthy environment. In this regard, the UN Declaration on the Right to Development of 1986 expressly declares that:

All human rights and fundamental freedoms are indivisible and interdependent; equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, political, economic, social and cultural rights;<sup>115</sup> All the aspects of the right to development set forth in the present Declaration are indivisible and interdependent and each of them should be considered in the context of the whole.<sup>116</sup>

Shelton sees this right as a synthesis of existing human rights because it reintegrates the civil, political, economic, social and cultural groups of rights. The indivisibility of human rights and the inextricable linkage between civil and political rights, and between economic, social and cultural rights is expressed in the right to development.<sup>117</sup> Espiell states that:

The individual rights outlined by the Universal Declaration of Human Rights, and further guaranteed and protected by regional treaties, are meaningless if they are not all respected. All human rights are so interdependent that if one is violated it has a negative domino effect on the other rights, and the human right of development is a case in point.<sup>118</sup>

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<sup>114</sup> *Id.* at 501.

<sup>115</sup> Article 6(2).

<sup>116</sup> Article 9(1).

<sup>117</sup> Shelton D “A response to Donnelly and Alston” (1985) Vol. 15 *California Western International Journal* at 524, 526.

<sup>118</sup> Espiell Gros H. *op. cit.* (n 8) at 205.

The right to development entitles individuals and peoples to an international order which provides for a just and adequate realization of the universally recognized human rights. It imposes a duty to improve the quality of life of all peoples.<sup>119</sup> The right to development is a composite right, which by encompassing several well-recognized rights, enhances their value and makes them a true force for the establishment of the New International Economic Order.<sup>120</sup>

- The right to development has the potential to act as an international unifying force. In addition to state political sovereignty, the right to development includes permanent sovereignty over natural resources. A breach of the latter would threaten international peace and security and therefore the economic interdependence and development of nations.<sup>121</sup> Van Reenen emphasizes that the right to development implies the shared purpose of the international community to repair the grave injuries of previous colonial exploitation.<sup>122</sup> This allows the existing unjust international economic order to be questioned by the developing countries. If the goods and services available to the developing countries can be increased, the enjoyment of human rights as a whole will become a reality.

Essentially, the right to development is a right to the enjoyment of all human rights. As a right, development requires the establishment of legal machinery to concretise the many other rights and amounts to a defence of all human rights. Without any such clear mechanism to secure the right to development, the many other rights would remain vulnerable.<sup>123</sup> The human rights-based approach to

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<sup>119</sup> Okafor Obiora Chinedu *op. cit.* (n 5) at 868.

<sup>120</sup> Donnelly J *op. cit.* (n 29) 505.

<sup>121</sup> Van Reenen TP *op. cit.* (n 34) at 435.

<sup>122</sup> *Idem.*

<sup>123</sup> Boko Duma Gideon *op. cit.* (n 2) at 43.

development reveals that human rights and development are inextricably linked:<sup>124</sup> development is not possible without the protection of human rights.<sup>125</sup>

The content of the right to development requires the identification of the rights and benefits of the active subjects or right-bearers, as well as the obligations of the passive subjects or duty-bearers towards the former.

#### *2.2.1.4 The subjects of the right to development*

The academic debate pertaining to the subjects of the right to development has been lively. It is obvious that the determination of the active subjects of the right to development, in other words, those who possess the right, depends on whether the right is viewed as an individual human right, a collective right of peoples, or as a collective right of the state.

Viewed as a collective right in international law, the active subjects of the right to development are states, particularly developing countries and peoples who are fighting for their self-determination against foreign and colonialist domination. In municipal law, the active subjects of this right are those collective entities such as provinces, regions, districts, municipalities and communities whose development must be promoted and encouraged.<sup>126</sup> According to Bedjaoui, if it is to have an effective meaning and content, the right to development must have a State as its subject and beneficiary. Thus, to avoid any misunderstanding, the author suggests that we call this ‘the right to development at the international

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<sup>124</sup> Haile M “Human rights, stability and development in Africa: Some observations on concept and reality” (1984) 24 3 *Virginia Journal of International Law* at 600, 601. See also Murray Rachel *op. cit.* (n 68) 237.

<sup>125</sup> Udombana N J *op. cit.* (n 17) at 765.

<sup>126</sup> Espiell Gros H *op. cit.* (n 8) at 198.



level'.<sup>127</sup> This does not mean that we should deny the existence of this right at the individual level.

Viewed as an individual right, the active subjects of the right are individuals. Certainly, this assertion implies a need to recognize the right to development of every human being without any distinction on the basis of race, sex, ideology, religion or nationality.<sup>128</sup> If one would like to share the view that the right is an individual human right it is obvious that the central subjects, active participants and primary beneficiaries of the right are all human beings. With this in mind, in 1984, the Working Group of Government Experts on the Right to Development recognized by consensus that the human being is the central subject of the right to development and that any development policy should have the individual as the main participant in, and primary beneficiary of, development.<sup>129</sup> Indeed, it may be argued that states are first holders of the right later to be transferred to individuals as a human right to development,<sup>130</sup> and the individual is the ultimate beneficiary of international legal norms. Individual welfare is achieved more surely and quickly if we begin with the welfare of the group to which the individual belongs. States are only subjects of international law in order to guarantee the exercise of rights which ultimately appertain to the individual.<sup>131</sup> States should be viewed as passive subjects of the right to development in the context of rights and duties. In its 1983 report, the Parliamentary Assembly of the Council of Europe has stated that states are widely seen as subjects of the right to development. They may have a right to development in the context of

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<sup>127</sup> Bedjaoui Mohammed "Some unorthodox reflections on the right to development" in Snyder Francis and Slinn Peter *op. cit.* (n 30) 89.

<sup>128</sup> Espiell Gros Hector *op. cit.* (n 8) at 199

<sup>129</sup> Paadi Ramokara *op. cit.* (n 40) at 17.

<sup>130</sup> *Idem.*

<sup>131</sup> Bedjaoui M "Some unorthodox reflections on the 'right to development' in Snyder Francis G and Slinn Peter (eds.) *op. cit.* (n 30) 89.

rights and duties, and not as a human right of individuals.<sup>132</sup> Thus, the comprehensive view should be that the holders of the right to development in its individual dimension are individuals, in its collective dimension all the peoples and the states. The human person remains the central subject of development and the active participant and beneficiary of the right to development.<sup>133</sup> On this basis, one shares the most widely quoted definition of the right to development:

- (i) the realization of the potentialities of the human person in harmony with the community should be seen as the central purpose of development;
- (ii) the human person should be seen as the subject and not the object of the development process;
- (iii) respect for human rights is fundamental to the development process;
- (iv) the human person must be able to participate fully in shaping his own reality;
- (v) a degree of individual and collective self-reliance must be an integral part of the process.<sup>134</sup>

### 2.2.2 Constitutionalization of the right to development

The inclusion and protection of the right to development in the constitutional bills of rights of a number of states has raised dispute not only in African countries, but also in a range of other countries throughout the world. Many of the concerns voiced in this respect reflect the general problems surrounding the normative status and validity of second and third generation rights.<sup>135</sup> The constitutions of most countries contain elaborate provisions in their bills of

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<sup>132</sup> Paadi R *op. cit.* (n 40) 18.

<sup>133</sup> Article 2(1) of the Declaration on the Right to Development, UNGA res. 41/128 of 4 December 1986, adopted by 146 votes to 1 (US) with 8 abstentions (Denmark, FRG, Finland, Iceland, Israel, Japan, Sweden and UK).

<sup>134</sup> Brietzke H. Paul "Consorting with the chameleon, or realizing the right to development" (1985) Vol. 15 *California Western International Law Journal* 562.

<sup>135</sup> Van Wyk David *et al.* (eds.) *Rights and constitutionalism: The new South African legal order* (1994) Juta Cape Town 602-611.

rights and guarantee the basic rights and freedoms of individuals.<sup>136</sup> The normative force of the right to development relies absolutely on the manner it is integrated into the domestic legal system. The entrenchment of the right to development in the constitution of a country would be a significant step taken because the constitution is the primary or supreme law of a country and constitutes the powerful legal source of human rights within a country. According to Van Reenen,<sup>137</sup> many modern constitutional states have, to varying degrees, included fundamental rights of all three categories in their constitutions. Whereas civil and political rights are recognized as fundamental, individual human rights, the approach to socio-economic rights has resulted in three possible choices:

- (i) non-justiciable fundamental individual human rights or;
- (ii) non-justiciable principles of ‘state policy guidelines or directive principles’ in a part of the constitution separate from the bill of rights, or;
- (iii) a combination of (i) and (ii), where a right is recognized as such in a bill of rights and backed up or re-affirmed later by imposing a positive duty on the state to facilitate its implementation and promotion.

A number of European constitutions contain provisions that can be termed social and economic rights and objectives. These rights are either justiciable or are included in a separate chapter on directive principles and state duties.<sup>138</sup> A closer look at their provisions, to the extent that they declare and protect the economic and social rights of individuals, reveals the implicit existence of a human right to development.<sup>139</sup> The right to development is the alpha and omega of human rights, the means and the goal of human rights, and indeed it is the *core right*

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<sup>136</sup> Boko Dumo Gideon *op. cit.* (n 2) at 42.

<sup>137</sup> Van Reenen TP *op. cit.* (n 34) at 431.

<sup>138</sup> Starck “Europe’s fundamental rights in the newest garb” (1982) 3 *Human Rights Law Journal* at 114-116.

<sup>139</sup> Espiell Gros H *op. cit.* (n 8) at 203.

from which all the other rights stem.<sup>140</sup> Rivero is of the view that ‘development seems less of a distinct right than of a combination of means that would render economic and social rights effective for the mass of people that are grievously deprived.’<sup>141</sup> Taking into consideration the heart of the debate on the right to development, the constitutions of the Federal Republic of Germany and of Spain respectively provide that:

Everyone has the right to the free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law.<sup>142</sup>

The dignity of the person, the inviolable rights that are inherent, the free development of the personality, respect for the law and the rights of others, are the foundation of political order and the social peace.<sup>143</sup>

In the USA, the Federal Constitution does not speak of social and economic rights, or of the right to development. Where individual American state constitutions have made such provisions, the courts have upheld these rights, but at the federal level they are not acknowledged or seen as belonging to a second generation of rights.<sup>144</sup> Therefore, in the USA, individual rights of a social and economic nature originate from ordinary statutory, rather than constitutional,

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<sup>140</sup> Bedjaoui “The right to development” in Bedjaoui (ed.) *International law: Achievements and prospects* (1991) 1182 in Steiner Henry J. and Alston Philip *International human rights in context: Law, politics, morals* (2000) 2<sup>nd</sup> ed. Oxford University Press New York 1321; Bedjaoui M (ed.) *International law: Achievements and prospects* 1177 (1991) at 1182 quoted by Steiner Henry J. and Alston Philip *op. cit.* (n 55) 117.

<sup>141</sup> Rivero J quoted by Espiell Gros H *op. cit.* (n 8) at 203. French text: “Le développement apparaît moins comme un droit distinct que comme l’ensemble des moyens qui permettront de rendre effectifs les droits économiques et sociaux pour la masse des hommes qui en sont douloureusement privés.” Translated by the *Texas International Law Journal*.

<sup>142</sup> Article 2.1 of the Basic Law for the Federal Republic of Germany of May 23, 1949 as amended to December 1, 1993. See also Currie DP *The Constitution of the Federal Republic of Germany* (1994) The University of Chicago Press Chicago / London 344.

<sup>143</sup> Constitution of Spain of 1978, article 10(1).

<sup>144</sup> The United States Supreme Court in *Goldberg v Kelly* 397 US 254 (1970), has regarded welfare benefits as being ‘more property than gratuity.’ See also Van Reenen TP *op. cit.* (n 34) at 432.

provisions. The state has the discretion, but it cannot be constitutionally compelled to provide social and economic programmes.<sup>145</sup> The United States seems reluctant to recognise development as an international human right, and yet the current administration proposes to double development spending on a programme that mirrors the model of the international right to development.<sup>146</sup>

The current German Federal Constitution, the ‘Basic Law’, does not elaborate on a system of social and economic rights, but article 20 and 28 do sanction the social state principle which is a typical example of directive principle of state policy.<sup>147</sup> Article 20 stipulates that:

the Federal Republic of Germany is a democratic and social federal republic<sup>148</sup> and that the constitutional order in federated states must comply with the principles of the republican, democratic and social law-based state, as defined in this Constitution.<sup>149</sup>

The term “social law-based state” refers to the balance which the German Law pursues in order to protect socio-economic interests on the one hand and civil and political rights on the other. The social state component of this constitutional concept comprises the basis of comprehensive legislation directed at the protection of social and economic interests.

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<sup>145</sup> Henkin “Economic-social rights as ‘rights’: A United States perspective” (1981) 2 *Human Rights Law Journal* at 229.

<sup>146</sup> Marks Stephen “The human right to development: Between rhetoric and reality” (2004) Vol. 17 *Harvard Human Rights Journal* at 137.

<sup>147</sup> De Wet Erika “Can the social state principle in Germany guide state action in South Africa in the field of social and economic rights?” (1995) Vol. 11 *South African Journal on Human Rights* at 31.

<sup>148</sup> Article 20(1).

<sup>149</sup> Article 28(1).

The Indian Constitution contains a separate chapter on directive principles which is far more extensive than any other similar exercise.<sup>150</sup> The appeal of the Indian provisions is that they originated in, and are in response to, the constitutional and political experiences and history of India, rather than an uncritical reproduction of ideologically-based, fashionable trends imported from elsewhere.<sup>151</sup> De Villiers asserts, further, that the directive principles of the Indian Constitution seek to balance the seemingly conflicting claims of individual liberties with social justice, and the recognition of the importance of socio-economic reform and renewal as a prerequisite for the effective protection of fundamental rights.<sup>152</sup>

On the African continent, the Constitutions of Nigeria and of Namibia contain a chapter on fundamental rights and one on directive principles. Both Bills of Rights contain the expected range of civil and political, as well as certain social and economic rights, and most of the rights require limited state intervention for their realization. The Namibian chapter on principles of state policy, for example, provides for certain social and economic objectives without creating justiciable rights.<sup>153</sup> Neither constitution explicitly mentions a right to development. According to Van Reenen, the directive principles were intended to pave the way for the establishment of an ‘economic democracy’, because the desperate social and economic needs of the population had to be met or the fundamental rights and freedoms in the bill of rights would remain paper rights.<sup>154</sup> The author asserts, further, that the distinction between the categories of first generation fundamental rights and second and third generation directive

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<sup>150</sup> Articles 36-51 of the Indian Constitution.

<sup>151</sup> Reddy KJ “Fundamentalness of fundamental rights and directive principles in the Indian Constitution” (1980) *Journal of the Indian Law Institute* 403.

<sup>152</sup> De Villiers “Directive principles of state policy and fundamental rights: The Indian experience” (1992) 8 *South African Journal on Human Rights* at 30; See also Van Reenen TP *op. cit.* (n 34) at 433.

<sup>153</sup> Chapter 11, article 95-101.

<sup>154</sup> Van Reenen TP *op. cit.* (n 34) at 433.

principles accurately reflects the fundamental, principled distinction between the private spheres of life, where the government should restrain its intervention, and the public interest sphere, which requires positive state action to address social and economic problems. The two categories are treated as separate from one another.

It is against the above-mentioned background that certain countries have given the right to development an important place in their constitutions. The Constitution of the Republic of Cameroon, promulgated in 2 June 1972, states in its Preamble, paragraph 3, that:

The people of Cameroon ... resolved to exploit its natural wealth in order to ensure the well-being of every citizen by the raising of living standards, proclaims its right to development as well as its determination to devote all its efforts to that end and declares that it is ready to co-operate with all states desirous of participating in this national enterprise in respect for its sovereignty and the independence of the Cameroonian state.<sup>155</sup>

Article 9 of the Constitution of Benin of 1990 provides that:

Every human being has a right to the development and full expansion of his person in his material, temporal and intellectual dimensions, provided that he does not violate the rights of others nor infringe upon constitutional order and good manners.

The African heads of state have recently reaffirmed their commitment to promote and protect all human rights, including the right to development, and to take note of their universal, interdependent and indivisible character.<sup>156</sup>

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<sup>155</sup> Blaustein Albert P and Flanz Gisbert H (eds.) *Constitutions of the countries of the world* (2006) Vol. III Oceana Publications New York.

<sup>156</sup> First Africa-Europe Summit, "Cairo Declaration," 4 April 2000 Paragraph 43. The Grand Bay (Mauritius) Declaration and Plan of Action; adopted in April 1999 by the Organization of

It has become apparent in all these differing constitutional provisions that explicitly or implicitly entrench the right to development in countries all over the world, most particularly in Africa, how this right has become a key point on the political agenda. In this respect, the right to development as a human right must enjoy similar constitutional protection to other constitutional human rights and requires the establishment of legal machinery for the concrete realization of those other complementary rights.

### **2.3 The relationship between the right to environment and the right to development**

The relationship between the right to environment and the right to development has been recognized by the international community. One is of the view that environmental problems and development are interlinked, therefore, they should be tackled together at the 'right time'. According to Schrijver, the right to development, or to sustainable development, includes a healthy environment.<sup>157</sup> The author emphasizes further that while it is true that in a developing country there will have to be development, this development must not be harmful to the environment.<sup>158</sup> In this connection, in 1994, the United Nations Secretary-General stressed that development has five dimensions, namely, peace, economy, environment, justice and democracy. These dimensions were not selected arbitrarily but emerged from a half century of practical work by the UN

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African Unity First Ministerial Conference on Human Rights in Africa, indicates for its part that 'the right to development, the right to a generally satisfactory healthy environment and the right to national and international peace and security are universal and inalienable rights which form an integral part of fundamental human rights' (Organization of African Unity DOC CONF/HRA/DECL (I) Paragraph 2; see also Ouguergouz F. *op. cit.* (n 20) 304.

<sup>157</sup> Nico Schrijver quoted by Charu Sharma "Human rights and environmental wrongs: integrating the right to environment and developmental justice in the Indian Constitution" in Raj Kumar C. and Chockalingam K. (eds.) *op. cit.* (n 18) 314.

<sup>158</sup> Charu Sharma "Human rights and environmental wrongs: integrating the right to environment and developmental justice in the Indian Constitution" in *Idem*.



and others with governments, organisations and people.<sup>159</sup> The Rio Declaration on Environment and Development<sup>160</sup> recognizes the interdependence and indivisibility of peace, development and environmental protection;<sup>161</sup> it introduces the concept of ‘sustainable development’ then asserts that ‘the right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations’;<sup>162</sup> and, ‘in order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.’<sup>163</sup> The Conference on Trade and Development<sup>164</sup> took up the position that ‘the developed countries, in adopting any environmental policies and pollution control measures, should take into account the development needs of the developing countries and ensure that their economies are not adversely affected.’ It is a fact that in the developing countries most of the environmental problems are caused by underdevelopment. Millions continue to live below the poverty line, deprived of adequate food and clothing, shelter and education, health and sanitation.<sup>165</sup> It is critical that the developing countries direct their efforts to development, but at the same time to bear in mind the need to safeguard and improve the environment. Thus, for this purpose, the gap between the industrialized countries and the developing countries should be reduced.<sup>166</sup> This should be done with due regard to the sovereignty of each state to avoid any behaviour which could lead to the ‘institutionalization’ of the theory of

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<sup>159</sup> Ouguergouz *op. cit.* (n 20) 307.

<sup>160</sup> Adopted by the United Nations Conference on Environment and Development, held in Rio de Janeiro (Brazil) in 1992, text report of the United Nations Conference on Environment and Development – Rio de Janeiro Vol. I. Resolutions adopted by the Conference UN DOC. A/CONF. 151/26/Rev. 1 (vol. I) New York 1993 no 3-28.

<sup>161</sup> Principle 25.

<sup>162</sup> Principle 3.

<sup>163</sup> Principle 4.

<sup>164</sup> UNCTAD Resolution 46/III, paragraph 1, Principle 12.

<sup>165</sup> Buljać M. *op. cit.* (n 3) 179.

<sup>166</sup> *Idem.*

‘*ingérence verte*’<sup>167</sup> or ‘*green interference*’ in the internal affairs of the country. One shares the view that environmental deficiencies generated by the conditions of underdevelopment, and natural disasters caused by climate change and drought, are problems best remedied by accelerated development through the transfer of substantial quantities of financial and technological assistance to supplement the domestic efforts of the developing countries<sup>168</sup> because, each country is ultimately responsible for its own development.<sup>169</sup> National initiatives may be supported but not replaced by international intervention through the process of cooperation. The Declaration on the Right to Development provides that:

States have the duty to cooperate with each other in ensuring development and eliminating obstacles to development. States should fulfill their rights and duties in such a manner as to promote a new international economic order based on sovereignty equality, interdependence, mutual interest and cooperation among all states, as well as to encourage the observance and realization of human rights.<sup>170</sup>

The environmental policies of all states should enhance the present and future development potential of developing countries, the attainment of better living conditions for all, and appropriate steps should be taken by states and

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<sup>167</sup> This theory is drawn from the notion of “humanitarian intervention.” Through this theory, African countries would be invited to accept the compensation of their debts by looking after or allowing the “North” to take over the management of the environment on the continent. This idea should be scrutinized properly by African leaders so that the continent would not again fall under a neo-colonial form of exploitation under the pretext of environmental protection. Kamto M *op. cit.* (n 21) 59.

<sup>168</sup> *Id.* at 179. One could also argue that these are unnatural “natural” disasters because they are caused by human activities harmful to the global environment.

<sup>169</sup> Jospin, stated in the *International Herald*, that there is no universal model of development; the development strategy must match with the social reality of each country (Le *Monde* 20-21 Juin 1999). French text: “Il n’y a pas de modèle universel de développement; une stratégie de développement doit s’inscrire dans la réalité de chaque pays”. See Charvin Robert *L’investissement international et le droit au développement* (2002) Harmattan Paris at 110.

<sup>170</sup> Article 3(3).

international organizations to reach agreement on how to deal with any national and international economic consequences resulting from the application of environmental measures. To reach these goals, and preserve and improve the environment, resources should be made available, taking into consideration the circumstances and particular requirements of developing countries and any costs which may emanate from their incorporating environmental safeguards into their development planning and the need for making available to them, upon their request, additional international technical and financial assistance for the present purpose.<sup>171</sup> In this context, environment and development belong together, and should be dealt with together all over the world. The right to development may seem the prerogative of the developing countries where the need for development is acutely felt. In fact, this impression of the right to development is true as it will naturally seldom need to be applied in the developed regions of the world.<sup>172</sup>

To encompass the need for environmental protection within the process of development places some limitations on the right to development inasmuch as it cannot be asserted at the expense of the community or at the expense of neighbouring states whose prospects may be jeopardized. A state cannot, in the name of development, proceed to applications of nuclear energy in such a way as to harm the environment and imperil human life, whether in the immediate neighbourhood or in the surrounding region.<sup>173</sup> The United Nations Secretary-General stressed that ‘the environmental problems of developing countries fall broadly into two categories, the problems arising out of poverty or the inadequacy of development itself, and the problems that arise from the very

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<sup>171</sup> Buljać Mulan *op. cit.* (n 3) 179.

<sup>172</sup> Nagendra Singh “Sustainable development as a principle of international law” in Paul de Waart, Paul Peters and Erik Denters *op. cit.* (n 70) 2.

<sup>173</sup> *Id.* at 3.

process of development.’<sup>174</sup> One may also highlight the fact that desertification is another factor which threatens the whole process of development in the affected countries and lack of development in turn impedes any attempt to combat it.<sup>175</sup> Deforestation, another scourge of the African continent is caused to some extent by the heavy consumption of wood by certain populations for domestic use or to the system of slash and burn farming; that is, when it is not simply a result of the imperatives of development itself, which calls for maximum exploitation of the forest. Therefore, a ‘general satisfactory environment favorable to development’ must also mean a quality environment: in other words, clean air and water, and the protection of the flora and fauna so integral to traditional ways of life.<sup>176</sup>

Ouguergouz notes that under-development like mal-development impacts negatively on the environment. The relationship between environment and development is interactive, because a degraded environment may impede the process of development and the lack of development may be a source of environmental degradation.<sup>177</sup> The application of the principle of sustainable development, which embodies the application of an environmental impact

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<sup>174</sup> Development and Environment (Subject Area V) – Report by the General Secretary of the United Nations DO. A/CONF. 48/10 22 December 1971 Ann. I p. 9 para. 16. “The problems in the first category are reflected in the poor social and economic conditions that prevail in both the rural and urban areas (water pollution, poor housing, public hygiene and nutrition, sickness and natural disasters). For most developing countries these are, by far, the problems of greatest importance. But as the process of development gets under way the problems in the second category also begin to emerge and to gain in significance.” This classification was adopted by the World Bank in its *World Development Report* 1992.

<sup>175</sup> In Africa, over the next 20 years, some 60 million people are expected to move from the Sahelian region to less hostile areas if the desertification of their land is not halted. See Ouguergouz *op. cit.* (n 20) 363.

<sup>176</sup> Ouguergouz *op. cit.* (n 20) 364.

<sup>177</sup> *Id.* at 362.

assessment remains a key point and balancing factor in the relationship between environmental and developmental rights.<sup>178</sup>

## 2.4 Conclusion

Development as a human right has been recognized and protected explicitly or implicitly at the international level by different instruments on human rights and at the national level through domestic legal systems. No member state of the UN may, today, legitimately call into question the right to development; it henceforth falls under the domain of *jus cogens*.<sup>179</sup> The United Nations Declaration on the Right to Development of 1986 is a prominent international legal source, which has elevated ‘development’ to the status of a right and inspired a new perspective on how development and human rights are interlinked. The Declaration adds a specifically defined and new human right, while simultaneously asking for various ‘development considerations’ to be taken into account in pursuing the application of international law in general and human rights law in particular.<sup>180</sup> Development has to be of such a nature that all human rights and fundamental freedoms can be fully realized. In other words, when there is gross violation of human rights and fundamental freedoms, development is compromised.<sup>181</sup> Thus, in the light of the provisions of the Declaration, development is conceptually employed in different senses: more

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<sup>178</sup> See Kirby Ronald Vernon *A comparative study of the enforcement of environmental law with regard to the conservation of fauna and flora in the RSA* (2002) University of South Africa Pretoria [Unpublished LL. D thesis] at 54; Cordonier Segger Marie Claire and Khalfan Ashfaq *Sustainable development law: principles, practices, and prospects* (2004) Oxford New York 1. Sustainable development as the balancing factor between environmental and developmental rights is not the prime focus of this research. Nevertheless, it presents an untapped and topical field for future postgraduate research.

<sup>179</sup> Bedjaoui quoted by Mavungu Jean Pierre *op. cit.* (n 89) 41.

<sup>180</sup> Ramcharan B.G “The role of the development concept in the UN Declaration on the right to development and in the UN Covenant” in De Waart Paul, Peters Paul and Denters Erik *op. cit.* (n 70) 295.

<sup>181</sup> Articles 5 and 6 of the Declaration on Human Rights of 1986.

narrowly in the legal sense of a right (Article 1(1)); broadly as a goal; relatively as a guide; and practically as a means. The first sense (a new right) represents an advance upon International Covenant on Economic, Social and Cultural Rights which does not contain a specific affirmation of the right to development, although there may be some traces of the notion in the Covenant.<sup>182</sup> The African Charter on Human and Peoples' Rights explicitly mentions the right to development in article 22. With regard to the provisions of the afore-mentioned and other instruments on human rights, states have been requested to put in place legal systems for the concrete realization of the right to development as a whole.<sup>183</sup> This right is a combination of existing rights recognized by the international instruments on human rights and contributing to the development of peoples and states.<sup>184</sup> Conceived as an individual right which can be exercised collectively, the right to development places the human being at its centre.<sup>185</sup> States are bearers of this right on the international legal plane and individuals are the beneficiaries *vis-à-vis* their states. With this in mind, equality of opportunity for development which is a prerogative of nations and of individuals within nations<sup>186</sup> should be granted to everyone. This includes the fact that development is the condition of all social life, the international duty of solidarity, the duty of reparation for colonial and neo-colonial exploitation. Society must be imbued with the notion of solidarity, the notion that the development of all is the responsibility of everyone. Only in such a society will people be empowered to exercise political and economic rights, and enjoy them as well. National resources must be mobilized for the betterment of all.<sup>187</sup> The

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<sup>182</sup> Ramcharan BG "The role of the development concept in the UN Declaration on the Right to Development and in the UN Covenant" in De Waart Paul, Peters Paul and Denters Erik *op. cit.* (n 70) 298.

<sup>183</sup> Article 3 and 8 of the Declaration on the Right to Development of 1986.

<sup>184</sup> Donnelly Jack *op. cit.* (n 29) at 481.

<sup>185</sup> Article 2 of the Declaration on the Right to Development of 1986.

<sup>186</sup> Donnelly Jack *op. cit.* (n 29) at 480.

<sup>187</sup> Haroub Othman "Political and economic empowerment as prerequisites for the full enjoyment of human rights" in University of Namibia *op. cit.* (n 2) at 50.

development of the collectivity and that of the individual are thus interdependent, complementary and mutually reinforcing.<sup>188</sup>

In the next chapter the rights to environment and to development will be discussed in the SADC, DRC and RSA contexts.

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<sup>188</sup> Okafor Obiora Chinedu *op. cit.* (n 5) at 870.

## CHAPTER 3:

### **THE RIGHT TO ENVIRONMENT AND THE RIGHT TO DEVELOPMENT IN THE SADC REGION AND IN THE CONSTITUTIONS OF THE DEMOCRATIC REPUBLIC OF CONGO AND THE REPUBLIC OF SOUTH AFRICA**

The Sixties and Seventies were a watershed era that saw the decolonization of many African states and a new direction for environmental management in Africa.<sup>1</sup> Economic development issues topped the international agenda in several fora.<sup>2</sup> An ‘urge to merge’ into regional entities,<sup>3</sup> over the years, meant that environmental and developmental initiatives were undertaken by individual countries or groups of countries with shared problems. Various regional and sub-regional organizations, for example, the Organization of the African Unity (OAU)<sup>4</sup> and Southern African Development Community (SADC) were respectively created, and their members committed themselves to the sustainable use of resources so as to protect the rights of present and future generations.

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<sup>1</sup> Chenje M (ed.) *Reporting the Southern African environment: A media handbook* (1998) Southern African Research and Documentation Centre 1.

<sup>2</sup> Important controversies and concern surround the development of the African continent. The *Economist* of 21 May 2000 published an article entitled ‘Hopeless Africa’ which said: ‘Does Africa have some inherent character flaw that keeps it backward and incapable of development? Some think so. They believe Africa’s wars, corruption and tribalism are “just the way Africa is”, and that African societies are unable to sustain viable States. In the past, outsiders would have described Africa’s failure in racial terms. Some still do. They are wrong, but social and cultural factors cannot be discounted.’ See Odinkalu Chidi Anselm “Implementing economic, social and cultural rights under the African Charter on Human and Peoples’ Rights” in Evans Malcolm D. and Murray Rachel (eds.) *The African Charter on Human and Peoples’ Rights: The system in practice 1986-2000* (2002) Cambridge University Press UK New York 178; See also Alston “Revitalising United Nations work on Human Rights and Development” (1991) 18 *Melbourne University Law Review* at 218; Mbazira Christopher “Enforcing the economic, social and cultural rights in the African Charter on Human and Peoples’ Rights: Twenty years of redundancy, progression and significant strides” (2006) 6 *African Human Rights Law Journal* at 335 – 336.

<sup>3</sup> Söderbaum Fredrik *The political economy of regionalism in Southern Africa* (2002) Göteborg University Sweden 1.

<sup>4</sup> Currently known as the African Union.



Most of the SADC countries have ratified all the major environmental conventions of the Nineties which testify their willingness to work together with the international community to solve global environmental challenges,<sup>5</sup> while remembering that to protect the environment is integral to successful and sustainable development.<sup>6</sup> Development increases the likelihood that human rights will be upheld,<sup>7</sup> and its lack places human rights in constant jeopardy. Article 8 of the Declaration on the Right to Development<sup>8</sup> views persistent underdevelopment, which means little or no access to such necessities as food, clean water, clothing, housing and medicine and generally appalling living conditions as a mass violation of human rights.<sup>9</sup> Abi-Saab considers that:

although it may be true that human rights can formally exist in any society, regardless of its level of development, and that development alone guarantees neither the recognition nor the respect of these rights, it is also true that the

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<sup>5</sup> Chenje M *op. cit.* (n 1) 63. As parties to Multilateral Environmental Agreements (MEAs), SADC Member States have a legal and moral obligation to implement their provisions at national, regional and international levels in order to safeguard the environment for the benefit of both present and future generations. See the Southern African Development Community's Engagement with Multilateral Environmental Agreements: Experiences from the Conference of Parties 8 of the Convention on Biological Diversity (2006) SADC/IUCN/UNDP Gaborone 12.

<sup>6</sup> Van der Linde Morne and Basson Ernst *Environment* in Woolman *et al.* (eds.) *Constitutional law of South Africa* (2004) 2<sup>nd</sup> ed. Juta Kenwyn 50-21.

<sup>7</sup> Tlakula Pansy "Human rights and development" in Tiyambe Zeleza Paul and McConnaughay Philip J *Human rights, the rule of law, and development in Africa* (2004) University of Pennsylvania Press USA Philadelphia 119.

<sup>8</sup> Article 8 of the United Nations Declaration on the Right to Development reads:

"1. States should undertake, at the national level, all necessary measures for the realization of the right to development and shall ensure, *inter alia*, equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income. Effective measures should be undertaken to ensure that women have an active role in the development process.

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

<sup>9</sup> Hilderling Antoinette "The right of access to freshwater resources" in Nico Schrijver and Friedl Weiss (eds.) *International law and sustainable development: Principles and practice* (2004) Martinus Nijhoff Publishers Leiden / Boston 415.

quality of their implementation or practical realization depends upon social conditions *lato sensu* that may be termed the society's level of development.<sup>10</sup>

Today, the claim for the recognition of environmental and developmental rights is an urgent issue. The time to eradicate poverty and all its inter-related challenges within the SADC region and, more particularly, in the Democratic Republic of Congo and the Republic of South Africa is long overdue.

## THE SOUTHERN AFRICAN DEVELOPMENT COMMUNITY

### **3.1 The rights to environment and to development in the Southern African Development Community region**

The Preamble of the Treaty of the Southern African Development Community (SADC) makes constant reference to human rights and the need for progress and the improved well-being of the people of Southern Africa. People must remain at the centre of the development process in order to alleviate poverty, and guarantee the observance of their human rights and of the rule of law. This commitment is a thread that runs through articles 5 and 21 of the Treaty:

Article 5 states:

1. The objectives of SADC shall be to:

- (a) promote sustainable and equitable economic growth and socio-economic development that will ensure poverty alleviation with the ultimate objective of its eradication, enhance the standard and quality of life of the people of Southern Africa and support the socially disadvantaged through regional integration;

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<sup>10</sup> Abi-Saab quoted by International Commission of Jurists *Report of regional seminar on economic, social and cultural rights* 9-12 March 1998 (1999) Abidjan Côte d'Ivoire at 44.

- (d) promote self-sustaining development on the basis of collective self-reliance, and the interdependence of Member States;
- (g) achieve sustainable utilization of natural resources and effective protection of the environment;
- (j) ensure that poverty eradication is addressed in all SADC activities and programmes... ;

While Article 21 provides that:

1. Member States shall cooperate in all areas necessary to foster regional development and integration on the basis of balance, equity and mutual benefit.
2. Member States shall, through appropriate institutions of SADC, coordinate, rationalise and harmonise their overall macro-economic policies and strategies, programmes and projects in the areas of co-operation.
3. In accordance with the provisions of this Treaty, Member States agree to co-operate in the areas of:
  - a. infrastructure and services;
  - b. trade, industry, finance, investment and mining;
  - c. social and human development and special programmes;
  - d. science and technology.
  - e. natural resources and environment;
  - f. social welfare, information and culture; and
  - g. politics, diplomacy, international relations, peace and security.
4. Additional areas of co-operation may be decided upon by the Council.

The Treaty outlines the strategies and responsibilities to attain the objectives defined in Article 5. 2 which provides that:

2. In order to achieve the objectives set out in paragraph 1 of this article, SADC shall:
  - a. harmonise political and socio-economic policies and plans of Member States;

- b. encourage the people of the Region and their institutions to take initiatives to develop economic, social and cultural ties across the Region, and to participate fully in the implementation of the programmes and projects of SADC;
- c. create appropriate institutions and mechanisms for the mobilisation of requisite resources for the implementation of programmes and operations of SADC and its institutions;
- d. develop policies aimed at the progressive elimination of obstacles to the free movement of capital and labour, goods and services, and of the people of the Region generally, among Member States;
- e. promote the development of human resources;
- f. promote the development, transfer and mastery of technology;
- g. improve economic management and performance through regional co-operation;
- h. promote the coordination and harmonisation of the international relations of Member States;
- i. secure international understanding, co-operation and support, and mobilise the inflow of public and private resources into the Region; and
- j. develop such other activities as Member States may decide in furtherance of the objectives of this Treaty.

In addition to these provisions, one must take note of three further important instruments. In terms of Article 8 of the Protocol on Mining in the Southern African Development Community, the SADC member states shall:

- Promote sustainable development by ensuring that a balance between mineral development and environmental protection is attained.
- Encourage a regional approach in conducting environmental impact assessments especially in relation to shared systems and cross border environmental effects.
- Collaborate in the development of programs to train environmental scientists in fields related to the mining sector.

- Undertake to share information on environmental protection and environmental rehabilitation.<sup>11</sup>

Article 3 of the Charter of Fundamental Social Rights in SADC<sup>12</sup> emphasizes basic human and organizational rights as follows:

1. This Charter embodies the recognition by governments, employers and workers in the Region of the universality and indivisibility of basic human rights proclaimed in instruments such as the United Nations Universal Declaration of Human Rights, the African Charter on Human and Peoples' Rights, the Constitution of the International Labour Organization, the Philadelphia Declaration and other relevant international instruments.
2. Member States undertake to observe the basic rights referred to in this Charter.

The Protocol on Politics, Defence and Security Co-operation notes amongst the objectives of the Organ the promotion of 'the development of democratic institutions and practices within the territories of state Parties and encourage the observance of universal human rights as provided for in the Charters and Conventions of the Organization of African Unity and United Nations respectively.'<sup>13</sup> Furthermore, the Protocol notes that genocide, ethnic cleansing, and gross violations of human rights in state parties qualify as significant intra-state conflicts, which the Organ is mandated to address.<sup>14</sup>

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<sup>11</sup> Protocol adopted in September 1997. DRC to accede, Angola, Swaziland to ratify. See Oosthuizen Gabriël H *The Southern African Development Community: The organization, its policies and prospects* (2006) Institute for Global Dialogue Midrand South Africa 140.

<sup>12</sup> Charter signed and entered into force on 26 August 2003. Angola and Botswana to sign. See *Id.* at 141.

<sup>13</sup> Article 2 (2) (g) of the Protocol on Politics, Defence and Security Co-operation of 14 August 2001.

<sup>14</sup> Article 11 (2) (b) (i) of the Protocol on Politics, Defence and Security Co-operation of 14 August 2001.

The main goals for a regional environment policy and strategy are defined by the SADC Policy and Strategy for Environment and Sustainable Development as follows:

- protect and improve the health, environment and livelihoods of the people in Southern Africa with priority to the poor majority;
- preserve the natural heritage, biodiversity and life-supporting ecosystems in Southern Africa;
- support regional economic development on an equitable and sustainable basis for the benefit of present and future generations;
- strengthen the analytical, decision-making, legal, institutional and technological capacities for achieving sustainable development in Southern Africa;
- increase public information, education and participation on environment and development issues in Southern Africa;
- expand regional integration and global cooperation on environmental and natural resources management for sustainable development.<sup>15</sup>

Bearing in mind the focused attention given to human rights,<sup>16</sup> environmental matters, and developmental needs within the region, it is surprising and disappointing that neither the right to environment nor the right to development are explicitly defined in the Treaty. They may be inferred only, so this is crucial point that the Organization must scrutinize in order to give real protection to the environment as part of the way toward development and the effective implementation and enforcement of human rights. Fortunately, Article 12 of the

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<sup>15</sup> SADC Policy and Strategy for Environment and Sustainable Development *Environment and Land Management Sector (ELMS)* (1996) Maseru in Munyaradzi Chenje (ed.) *State of the environment 2000 Zambezi Basin* (2000) SADC/IUCN/ZRA/SARDC Maseru/Lusaka/Harare 272.

<sup>16</sup> It is distressing to note that the SADC tends to treat the values of democracy, good governance, and respect for the rule of law and for human rights as useful rhetorical devices to avert criticism or to “avoid dealing with serious political instability and violence” and fail to see their integral worth and importance. See Oosthuizen Gabriël H *op. cit.* (n 11) 308.

Charter of Fundamental Social Rights in the SADC contains important, albeit limited, detail related to the above rights.<sup>17</sup>

Along the same lines, State members of the Organization play a pivotal role through their domestic legal systems in the light of Article 6 of the Treaty which provides that:

1. Member States undertake to adopt adequate measures to promote the achievement of the objectives of SADC, and shall refrain from taking any measure likely to jeopardize the sustenance of its principles, the achievement of its objectives and the implementation of the provisions of this Treaty.

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<sup>17</sup> Articles 12 reads:

Member States shall endeavour to create an enabling environment so that:

- a) subject to paragraph (b) to (g) of this Article, every worker in the Region has the right to health and safety at work and to a healthy and safe environment that sustains human development and access to adequate shelter;
- b) Employers shall provide safe workplaces that do not pose a risk to the health of employers or any other person exposed;
- c) Basic work environment and occupational health and safety standards as set out in ILO Convention No. 155 are provided;
- d) Engineering is prioritized to control risk from hazards at source;
- e) The organization of occupational health and safety shall be on the basis of bipartite and tripartite co-operation and the full participation of all parties;
- f) Workers have a right to information on workplace hazards and the procedures being taken to address them, and to appropriate health and safety training in paid working time;
- g) Workers have the right to stop work that they reasonably believe poses an immediate and serious risk to their health, safety or physical well being according to ILO Convention No. 155;
- h) Workers have the right to services, that provide for the prevention, recognition, detection and compensation of work related illness or injury, including emergency care, with rehabilitation and reasonable job security after injury and adequate inflation adjusted compensation;
- i) Employers control and are liable for work related environmental risks according to the 'polluter pays' principle;
- j) Workplace based health service for workers is accessible, affordable and equitable, and is provided on a professional ethical basis; and
- k) Economic and investment measures take into consideration health, safety and environmental standards.

2. SADC and Member States shall not discriminate against any person on grounds of gender, religion, political views, race, ethnic origin, culture, ill health, disability, or such other ground as may be determined by the Summit.
3. SADC shall not discriminate against any Member State.
4. Member States shall take all steps necessary to ensure the uniform application of this Treaty.
5. Member States shall take all necessary steps to accord this Treaty the force of national law.
6. Member States shall co-operate with and assist institutions of SADC in the performance of their duties.

Taking into consideration the content of this Article 6, the member states have incorporated explicitly or implicitly the right to environment and the right to development in their constitutions.

### 3.1.1 Protecting environmental and developmental rights through constitutional provisions in the SADC member States

The inception of a chapter or bill of rights in a constitution is particularly relevant for the protection of human rights. This should also be considered as an important step accomplished by states on the road to implementation, justiciability or enforcement of these rights. Through this process, individuals will be able to invoke the constitutional provisions to obtain relief from the courts when their rights are infringed or threatened by the state.<sup>18</sup> One shares the point of view that the domestic level is the most important level on which human rights should be protected by law in Africa. If the legal system of a particular country protects the human rights of everyone within its jurisdiction,

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<sup>18</sup> Liebenberg Sandra “The protection of economic and social rights in domestic legal systems” in Eide Asbjörn, Krause Catarina and Risas Allan (eds.) *Economic, social and cultural rights: A textbook* (2001) 2<sup>nd</sup> rev. ed. Martinus Nijhoff Publishers Dordrecht / Boston / London 56.



there will be little or no need for higher levels of protection. Furthermore, without a certain level of respect for human rights in the participating domestic systems, a regional system, which is based on consensus and voluntary compliance by member states, cannot function.<sup>19</sup> At this stage, a real concern may be raised by asking the question ‘why, or how, would a state bow to the human rights judgments of a supranational court if it does not do so in respect of its own courts?’ Political leaders must show their willingness by taking into account the values offered by constitutionalism and democracy. Constitutionalism is identified with human rights or different values<sup>20</sup> and rules, which are not exclusive but serve to reinforce<sup>21</sup> written constitutions, the separation of powers, and further judicial review. However, it can be stressed that the mere existence of a constitution, even if contains an eloquent exposition of human rights, does not of itself, suffice to ensure constitutionalism. There are, indeed, many countries in the world today with written constitutions but without constitutionalism.<sup>22</sup> A written constitution is not an obligation to, or a guarantee of, the existence of constitutionalism, as may be observed in the case of the United Kingdom.<sup>23</sup> Nevertheless, although not all constitutions conform to the demands of constitutionalism, and although constitutionalism is not dependent on the existence of a written constitution, the realization of the spirit of constitutionalism generally goes hand in hand with the implementation of a written constitution. The constitution remains both the symbol and instrument of

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<sup>19</sup> Heynes Christof and Viljoen Frans “The regional protection of human rights in Africa: An overview and evaluation” in Tiyambe Zeleza and McConnaughay Philip J (eds.) *op. cit.* (n 7) 131.

<sup>20</sup> First, second and third generation rights.

<sup>21</sup> Mangu, André Mbata Betukumesu *The road to constitutionalism and democracy in post-colonial Africa: the case of the Democratic Republic of Congo* (2002) University of South Africa Unisa Pretoria [Unpublished LL D thesis] at 112.

<sup>22</sup> The Soviet Union can be cited as an example. See Nwabueze BO *Constitutionalism in the emergent states* (1973) Hurst London 2.

<sup>23</sup> The United Kingdom provides an example of the fundamental tenets of constitutionalism without the existence of a written constitution. See Rosenfeld M “Modern constitutionalism as interplay between identity and diversity” in Rosenfeld M *Constitutionalism, identity, difference and legitimacy* (1994) Duke University Press 3.

constitutionalism,<sup>24</sup> an apt vehicle for the constitutionalization of the essential requisites of constitutionalism. In this respect, democracy will play a pivotal role. According to Cowen ‘democracy means one or other or both of two different things, namely (a) democracy considered as a method of governance ... government of the people by the people for the people; and (b) democracy considered as a set of values, especially, the value which holds that in democracy there is no room for arbitrary fiats on the part of those who are entrusted with power to make decisions. In other words, democracy is the opposite of authoritarianism, despotism or tyranny.’<sup>25</sup> Barak emphasizes that ‘democracy is not just the rule of the majority; formal democracy means also the rule of values. Democracy means human rights. When judges use constitutional values in order to protect human rights, they are furthering democracy in its fullest and richest sense.’<sup>26</sup> Democracy and human rights merge in a constitutional democracy and should be seen as complementary rather than opposed.<sup>27</sup>

Recently, the SADC has given more attention to the issues of environmental rights and the right to development, despite the long-lived controversial and lively debate between academics at the international level. Colonialism previously ignored political, socio-economic, cultural, environmental and developmental rights<sup>28</sup> and the majority of Southern African peoples lost their right of access to resources. Nowadays, these rights have been recognized and, in the constitutions of some countries, explicitly entrenched, as discussed below.

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<sup>24</sup> Nwabueze *op. cit.* (n 22) at 23.

<sup>25</sup> Cowen DV “The new South African Constitution and opportunities for environmental justice in a democratic South Africa” (1999) *Acta Juridica* at 125.

<sup>26</sup> Barak A “The role of the Supreme Court in a democracy” (1999) *Israel Law Review* at 5.

<sup>27</sup> Klaaren J “Structures of government in the 1996 South African Constitution: Putting democracy back into human rights” (1997) *South African Journal on Human Rights* at 6.

<sup>28</sup> Chenje M *op. cit.* (n 1) 43.

### *3.1.1.1 Incorporation of the right to environment in the constitutions of SADC state members*

The right to environment is defined in the constitutions of a number of the SADC state members either as a fundamental human right, or as a general principle or objective. Some states mention this right implicitly as a human right provided by international instruments on human rights. This may be drawn from the preamble of the constitution or a chapter related to international instruments within the constitution. The situation is outlined below:

#### **Republic of Angola**

##### Article 24

1. All citizens shall have the right to live in a healthy and unpolluted environment.
2. The State shall take the requisite measures to protect the environment and national species of flora and fauna throughout the national territory and maintain ecological balance.
3. Acts that damage or directly or indirectly jeopardize conservation of the environment shall be punishable by law.<sup>29</sup>

#### **Republic of Botswana**

The Constitution of Botswana is silent on the right to environment. However, Botswana has ratified the African Charter on Human and Peoples' Rights of 1981 which provides for the right to environment in Article 24.<sup>30</sup>

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<sup>29</sup> Law No. 12/91 on the amendment of the Constitution of Angola introduced in March 1991.

<sup>30</sup> Botswana ratified the Charter on 17/07/1986.

## **Democratic Republic of Congo**

### Article 53

Everyone has the right to a healthy environment, one which is favourable to their integral development.

He has a duty to provide for its defence.<sup>31</sup>

## **The Kingdom of Lesotho**

Article 36 on the protection of the environment states:

Lesotho shall adopt policies designed to protect and enhance the natural and cultural environment of Lesotho for the benefit of both present and future generations and shall endeavour to assure to all citizens a sound and safe environment adequate for their health and well-being.<sup>32</sup>

## **Republic of Malawi**

### Article 13 (d)

The State shall actively promote the welfare and development of the people of Malawi by progressively adopting and implementing policies and legislation aimed at achieving the following goals:

(d) The environment

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 sustainable development of natural resources;
- and

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<sup>31</sup> Constitution of 18 February 2006.

<sup>32</sup> Constitution of the Kingdom of Lesotho.

(iv) conserve and enhance the biological diversity of Malawi.<sup>33</sup>

### **Republic of Madagascar**

Article 39 of this Constitution provides that:

Everyone shall have the duty to respect the environment.

The State, with the participation of the autonomous provinces, assures the protection, the conservation and the improvement of the environment through appropriate means.<sup>34</sup>

### **Republic of Mauritius**

The Constitution of Mauritius does not acknowledge the right to environment. One may rely on the provisions of the African Charter on Human and Peoples' Rights because Mauritius has ratified<sup>35</sup> this international instrument which provides for the right to environment through Article 24.

### **Republic of Mozambique**

Article 72 states:

All citizens shall have the right to live in, and the duty to defend, a balanced natural environment.<sup>36</sup>

### **Republic of Namibia**

Article 95 provides that:

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<sup>33</sup> Constitution of the Republic of Malawi of 1994.

<sup>34</sup> Constitution of 19 August 1992.

<sup>35</sup> Mauritius ratified the Charter on 19/06/1992.

<sup>36</sup> Constitution of the Republic of Mozambique of 1990.

The State shall actively promote and maintain the welfare of the people by adopting, *inter alia*, policies aimed at the following:

(i) maintenance of ecosystems, essential ecological processes and biological diversity of Namibia and utilization of living natural resources on a sustainable basis for the benefit of all Namibians, both present and future; in particular, the Government shall provide measures against the dumping or recycling of foreign nuclear and toxic waste on Namibian territory.<sup>37</sup>

### **Republic of the Seychelles<sup>38</sup>**

Article 38 provides that:

The state recognises the right of every person to live in and enjoy a clean, healthy and ecologically balanced environment and with a view to ensuring the effective realisation of this right the state undertakes -

- (a) to take measures to promote the protection, preservation and improvement of the environment;
- (b) to ensure a sustainable socio-economic development of Seychelles by a judicious use and management of the resources of Seychelles;
- (c) to promote public awareness of the need to protect, preserve and improve the environment.<sup>39</sup>

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<sup>37</sup> Constitution of the Republic of Namibia.

<sup>38</sup> In 1999, the Seychelles asked the SADC to consider allowing it to be less than a full member. The demand was rejected because the original SADC Treaty did not allow for conditional membership. During the August Summit, a few months after the Seychelles had given notice of its intention to withdraw, the Summit apparently expressed its regret about the withdrawal and agreed to continue talking to the Seychelles about continued membership. The attempt failed, even after the SADC had proposed that the Seychelles could settle its arrears in terms of a new, more favourable, membership contribution formula, to be applied retroactively. See Oosthuizen Gabriël H *op. cit.* (n 11) 137.

<sup>39</sup> Constitution of the Republic of Seychelles approved on 18 June 1993 and amended by Act No 14 of 1996.

## **Republic of South Africa**

Article 24 reads 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.<sup>40</sup>

## **Kingdom of Swaziland**

Section 216 proclaims that:

- (1) Every person shall promote the protection of the environment for the present and future generations
- (2) Urbanization or industrialisation shall be undertaken with due respect for the environment
- (3) The Government shall ensure a holistic and comprehensive approach to environmental preservation and shall put in place an appropriate environmental regulatory framework.<sup>41</sup>

## **Republic of Tanzania**

The Government has limited itself by stating in the Preamble to the Constitution that ... all human rights are preserved and protected ... in Tanzania. In addition to those international human rights instruments ratified by the Republic of

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<sup>40</sup> Constitution of the Republic of South Africa of 1996.

<sup>41</sup> Constitution of the Kingdom of Swaziland.

Tanzania, Judge Lukakingira held in the case of *Rev. Mtikila v. Attorney General*<sup>42</sup> that: ‘fundamental rights are not gifts from the State. They are inherent in a person by reason of his birth and are, therefore, prior to the State and the law ...’.

### **Republic of Zambia**

The Preamble of the Constitution of Zambia recognizes that the ‘... individual rights of citizens including freedom, justice, liberty and quality are founded on the realization of the rights and duties of all men in the protection of life ...’ It is in the light of this declaration extensively that one may find an implicit recognition of the right to environment in the constitution.

### **Republic of Zimbabwe**

The Constitution of Zimbabwe of 1979, as amended to September 14, 2005 does not give explicit mention to the right to environment. A glancing reference to environmental matters exists in article 16 (1) that reads as follows:

Subject to section 16A, no property of any description or interest or right therein shall be compulsorily acquired except under the authority of a law that -  
a) requires –

(i) in the case of land or any interest or right therein, that the acquisition is reasonably necessary for the utilization of that or any other land –

A. for resettlement for agricultural or other purposes; or

B. for purposes of land reorganization, forestry, environmental conservation or the utilization of wild life or other natural resources; or ...

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<sup>42</sup> 1995 T.L.R. 31 in Shivji G. Issa *et al.* (ed.) *Constitutional and legal system of Tanzania: A civics sourcebook* (2004) Mkuki na Nyota Publishers Dar Es Salaam 77. See also Maina PC *Human rights in Tanzania: Selected cases and materials* (1997) Rüdiger Köppe Verlag Köln German 152.



In summary, it is obvious that the member states of the SADC do not share a common recognition of the right to environment. Bruch points out that African constitutions amended before 1989 generally lack explicit environmental provisions, while most African constitutions that were amended after 1992, generally include environmental provisions.<sup>43</sup> The mechanisms for the protection of environmental rights differ dramatically within the SADC area and this has a serious impact on the management of the environment within the region. The lack of a common agenda on environmental rights within the SADC hinders the fulfilment of the objectives of the organization and the achievement of the goals of the SADC Regional Environmental Educational Programme.<sup>44</sup> Without a clear definition of the right to environment within each country's constitution, it may be difficult, if not impossible, to guarantee the individual right to life and those other rights which presuppose a healthy environment.<sup>45</sup> Some countries within the region have incorporated provisions in the constitutions which allow citizens to compel their governments to protect their environmental rights. In Mozambique, for instance, all citizens have the right to present petitions, complaints and claims before the relevant authority to obtain the restoration of rights that have been violated, or in defence of the public interest. The Mozambican Constitution further gives citizens the right not to comply with orders that are illegal or which infringe upon their rights.<sup>46</sup> Constitutional provisions are strong tools that open the door for the people to enjoy their environmental rights fully.

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<sup>43</sup> Bruch C, Coker W and Van Arsdale C "Breathing life into fundamental principles: Implementing constitutional environmental protections in Africa" (2000) 7 *South African Journal of Environmental Law and Policy* at 34.

<sup>44</sup> The purpose of the SADC Regional Environmental Education Programme is to enable environmental education practitioners in the SADC region to strengthen environmental education processes for equitable and sustainable environmental management choices. See SADC Regional Environmental Educational Programme. Available at: [www.environment.gov.za/ProjProg/2003SADC/capacity\\_building\\_sadc\\_210520](http://www.environment.gov.za/ProjProg/2003SADC/capacity_building_sadc_210520) (visited 22 June 2009).

<sup>45</sup> Chenje M *op. cit.* (n 1) 46.

<sup>46</sup> Article 80 of the Constitution of Mozambique.

### 3.1.1.2 *Incorporation of the right to development in the constitutions of the SADC member states*

In spite of the fact that debates over the recognition of the right to development at the intergovernmental level have for the large part remained polarized along a North – South axis, in Africa, people believe that this is a human right which must enjoy a similar protection to other rights and, further, be included within the International Bill of Rights.<sup>47</sup> Since the recognition of the right to development by the international community as a human right a number of decades ago, international, regional and further constitutional texts have painstakingly affirmed and reaffirmed this right as a human right.<sup>48</sup> The option adopted by the African Charter on Human and Peoples’ Rights of 1981 to mention explicitly and to elevate the right to development to the status of a human right<sup>49</sup> demonstrates the predilection of members of the above Charter.<sup>50</sup> Giving substance to their commitment, the entrenchment of the right to development in the constitutions of SADC member states should not be a debatable point. Appropriate national institutions dealing with the protection and promotion of the right to development, in particular, and all human rights

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<sup>47</sup> Orford Anne “Globalization and the right to development” in Alston Philip (ed.) *Peoples’ rights* (2001) Vol. IX 2 Academy of European Law Oxford New York 134.

<sup>48</sup> Tlakula Pansy “Human rights and development” in Tiyambe Zeleza Paul and McConaughay Philip J. (eds.) *op. cit.* (n 7) 110.

<sup>49</sup> The Preamble of the African Charter on Human and Peoples’ Rights of 1981 emphasizes that: “Convinced that it is henceforth essential to pay particular attention to the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their inception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights”; see also article 22.

<sup>50</sup> Sometimes called the “Banjul Charter”, the African Charter on Human and Peoples’ Rights was adopted by the OAU in Nairobi, Kenya, on 27 June 1981 and entered into force on 21 October 1986. All SADC State Members ratified this Charter: Angola 2/03/1990; Botswana 17/07/1986; Democratic Republic of Congo 20/07/1987; Lesotho 10/02/1992; Madagascar 9/03/1992; Malawi 17/11/1989; Mauritius 19/06/1992; Mozambique 22/02/1989; Namibia 30/07/1992; 1992; South Africa 09/07/1996; Swaziland 15/09/1995; Tanzania 18/02/1984; Zambia 10/01/1984; Zimbabwe 30/05/1986. See Heyns Christof and Killander Magnus (eds.) *Compendium of key human rights documents of the African Union* (2007) 3<sup>rd</sup> ed. Pretoria University Law Press PULP Pretoria 356/357.

guaranteed by the Charter, in general, should be clearly defined and established through the supreme law of each country.<sup>51</sup>

It is disturbing to note that only a limited number of countries have made a difference by acting positively through the inception of this right in their constitutions. Others remain reluctant despite their commitment through the African Charter on Human and Peoples' Rights and the Treaty of SADC to deal with the issues related to development and the attainment of the United Nations Millennium Development Goals.<sup>52</sup> The states who have explicitly mentioned this right in their constitutions are:

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<sup>51</sup> Article 26 of the African Charter on Human and Peoples' Rights of 1981.

<sup>52</sup> The United Nations Millennium Development Goals:

**Goal 1 Eradicating extreme poverty and hunger**

Target 1 Halve, between 1990 and 2015, the proportion of people whose income is less than one dollar a day.

Target 2 Halve, between 1990 and 2015, the proportion of people who suffer from hunger.

**Goal 2 Achieve universal primary education**

Target 3 Ensure that, by 2015, children everywhere, boys and girls alike, will be able to complete a full course of primary schooling.

**Goal 3 Promote gender equality and empower women**

Target 4 Eliminate gender disparity in primary and secondary education, preferably by 2005, and at all levels of education no later than 2015.

**Goal 4 Reduce child mortality**

Target 5 Reduce by two thirds, between 1990 and 2015, the under-five mortality rate.

**Goal 5 Improve maternal health**

Target 6 Reduce by three quarters, between 1990 and 2015, the maternal mortality ratio.

**Goal 6 Combat HIV/AIDS, malaria and other diseases**

Target 7 Have halted by 2015 and begun to reverse the spread of HIV/AIDS.

Target 8 Have halted by 2015 and begun to reverse the incidence of malaria and other major diseases.

**Goal 7 Ensure environmental sustainability**

Target 9 Integrate the principles of sustainable development into country policies and programmes and reverse the loss of environmental resources.

Target 10 Halve, by 2015, the proportion of people without sustainable access to safe drinking water and basic sanitation.

Target 11 Achieve, by 2020, a significant improvement in the lives of at least 100 million slum-dwellers.

**Goal 8 Develop a global partnership for development**

Target 12 Develop further an open, rule-based, predictable, non-discriminatory trading and financial system (includes a commitment to good governance, development and poverty reduction – both nationally and internationally).

## Republic of Malawi

Article 30 of the Constitution provides that:

- (1) All persons and peoples have a right to development and therefore to the enjoyment of economic, social, cultural and political development and women, children and the disabled in particular shall be given special consideration in the application of this right.
- (2) The State shall take all necessary measures for the realization of the right to development. Such measures shall include, amongst other things, equality of opportunity for all in their access to basic resources, education, health services, food, shelter, employment and infrastructure.
- (3) The State shall take measures to introduce reforms aimed at eradicating social injustices and inequalities.

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Target 13 Address the special needs of the least developed countries (includes tariff- and quota-free access for least developed countries exports; enhance programme of debt relief for heavily indebted poor countries and cancellation of official bilateral debt; and more generous ODA for countries committed to poverty reduction).

Target 14 Address the special needs of landlocked countries and Small Island developing States (through the Programme of Action for the Sustainable Development of Small Island Developing States and the outcome of the twenty-second special session of the General Assembly).

Target 15 Deal comprehensively with the debt problems of developing countries through national and international measures in order to make debt sustainable in the long term.

Target 16 In cooperation with developing countries, develop and implement strategies for decent and productive work for youth.

Target 17 In cooperation with pharmaceutical companies, provide access to affordable, essential drugs in developing countries.

Target 18 In cooperation with the private sector, make available the benefits of new technologies, especially information and communications. United Nations Millennium Declaration, UN GA Res55/2 (2000); See also UNDP Human Development Report (2002) Oxford New York; Kofi Annan *In a large freedom: Towards development, security and human rights for all: Report of the Secretary General of the UN* (2005) United Nations New York 12/13; Tladi Dire *Sustainable development in international law: An analysis of key enviro-economic instruments* (2007) Pretoria University Law Press PULP Pretoria 31; Thirlwall AP *Growth and development with special reference to developing economies* (2006) 8<sup>th</sup> ed. Palgrave MacMillan New York 11; Southern African Development Community SADC's *Engagement with Multilateral Environmental Agreements: Experiences from the Conference of Parties 8 of the Convention on Biological Diversity* (2006) SADC/IUCN/UNDP Gaborone 13.

- (4) The State has a responsibility to respect the right to development and to justify its policies in accordance with this responsibility.

### **Democratic Republic of Congo**

Article 58 of the Constitution provides that:

All Congolese have the right to enjoy the national wealth.

The State must equitably distribute the national wealth and guarantee the right to development.

From this outlook flows a critical concern related to the real commitment of states to guarantee and promote human rights through the rule of law within the region. The determination to not only alleviate, but eradicate, poverty, through deeper regional integration and sustainable economic growth and development<sup>53</sup> seems at this stage to be no more than a slogan. It is only by a sincere reliance on the international law of treaty, which forms the backbone of the international recognition of the right to development, that this right will have an impact on each member's municipal laws.

A closer look at the constitutions of the Democratic Republic of Congo and the Republic of South Africa reveals that they both explicitly refer to the right to environment; in contrast, however, the right to development is explicitly entrenched in the Congolese Constitution, but only implied in South Africa's supreme law.

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<sup>53</sup> Preamble of the SADC Treaty.

## THE DEMOCRATIC REPUBLIC OF CONGO

### **3.2 Environment rights and the right to development in the Constitution of the Democratic Republic of Congo**

The new constitution<sup>54</sup> of the DRC is a powerful instrument which paves the way to constitutionalism and democracy. Human rights are guaranteed and environmental rights and the right to development incorporated in the Constitution.

#### 3.2.1 Environmental rights in the Democratic Republic of Congo

For decades, environmental rights have been an important point on the daily agenda of the DRC's political leaders for various reasons. The Democratic Republic of Congo, formerly Zaire, is an immense country located in Central Africa, and its flora and fauna are among some of the richest and most varied in the world. Some species, however, face extinction due to environmental degradation, deforestation, the encroachment of human settlement and poaching. The natural habitat is shrinking at a rapid pace because of mismanagement. The country possesses an abundance of arable land, together with a climate and water system suitable for the support of a thriving agricultural sector.<sup>55</sup>

Under colonial rule, the management of the environment was one of the matters with which Belgium had to contend.<sup>56</sup> The natural wealth of the Congo attracted

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<sup>54</sup> Constitution of 18 February 2006.

<sup>55</sup> Gondola CH.Didier *The history of Congo: The Greenwood histories of the modern nations* (2002) Greenwood Press London Westport 2, 3.

<sup>56</sup> Kitambala Albert, Nkubiri Fidèle, Bwenge Madeleine and Bayubasire "Les réfugiés et l'environnement au Sud-Kivu" in Mugangu Matabaro Séverin (s/dir.) *Les droits de l'homme dans la Région des Grands Lacs : réalités et illusions* (2003) Fédération Internationale des Universités Catholiques FIUC Université Catholique de Bukavu UCB Academia Bruylant Belgique 410.

the Belgians into the colonial venture, and led directly to Belgium's decision to annex Leopold's imperial domain.<sup>57</sup> The Belgians were interested in the protection of the environment for exploitative reasons and not out of any great concern for the welfare of the Congolese people, who were treated as subjects without rights.<sup>58</sup>

For the above-mentioned reason, and among others, the care of the environment was managed through various treaties and royal decrees. It is from this perspective that the Convention on the Preservation of the Fauna and Flora in its Natural State was ratified by the colonial power in 1935;<sup>59</sup> the Institute of Natural Parks of Congo was created by Royal Decree on 26 November 1934 while others areas were protected or reserved to avoid the widespread destruction of biodiversity.<sup>60</sup> According to Dzidzornu, 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, nature or forest reserves, were established to achieve this goal. Generally speaking, the exploitation of flora and the hunting, killing and capture of fauna were controlled by restricting access to the reserves. There was no integrated approach to resource and environmental management, so the effectiveness of each individual colonial administration and its observation of

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<sup>57</sup> Gondola CH. Didier *op. cit.* (n 55) 77.

<sup>58</sup> Ngondankoy Nkoy-ea-Loongya *Droit Congolais des droits de l'homme* (2004) Bruylant Academia Louvain-la Neuve Belgique 66. See also National Plan of Actions for the Promotion and Protection of Human Rights – Democratic Republic of Congo, Office of the United Nations High Commissioner for Human Rights. Available at: [http://www2.ohchr.org/english/issues/plan\\_actions/drc\\_fr\\_2.htm](http://www2.ohchr.org/english/issues/plan_actions/drc_fr_2.htm) (accessed on 18 December 2007).

<sup>59</sup> London Convention of 1933 pertaining to the Preservation of the Fauna and Flora in their Natural State.

<sup>60</sup> Cornevin Robert *Histoire du Zaïre: des origines à nos jours* (1989) Hayez Académies des Sciences d'Outre-Mer Bruxelles Paris 29 ; See also Piron P et Devos J *Codes et lois du Congo-Belge* (1943) éditions des codes Louwers-Strouvens Bruxelles Léopoldville 823.

the treaties determined to a large extent the level of responsible environmental protection in each colony.<sup>61</sup> Clearly, the Congolese were excluded from the management of the environment during the colonial era and could not, *ipso facto*, claim any rights.

### *3.2.1.1 Environmental rights prior to the 2006 Constitution*

Since its inception, the realization of the right to environment and of other rights related to the environment has been debatable. Despite its recognition as a human right at the international level, some countries remain reluctant at national and regional levels to give it true effect. Without a doubt, many constitutions have been silent on the question of environmental rights and duties, and the DRC is no exception both during and after its colonization. It was only after a hiatus, that the political leaders were pressured by people claiming their human rights and by the environmental challenges defined by the international community through the UN Millennium Development Goals into taking this right more seriously.

#### a. The Colonial Charter of 1908

The Colonial Charter<sup>62</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>63</sup> This Charter allowed Leopold's successor, King Albert I, to exert a great deal of influence over affairs in Congo by appointing high-ranking officials and signing laws.<sup>64</sup> However, the

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<sup>61</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* at 148.

<sup>62</sup> Belgian Law of October 18, 1908, entitled "Law of the Government of the Belgian Congo."

<sup>63</sup> Article 1.

<sup>64</sup> Gondola Ch. Didier *op. cit.* (n 55) 78.



Colonial Charter did not contain a bill of rights<sup>65</sup> and, therefore, ignored environmental rights.

#### b. The Fundamental Law

The Fundamental Law was promulgated by the Belgian King in 1960 and served as the transitional structure of government. The Fundamental Law would remain in force until such time as the Congolese could fashion their own Constitution.<sup>66</sup> At this time, the people and their political leaders concentrated more upon political change than upon claims to such human rights as their right to environment.

#### c. 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 it failed to introduce any environmental clauses. According to Briton, the new Constitution represented generally a continuation of the general style and concepts of government inaugurated under the Fundamental Law.<sup>67</sup>

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<sup>65</sup> Mazyambo Makengo Kisala André “Introduction aux droits de l’homme : Théorie générale, instruments, mécanismes de protection” in Programme des Nations Unies pour le Développement (PNUD) Projet “Appui aux Institutions de la Transition” *Mandats, rôles et fonctions des pouvoirs constitués dans le nouveau système politique de la République Démocratique du Congo: journées d’information et de formation organisées à l’intention des parlementaires, députés provinciaux et de hauts cadres de l’administration Février – Juin 2007* (2007) Modules de formation Kinshasa P. 245 ; National Plans of Action for the Promotion and Protection of Human Rights – Democratic Republic of Congo, Office of the United Nations High Commissioner for Human Rights *op. cit.* (n 58).

<sup>66</sup> Article 3 of the Fundamental Law of 19 May 1960 in Iyeleza Moyu-Mbey, Masika Katsuva, Isengingo Kambere Ing’sse *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*(1989) Editions Ise-Consult Kinshasa.

<sup>67</sup> Briton JT “The Constitution of the Congo promulgated August: August 1, 1964” (1965) *The American Society of International law* 1-55 at 5; See also Ngondankoy Nkoy-ea-Loongya *op. cit.* (n 58) 69.

#### d. The Constitution of 1967

A new constitutional dispensation under President Mobutu was adopted on June 24, 1967 with minor changes in the light of the Constitution of 1964 regarding the protection and promotion of human rights. The constitutional changes brought about by the new order were followed by different modifications and did not offer the opportunity for personal and human rights. The last modification adopted on July 5<sup>th</sup>, 1990, was likewise silent on environmental rights. Obviously, the 1967 Constitution was not going to focus on fundamental human rights. At the time, the problem was twofold, namely: the inapplicability or the poor application of the constitutional provisions; and the lack of an appropriate constitutional text that proclaimed clearly the fundamental human rights. From 1967 until 1990, the catalogue of human rights in the DRC did not change.<sup>68</sup> The Constitutional Decree of 28 May 1997, completed by the Constitution of 1998, after the Constitutional Act of the Transition of 1994, 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.

#### e. Environmental Rights under the Transitional Constitution of 2003

Environmental rights and duties are embodied in the Transitional Constitution which came into force on 5 April 2003, and they were entrenched within a very

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<sup>68</sup> Mazyambo Makengo Kisala André *op. cit.* (n 65) 248, 249.

particular political context. A brief presentation of this political climate will give us a better understanding of these environmental clauses.

- Political context of the incorporation of environmental clauses in the Constitution

The elaboration and adoption of the present constitutional framework were a sign of the search for reconciliation and peace amongst all parties involved in the civil war of the DRC.<sup>69</sup>

After the *coup d'état* of 1965, President Mobutu renamed the Congo 'Zaire' and maintained power by portraying himself as an anti-communist. He hereby gained the financial and military support of the United States and France. In 1997, with the end of the Cold War, Mobutu's power came to an end when the United States severed ties with him.<sup>70</sup> The rebel group, 'Alliance for the Democratic Forces for the Liberation of the Congo',<sup>71</sup> led by Laurent Kabila,<sup>72</sup>

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<sup>69</sup> The Congolese conflict has been described as the first African war, the most widespread intra-state war in modern African history. See Mollel Andrew L "Judicial settlement of armed conflicts in international law: Reflecting the 2005 International Court of Justice decision in the Democratic Republic of Congo" (2007) Vol. 76 No. 4 *Nordic Journal of International Law* at 417. See also Wolpe H "The Great Lakes crisis: An American view" (2000) 7 *African Journal of International Affairs* at 27; Mangu AMB "Democracy and elections in the Democratic Republic of Congo: Lessons for Africa" (2008) Vol.12 No. 1 *Law, Democracy and Development* at 94. Stefaan Marsse Decentralization issues in post-conflict Democratic Republic of the Congo (DRC). Available at: <http://129.194.252.202/POL/602410.pdf> (accessed on 24 October 2007).

<sup>70</sup> Kihangi Bindu 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 (2006) University of South Africa Unisa [Unpublished LLM dissertation] Pretoria 23. See also The Institute for Global Dialogue *Guide to the Southern African Development Community* (2001) Institute for Global Dialogue Johannesburg South Africa 61, 62.

<sup>71</sup> In French: "Alliance des Forces Démocratiques pour la Libération du Congo (AFDL)".

<sup>72</sup> Kabila Laurent Desiré, a former Lumumba disciple turned businessman, returned to active politics and was appointed to lead a rebellion against Mobutu by the US-proclaimed 'new breed' of African leaders. See Mangu A "The conflict in the Democratic Republic of Congo and the protection of rights under the African Charter" (2003) 3 *African Human Rights Law Journal* at 236.

was supported and sponsored by the Vice President of Rwanda, and the Presidents of Uganda, Burundi and Angola, facilitated by the mediation exercise led by South Africa. The new Congolese regime emerged in May 1997, after the overthrow of Mobutu, and Kabila proclaimed himself President and renamed the country the 'Democratic Republic of Congo'. Kabila used the same approach and strategy as Mobutu, but he employed different tactics.<sup>73</sup> On 2<sup>nd</sup> August 1998, some of Kabila's comrades rebelled against him, and accused him of authoritarianism, corruption, mismanagement, nepotism and tribalism. They created a rebel movement named "Congolese rally for Democracy"<sup>74</sup> which gained support from Rwanda and Uganda. Another movement, named 'Movement for the Liberation of Congo'<sup>75</sup> joined the rebellion against Kabila. Kabila was assassinated in 2001 and succeeded by his 30-year-old son, Joseph Kabila. Rebel movements took control of the 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 at Sun City, which defined the terms for the end of hostilities and the formation of a Transitional Government.<sup>76</sup> This reflects the zenith of a peace process that began with the Lusaka Accord in 1999 and the atmosphere in which the Constitution of 2003 was drafted. South African political leaders played a key role during the 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.

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<sup>73</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>74</sup> In French: "*Rassemblement Congolais pour la Démocratie*" (RCD).

<sup>75</sup> In French: "*Mouvement pour la Libération du Congo*" (MLC).

<sup>76</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* at 174.

- Environmental rights and duties

Environmental rights and duties fall under heading III of the Transitional Constitution of 2003 of the DRC, entitled ‘The public liberties, the fundamental rights and duties of citizens.’

Article 54 provides:<sup>77</sup>

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.

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.

*3.2.1.2 Environmental rights in the 2006 Constitution*

Having paved the way for the first general democratic elections held in the DRC, forty-six years after its independence, this Constitution expressly acknowledges the right to environment and the rights related to the environment following the 2003 Constitution. Further important clauses dealing with environment are included within the Constitution. The following articles are relevant:

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<sup>77</sup> Researcher’s translation from the French.

**Article 53:**

Every person has the right to a healthy environment, one which is favourable to their integral development.

He has a duty to provide for its defence

The State provides for the protection of the environment and the population's health.

**Article 54:**

The conditions for the construction of industrial plants, the storage, the manipulation, the burning and the removal of toxic, polluting or radioactive waste produced by industrial units or workshops established in the national territory are regulated by law.

Any pollution or destruction resulting from an economic activity gives rise to compensation and/or reparation.

The law defines the nature of the contemporary and reparatory measures as well as the conditions for their implementation.

**Article 55:**

The transfer, importation, storage, spilling and disposal of toxic, polluting or radioactive waste or of any other dangerous product in the continental waters or maritime space under national jurisdiction, or their release into the airspace, whether they are from abroad or not, constitute a crime punishable by law.

**Article 56:**

Any action, agreement, convention, arrangement or other act which has the consequence of depriving the nation, individuals or corporations of all or part of their means of subsistence drawn from their natural resources or wealth, is qualified, without prejudice to the international provisions on economic crimes, as the crime of looting punishable by law.

Article 57:

The acts referred to in the preceding article as well as the attempt thereof, whatever their conditions, are punishable as offenses of high treason if they are committed by a person invested with public authority.

Drawing upon the lessons from the 2003 transitional Constitution, the inclusion of article 53 of the 2006 Constitution clearly defines to whom the right applies, who the beneficiaries are, and who shall look after the environment.

As a point of departure, it can be argued that article 53 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 and third paragraphs place a specific obligation or duty upon the citizens and the public authorities. Citizens must defend the environment in order to give effect and meaning to the right guaranteed, and public authorities must ensure that the good health of the population is protected through the protection of the environment.

Indeed, it should be borne in mind that the right to environment is a fundamental right which falls under the title of the Constitution related to ‘human rights, fundamental liberties and the duties of the citizens and the state’. Thus, any right under this heading binds the public authorities and all persons.<sup>78</sup> The Constitution guarantees the inviolability of the fundamental rights and liberties of human beings, and the judiciary is the guarantor of the individual liberties and fundamental rights of the citizens.<sup>79</sup> Any measure declared by the Constitutional Court as inconsistent with the Constitution is automatically void.<sup>80</sup> The duties of DRC citizens are defined extensively by Chapter Four of the Constitution. The

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<sup>78</sup> Articles 60 and 62.

<sup>79</sup> Article 150.

<sup>80</sup> Article 168 para 2.

Constitution is the supreme law of the country. It is binding on all persons,<sup>81</sup> the legislature,<sup>82</sup> the executive<sup>83</sup> and the judiciary.<sup>84</sup> In this regard, the Constitution applies both vertically and horizontally.<sup>85</sup> In the light of 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.

Coming back to the provision of article 53, the language used by the legislature in all three paragraphs: ‘Every person has the right to ... favourable to their integral development’, ‘He has the duty to ...’; ‘The State provides for ... and health of the population’, reveals the implicit support for the principle of intragenerational equity and sustainable development proclaimed by international agreements or treaties on the environment ratified by the DRC. Such is the case, for instance, of the landmark Stockholm Declaration<sup>86</sup> of 1972 and the Rio Declaration<sup>87</sup> of 1992.

According to Weiss, the principle of intergenerational equity is an *obligatio erga omnes*<sup>88</sup> (an obligation towards the international community as a whole). The idea is that future generations have rights against present generations to be handed down a healthy environment. It is in the interest of present 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 in this

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<sup>81</sup> Article 62.

<sup>82</sup> Articles 100.

<sup>83</sup> Articles 69.

<sup>84</sup> Articles 150, 168.

<sup>85</sup> Article 62 para 2, 65 and 66.

<sup>86</sup> Principle 2 of the 1972 Stockholm Declaration on the Human Environment.

<sup>87</sup> Principle 3 of the 1992 Rio Declaration on the Environment and Development.

<sup>88</sup> Feris AL and Tladi D “Environmental rights” in Brand Danie and Heyns Christof (eds.) *Socio-economic rights in South Africa* (2005) Pretoria University Law Press PULP Cape Town at 5.



regard, integrates and clearly defines the notion of sustainable development and some of its key principles, such as public participation, futurity (intergenerational equity), social justice (intragenerational equity) and other important principles for the protection of the environment to avoid any misunderstanding or neglect. In this respect, the National Environmental Management Act 107 of 1998 of the Republic of South Africa makes adequate provision.

The contents of environmental rights have, indeed, derived from the existing universally recognized rights, both with regard to substantive rights (such as the rights to life, health and privacy) and procedural rights (namely, access to information and due process of law). Taking this perspective into account, the Constitution guarantees the right to life in terms of Article 16, the right to privacy in terms of Article 31, the right to information in terms of Article 24, and the right to public health care and food in terms of Article 47. The right to information has, for instance, been highlighted by the Mining Code of 2002 in terms of the followings articles:

Articles 323 provides:

The registers relating to mining and quarry rights, as well as the registry survey maps may be consulted by the public free of charge at the Mining registry.

However, the collection of data is subject to payment of the charges set forth in the Mining Regulations.

Article 324 reads:

The technical, geological and mining information submitted by the holder are confidential for a maximum period of ten (10) years. After this period, they shall be available to the public. However, this information may be used and

published globally for documentary purposes before the expiry of this period, without disclosing personal information.

The information is no longer confidential upon expiry of the mine or quarry exploration title, if the holder renounces it, or if he has been deprived thereof.

Human rights carry obligations, so the right to environment is balanced with duty, which is a real limitation on the right. If a right is claimed, legitimately and justifiably, by any agent in society, then all other agents in society whose actions have influence on the fulfilment of that right will have an obligation, to the maximum extent possible, to take measures to fulfil it.<sup>89</sup> Bentham states that ‘for every right which the law confers on one party, whether that party be an individual, a subordinate class of individuals, or the public, it thereby imposes on some other party a duty or obligation.’<sup>90</sup>

An express duty is placed on the Congolese citizens and public authorities to look after the environment within conditions that must be determined by the statutory law. In order to support the fulfilment of this civic duty, it would be wise if government put in place an educational programme, in conjunction with the SADC Regional Environmental Educational Programme, and in accordance with Article 25 of the African Charter on Human and Peoples’ Rights,<sup>91</sup> to stimulate people’s awareness of our environmental responsibilities to conserve and protect the environment in the interest of present and future generations.

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<sup>89</sup> Sengupta A “The right to development and its implications for governance reform in India” in Raj Kumar C and Chockalingam K (eds.) *Human rights, justice and constitutional empowerment* (2007) Oxford University Press New York 190.

<sup>90</sup> Bentham quoted by Alston Philip “Making space for new human rights: The case of the right to development” (1988) Vol. 1 *Harvard Human Rights Yearbook* at 33.

<sup>91</sup> Article 25 of the African Charter on Human and Peoples’ Rights of 1981 provides that: “States parties to the present Charter shall have the duty to promote and ensure through teaching, education and publication, the respect of the rights and freedoms contained in the present Charter and to see to it that these freedoms and rights as well as corresponding obligations and duties are understood.”

### 3.2.2 The right to development in the Democratic Republic of Congo

It has been stressed that the right to development depicts a new phase of human development that combines the human rights approach with the programmes and policies of human development.<sup>92</sup> Human development lies at the foundation of the family and of society, and frees and empowers the individual to be self-reliant enough to live a full and meaningful life, and to cope with hardship. This does not relieve society of the need to put in place programmes that help people to overcome the setbacks of poverty, disaster and historical disadvantage. Human rights are legitimate and pressing claims and are not charity or a sign of favour; indeed, they must be provided to all as the state's first priority.<sup>93</sup> In this respect, development has been defined, by the UN Declaration on the Right to Development, as a composite, an umbrella right or the sum of a set of rights, as a process where all human rights are realised. This notion of a composite right explicitly recognizes the interdependence of all rights and their integrity in the sense that if any one of these rights is violated, it cannot be sustained that any other right may be enhanced.<sup>94</sup> A violation of any right would be tantamount to a failure to realize the right to development.<sup>95</sup> However, it should be borne in

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<sup>92</sup> Human rights embody certain essential freedoms and basic needs that can only be realized through the notions of "equity, non-discrimination, participation, and empowerment". Therefore, these notions must be applied to any human rights based development policy. See Sengupta Arjun "The right to development and its implications for governance reform in India" in Raj Kumar C and Chockalingam K (eds.) *op. cit.* (n 89) 185-186.

<sup>93</sup> In other words, the human rights approach to development added a further dimension to the development thinking. While the human development approach aims at realizing individuals' freedoms by making the enhancement of their capabilities the goal of development policy, the human rights approach focuses on claims that individuals have on the conduct of the State and other agents to secure their capabilities and freedoms. See Sengupta Arjun "Implementing the right to development" in Nico Schrijver and Friedl Weiss (eds.) *op. cit.* (n 9) 345. Sengupta A "The right to development and its implications for governance reform in India" in Raj Kumar C. and Chockalingam K. (eds.) *op. cit.* (n 89) 185.

<sup>94</sup> Preamble of the UN Declaration on the Right to Development; see also Sengupta A "The right to development and its implications for governance reform in India" in Raj Kumar C and Chockalingam (eds.) *op. cit.* (n 89) 189.

<sup>95</sup> Sengupta Arjun "Implementing the right to development" in Nico Schrijver and Friedl Weiss (eds.) *op. cit.* (n 9) 345, 347.

mind that as a synthetic right, the right to development is greater than the sum of its parts.<sup>96</sup> According to Keba Mbaye, ‘a synthesis is not or has never been the sum of summarized elements. This is *sui generis* right.’<sup>97</sup> Since its elevation to the status of an inalienable human right, the right to development has been recognized and guaranteed by states within their constitutions, and the DRC has followed suit.

### 3.2.2.1 *The right to development before the 2006 Constitution*

The constitutional background of the DRC reveals that the right to development is not a new phenomenon brought about by the new dispensation. This right has been a subject of some constitutional texts that governed the country since its independence. For instance, the 1994 Constitutional Act of Transition provided that ‘Every Zaïrian has the right to peace, development and to the common heritage of mankind.’ It is in the same fashion that the Constitutional Decree-Law of 1997 emphasized the importance of the right to development.<sup>98</sup> An explicit mention of the right to development is also made within the Transitional Constitution of April 2003. In terms of Article 53:

Every Congolese shall have the right to enjoy national wealth.

The State shall have the duty to redistribute it equitably and to guarantee the right to development.

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<sup>96</sup> Van Reenen TP “The right to development in international and municipal law” (1995) 10 *Suid-Afrikaanse Publikereg / Public Law* at 438.

<sup>97</sup> Author translation from the original French (« le droit au développement est un droit *sui generis*. Une synthèse n’est jamais la somme des éléments synthétisés »). See Keba Mbaye *Les droits de l’homme en Afrique* (2002) 2eme éd. A. Pedone Paris 212.

<sup>98</sup> Article 12 Paragraph 2. However, one must note that the so-called “third generation of rights” or “solidarity rights” appeared for the first time in the constitutional drafts of the Democratic Republic of Congo during the transitional period of 1992 – 1994. See Mazyambo Makengo Kisala André *op. cit.* (n 65) 249.

From the above point of view, one notes that the right to development is of concern to the political leaders and people of the DRC as evidenced by its entrenchment in the Constitution. Unfortunately, most of the time, the inception of this right has not yet been sustained by appropriate measures or mechanisms of protection and promotion to improve the life of the Congolese. Obviously, the content of the right has never been defined properly because of the lack of jurisprudence. The constitutional entrenchment of this right seems to be an ‘act’ of democratic prestige and credibility for the country at the international level, but without any internal impact. Being aware of the weaknesses and disappointing outcome of the constitutionalization of the right to development in the DRC under the 2003 Transitional Constitution, is it appropriate and legitimate to consider the new democratic constitutional dispensation of 2006 as a way forward?

### *3.2.2.2 The right to development under the 2006 Constitution*

Title II of the 2006 Constitution grants an important number of human rights and fundamental liberties that are split into civil and political rights, economic, social and cultural rights, and collective rights. The emphasis on the collective dimension of human rights protection is not far from that of the pan-African concept of fundamental rights which informed the 1981 African Charter on Human and Peoples’ Rights<sup>99</sup> and, to some extent, the Southern African Development Community.

The new dispensation is the backbone of the DRC constitutional democracy which, while it is still in its infancy, explicitly guarantees and protects the right to development. Article 58 guarantees the right to development as follows:

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<sup>99</sup> Blaustein Albert P and Flanz Gisbert H (eds.) *Constitutions of the countries in the World: The Democratic Republic of the Congo commentary* (2006) Oceana Publications Vol. V Oxford University Press 5.

All Congolese have the right to enjoy the national wealth.

The State has the duty to equitably distribute the national wealth and guarantee the right to development.

In addition, Article 59 emphasises that:

All Congolese have the right to enjoy the common heritage of mankind.

He has the duty to facilitate enjoyment thereof.

In the light of these provisions, it seems that the legislator was not far from conceiving the right to development<sup>100</sup> as a composite right and the definition of the concept of 'development' as provided by the Preamble of the United Nations Declaration on the Right to Development:

... *Recognizing* that development is a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom, ... considering that all human rights and fundamental freedoms are indivisible and interdependent and that, in order to promote development, equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, political, economic, social and cultural rights and that, accordingly, the promotion of, respect for and enjoyment of certain human rights and fundamental freedoms cannot justify the denial of other human rights and fundamental freedoms, ...

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<sup>100</sup> In terms of the Preamble to the United Nations Declaration on the Right to Development, development as a composite right has been defined as a process of development where all human rights, civil, political, economic, social, and cultural (as well as other rights such as those of children and women which came to be recognized later) are realized. See also Oji Umozuke U *The African Charter on Human and Peoples' Rights* (1997) Vol. 2 The Raoul Wallenberg Institute Human Rights Library Martinus Nijhoff Publishers The Hague Boston London 60.

Giving effect to this composite understanding and character of the right to development, the Constitution embodies, for instance, the right to health care and food security,<sup>101</sup> the right to housing, drinking water and electric energy,<sup>102</sup> the right to education,<sup>103</sup> the right to life, physical integrity and free development,<sup>104</sup> the right to information,<sup>105</sup> and others. Thus, the right to

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<sup>101</sup> Article 47 provides that “The right to health and to food security is guaranteed. The law defines the fundamental principles and the rules of organization for public health and food security.”

<sup>102</sup> Article 48 reads “The right to decent housing, the right of access to drinking water and to electric energy are guaranteed. The law establishes the conditions of the exercise of these rights.”

<sup>103</sup> Article 45 provides that :

“Education is free.

It is nevertheless subject to supervision by the public authorities under the conditions prescribed by law.

All persons have access to establishments of national education without discrimination on grounds of place of origin, race, religion, sex, political or philosophical opinions, physical, mental or sensorial conditions in accordance with their capacities.

The national education establishments may, in cooperation with the religious authorities, ensure to pupils who have not attained the age of maturity an education in accordance with their religious convictions if their parents ask for it.

The public authorities have the duty to promote and to ensure, through teaching, education and dissemination of information, the respect of human rights, fundamental liberties and duties of the citizens enumerated in this Constitution.

The public authorities have the duty to ensure the dissemination and the teaching of the Constitution, the Universal Declaration of Human Rights, the African Charter on Human and Peoples’ Rights, as well as all the duly ratified regional and international conventions relating to human rights and to international humanitarian law.

The State is obliged to integrate the rights of the individual in all training programs of the armed forces, the police and the security services.

The law determines the conditions for the application of the present article.”

<sup>104</sup> Article 16 reads as follows:

“The individual is sacred. The State has the obligation to respect and protect him/her.

All persons have the right to life, physical integrity and to the free development of their personality, while respecting the law, public order, the rights of others and public morality.

No one may be held in slavery or in a similar condition.

No one may be subject to cruel, inhumane or degrading treatment.

No one may be submitted to forced or compulsory labor.”

<sup>105</sup> Article 24 proclaims that:

“All persons have the right to information.

The freedom of the press, the freedom of information and broadcasting by radio and television, written press or any other means of communication are guaranteed, subject to respect for the law, public order and the rights of others.

The law determines the conditions for the exercise of these liberties.

development is both an individual and collective right in the light of the constitutional provisions.

Like any other right, the right to development entails also obligations on the part of the duty-bearers. Appropriate development laws and policies<sup>106</sup> that give effect or content to the constitutional provisions must be formulated and implemented by the State, supported by the cooperation of the international community. Adequate steps must be taken to establish mechanisms to safeguard, promote and to prevent the right from being violated by other non-state actors. By acting positively, the State will be able to distribute fairly and equitably the national resources as requested by the Constitution in terms of paragraph 2, Article 58.

Having highlighted and considered the constitutional right to development as a composite of all economic, social, cultural and other rights, the Congolese legislator must put in place a programme to progressively realize, step by step, in planned phases, the roll out of the right to development. It is foreseeable that the national and international lack or availability of finance and other resources and the absence of good governance may place limits on the realisation of the right to development. According to Sengupta,<sup>107</sup> and somewhat ironically, economic growth itself is a precondition for the realisation of the right to development. Sengupta's view is, however, a realistic one and economic growth

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The audiovisual and written media of the State are public services to which all political and social movements are guaranteed access in an equitable manner. The status of the State media is established by law which guarantees objectivity, impartiality and plurality of view in the processing and distribution of information.”

<sup>106</sup> Article 122 (a) of the 2006 Constitution proclaims that statutory law establishes the rules concerning the rights of citizens and fundamental guarantees given to the Citizens for the exercise of public liberties.

<sup>107</sup> Sengupta A “The right to development and its implications for governance reform in India” in Raj Kumar and Chockalingam (eds.) *op. cit.* (n 89) 194.



is undoubtedly a preliminary tool for realising this right.<sup>108</sup> Nevertheless, when resources are used judiciously it is possible to realise certain rights in the absence of economic growth.<sup>109</sup> Constitutionalism and good governance, fight against impunity, corruption, economic dependence are sustained by the willingness of political leaders to preserve the strong mechanisms that are needed to build up, and fulfil, these rights and so accomplish the broad well-being of the people of the DRC. This will further allow people to enjoy the benefit of their important natural resources. The right to development will become a reality rather than a dream incorporated in the constitution that exists only in the imagination of the people.

Sally-Anne Way has observed the way in which some States use the qualified standard of ‘progressive realisation’ to neglect their obligations towards the right to food. Numerous developed nations have the food resources to eliminate hunger within (and outside) their borders but fail to do so.<sup>110</sup> There are equally many poor countries that could use the resources they have to fight hunger, but they fail to do so. This means that given the composite nature of the right to

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<sup>108</sup> Economic growth is so integral to the realisation of the many rights embodied in the right to development that it would be useful to make economic growth part of the right that the state must implement. Sengupta makes the case for growth as a ‘meta-right’ that creates the preconditions for the State to fulfil a human right. See Sengupta Arjun “The right to food in the perspective of the right to development” in Wenche Barth Eide and Uwe Kracht (eds.) *Food and human rights development: Evolving issues and emerging applications* (2007) Vol. II Oxford USA 111.

<sup>109</sup> For decades now, developing nations have purchased extremely expensive military equipment (used to destructive effect) from developed countries while accepting extremely low prices for their agricultural exports to the developed countries. This disparity does not assist the development process and it is important to turn the “expenditure of death” around into an “expenditure of life” in these countries. Eide A, Krause C and Rosas A (1995) at 40 quoted by Tlakula Pansy “Human rights and development” in Tiyaambe Zeleza and McConnaughay Philip J (eds.) *op. cit.* (n 7) pp. 118-119.

<sup>110</sup> At least 9 million people still suffer from hunger in industrialised countries. See FAO *The State of World Food Insecurity* (2004) FAO Rome quoted by Way Sally-Anne “The right to food and access to justice: Understanding the right to food as a ‘negative’ right” in Borghi Marco, Letizia Postiglione Blommestein (eds.) *The right to adequate food and access to justice* (2006) Bruylant Bruxelles Schulthess Geneva at 46.

development, all the economic, social and cultural rights should be limited by the availability of resources and the State should be required not only to intervene if these rights are violated, but also to abstain from violating them.<sup>111</sup> Considering that the realisation of the right to development cannot violate these other rights,<sup>112</sup> the right to development will be promoted.

The Congolese legislature has entrenched the right to development, but it will be meaningless until safeguards to promote and protect the process are implemented. The interdependent nature of human rights means that the level of realisation of one right is dependent upon the levels of realisation of other rights.<sup>113</sup> Human dignity is indivisible, and its loss at one place cannot be addressed by increasing it at another. Likewise, the violation of one human right cannot be overcome by protecting another. If one is hungry, lacking access to education or health, these rights cannot be compensated for by the institution of greater free speech or the freedom to associate. Likewise, a healthy and well-fed person who is denied access to food and health services has been denied basic liberties and freedoms.<sup>114</sup>

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<sup>111</sup> Nowadays, the conceptual development within the human rights field of study has collapsed the simplistic dichotomy between positive versus negative rights and an understanding has emerged that all human rights imply both positive and negative duties. See Commission on Human Rights *The right to adequate food and to be free from hunger: Updated study submitted to the Sub-Commission on the promotion and protection of human rights* by Eide A. 28 June 1999 (E/CN.4/Sub.2/1999/12); Shue H *The interdependence of duties* in Alston and Tomasevski K (eds.) *The right to food* (1984) Stichting Studie en Informatie-centrum Mensenrechten, Utrecht; Way Sally-Anne in Boghi Marco, *et al. op. cit.* (n 110) 46.

<sup>112</sup> This notion of a composite right explicitly recognizes not only the interdependence of all rights but also their integrity in the sense that if any one of these rights is violated, it cannot be maintained that other rights may be properly fulfilled or improved. See Sengupta Arjun “The right to development and its implications for governance reform in India” in Kumar Raj C. and Chockalingam K. (eds.) *op. cit.* (n 89) 189.

<sup>113</sup> Sengupta A *Development and change* (June 2000) Vol. 31, No 3 Institute of Social Studies Blackwell Publishers The Hague.

<sup>114</sup> The Fourth and Fifth Report of the Independent Expert on the right to development in *The right to development* (2002) Franciscans International Geneva.

It can be legitimate under certain circumstances, and for reasonable, logistical or economic reasons or considerations to limit the realisation of a particular right, for instance, if the interests of an individual or small group of people might be harmed as a result of measures adopted for the benefit of the larger good or of the poor. This might be the case, for example, in the construction of a dam which would deprive certain people of their land, but which would be in the public interest in terms of the improved water and power supply. Although those people who had to be relocated may seem to have suffered a violation of their rights,<sup>115</sup> the state would be obliged to compensate the victims in terms of the constitution and the pertinent laws.<sup>116</sup> Thus, the “losers” in this situation would be persuaded to accept this nominal violation of their rights and consent to the relocation. Sengupta labels this violation as “nominal” because, with compensation, there should be no ‘real’ violation as the position of these people prior to, and after the justifiable “violation” has been made equal. It is, of course, crucial to put in place fair and appropriate compensation mechanisms that comply with human rights standards.<sup>117</sup> There are certain provisions in the South African Bill of Rights that are very helpful in these matters.<sup>118</sup>

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<sup>115</sup> For instance, the South African Constitutional Bill of Rights recognises exceptional situations of human rights limitations in terms of section 36 of the Constitution that reads:

“(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including

- a) the nature of the rights;
- b) the importance of the purpose of the limitation;
- c) the nature and extent of the limitation;
- d) the relation between the limitation and its purpose; and
- e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.”

<sup>116</sup> In terms of article 34 paragraph 4 of the 2006 Constitution of the DRC provides that:

“No one may be deprived of his/her property except for reasons of public utility and in return for prior payment of just compensation under the conditions established by law.”

<sup>117</sup> Sengupta Arjun “Implementing the right to development” in Nico Schrijver and Friedl Weiss *op. cit.* (n 9) 362.

<sup>118</sup> Section 25 provides that:

To sum up, through the collective rights outlined in Chapter 3 of the 2006 Constitution, the rights to environment and to development are explicitly introduced. In the light of the constitutional provisions related to these rights (Articles 53 and 58 respectively), the legislature has put human beings at the centre of concern: ‘*Everyone* has the right to a healthy environment that is favourable to their development’<sup>119</sup> and ‘*All the Congolese* have the right to enjoy national wealth ... The State has the duty ... to safeguard the right to development’. Thus, we may deduce that from the legislature’s point of view, that the development of everyone in the DRC relies upon the quality of the environment which is offered to him. Responsibility for looking after the environment is shared between the state and the citizens to give a positive effect to the composite character of the right to development to the benefit of present and future generations.

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(1) No one may be deprived of property except in terms of law of general application and no law may permit arbitrary deprivation of property.

(2) Property may be expropriated only in terms of law of general application –

a) for a public purpose or in the public interest; and

b) subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court.

3) The amount of the compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interests of those affected, having regard to all relevant circumstances, including –

a) the current use of the property;

b) the history of the acquisition and use of the property;

c) the market value of the property;

d) the extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of the property; and

e) the purpose of the expropriation.

4) For the purpose of this section –

a) the public interest includes the nation’s commitment to land reform, and to reforms to bring about equitable access to all South Africa’s natural resources; and

b) property is not limited to land.

5) The state must take reasonable legislative and other measures, within its available resources, to foster conditions which enable citizens to gain access to land on an equitable basis...”

<sup>119</sup> Article 53 paragraph 1.

Drawing upon the lesson of the African Charter on Human and Peoples' Rights and giving effect to the objectives and principles of the SADC, an important step has been taken by the DRC when it explicitly entrenched both the right to environment and the right to development within the Supreme Law of the country. However, this commitment will be meaningless if it does not provide appropriate legislative measures or statutory laws that define clearly the mechanisms of their implementation and justiciability or enforcement.

Against the background of the Congolese constitutional picture on environmental and development rights, it will be useful to analyse the attitude of the RSA 'as a member State of the SADC and as a party to the African Charter on Human and Peoples' Rights of 1981' *vis à vis* the right to environment and the right to development.

## THE REPUBLIC OF SOUTH AFRICA

### **3.3 Environmental rights and the right to development in the Constitution of the Republic of South Africa**

Until the end of the World War II, academics did not elaborate much on human rights. The post-World War II era has been characterised as the Age of Rights, during which the human rights movement came of age. South Africa is considered as the first state that is the product of that age and the norms it represents.<sup>120</sup> Obviously, human rights have dominated virtually every aspect of the 'rebirth' of this state, as evidenced by the constitutional Bill of Rights.<sup>121</sup> It

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<sup>120</sup> Makau wa Mutua "Hope and despair for a new South Africa: The limits of rights discourse" (1997) Vol. 10 *Harvard Human Rights Journal* at 63.

<sup>121</sup> The 1996 Constitution does not differ substantially from the 1993 Interim Constitution, although it adds to, and strengthens, the institutions created to promote and protect human rights and further illuminates economic and social rights. The 1996 constitution contains a strong Bill of Rights (Chapter 2 of the Constitution) that in all probability protects the widest

is in this respect that environmental and developmental rights are recognized as human rights in South Africa in two different contexts of their interpretation.

### 3.3.1 Environmental rights in South Africa

Due to the pertinence of the human rights-based approach related to environmental concerns in South Africa, environmental rights were introduced in the 1993 Interim Constitution in a very particular context of political change and transformation<sup>122</sup> and were retained in the final 1996 Constitution of the Republic of South Africa.

#### *3.3.1.1 Environmental rights before the Interim Constitution of 1993*

First of all, it should be noted that before the Interim Constitution of 1993, environmental rights in South Africa, under the Apartheid regime,<sup>123</sup> were appreciated in a very idiosyncratic situation of misunderstanding and a misinterpretation of social justice. South Africa's context, its historical

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range of rights of any constitution in the entire world. President Mandela signed the Constitution into law on International Human Rights Day – 10 December 1996 in Sharperville. See Makau wa Mutua *op. cit.* (n 120) at 66.

<sup>122</sup> Glazewski Jan “Environmental provisions in a new South African Bill of Rights” (1993) *Journal of African Law* at 177.

<sup>123</sup> This system was based on the notion of “apartness” or racial segregation. The Government preferred to use the term “separate development” as a substitute for apartheid. Apartheid laws fell into two categories: the laws that set out the personal, social, economic, cultural and educational status of the individual in society, and, the laws that set out the institutions of separate development and determine the political status of the individual. See Geoffrey Bindman (ed.) *South Africa: Human rights and the rule of law* (1988) International Commission of Jurists London and New York 5; Mario Raoul *Déclaration Universelle des Droits de l'Homme et réalités Sud Africaines* (1983) Unesco Paris 20; Badejo Diedre L. *Global organizations: The African Union* (2008) Infobase Publishing New York 20, 21. A French comment on the meaning of the word “apartheid” goes as follows: “Le terme ‘apartheid’ a récemment été introduit par l’expression ‘séparation dans l’inégalité basée sur la seule couleur de la peau’, formule qui traduisait beaucoup mieux la réalité Sud Africaine. Le gouvernement Sud Africain a beau tenté de substituer le terme ‘développer séparé’ ou encore celui de ‘différenciation verticale’ à celui d’apartheid, il n’en demeure pas moins que l’ensemble de sa politique reposait sur l’inégalité des races.”

background, lent itself to generally ineffective environmental management that contributed, to a large extent, to environmental resource degradation. According to Peart and Wilson, previous environmental management systems were poorly funded and lacked public support.<sup>124</sup> The Apartheid legislation distorted access to natural resources and denied the majority of the population access to, and use of, *inter alia*, land, and water resources. Major inequities therefore existed in respect of access to and the distribution of resources, and there was no constitutional protection of the environment. However, the lack of constitutional provision pertaining to environmental aspects was, to some extent, according to Welsh, covered by numerous parliamentary acts, provincial ordinances and local by-laws.<sup>125</sup> It is only after the political changes of the 1990s that a real transformation of the management of the environment took place within the country.

### *3.3.1.2 Environmental rights in the 1993 and 1996 Constitutions*

A new era of transformation and a truly democratic constitutional system for South Africa began with the Interim Constitution.<sup>126</sup> After the historical multiracial national elections in April 1994,<sup>127</sup> the new democratic Government started with policy-making to address the inequities of the past. In keeping with

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<sup>124</sup> Peart P and Wilson J “Environmental policy-making in the new South Africa” (1998) 5 *South African Journal of Environmental Law and Policy* at 240.

<sup>125</sup> Welsh A Environmental impact assessment and the constitutionally protected right to an ecologically sustainable environment (1997) University of South Africa [Unpublished LLM dissertation] Pretoria 1.

<sup>126</sup> The text of the Interim Constitution was the product of successful negotiations between the erstwhile white South African government and the liberation movement, and was part of a two-phase transition to democracy. The Interim Constitution set the stage for the drafting of the 1996 Constitution after the first democratic elections were held in South Africa in April 1994. See Thiruvengadam Arun *The global dialogue among courts: Social rights jurisprudence of the Supreme Court of India from a comparative perspective* in Raj Kumar C and Chockalingam K *op. cit.* (n 89) 269.

<sup>127</sup> Berger Iris *South Africa in world history* (2009) Oxford University Press 152; Georg Kreis *Switzerland and South Africa 1948-1994* (2007) Oxford New York 70.

this approach, environmental concerns were addressed by different negotiating parties in their respective draft bills of rights.<sup>128</sup> Environmental quality became one of the fundamental rights of citizens as laid down in the Interim and Final Constitutions. The Bill of Rights in section 29 of the Interim Constitution provided that:

Every person shall have the right to an environment which is not detrimental to his or her health or well-being.<sup>129</sup>

In fact, the right to environment contained in this provision has been a point of huge debate amongst scholars. Some argue that the right was negatively phrased; the provision does not place duties on either the state or individuals to protect the environment.<sup>130</sup> The section was deemed to be equally inadequate for its failure to include the notion of sustainability, as that it was too anthropocentric<sup>131</sup> and did not refer to the generally accepted components of environmental law, namely, resource utilization and conservation, pollution control and waste management, and planning and development law.<sup>132</sup>

Taking into consideration the various criticisms made against the environmental clause of the Interim Constitution, the drafters of the 1996 Constitution broadened the right in the new dispensation. The negative phraseology and the absence of a duty to protect the environment were seen as areas for improvement.<sup>133</sup> Thus, the 1996 Constitution included the right to environment in section 24 of the Bill of Rights in the following terms:

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<sup>128</sup> Glazewski J “Environmental provisions in a new South African Bill of Rights” *op. cit.* (n 122) at 179.

<sup>129</sup> Act 200 of 1993.

<sup>130</sup> Winstanley T “Entrenching environmental protection in the new Constitution” (1995) 1 *South African Journal of Environmental Law and Policy* at 93.

<sup>131</sup> Glazewski J “The environment and the new Interim Constitution” (1994) 1 *South African Journal of Environmental Law and Policy* at 6.

<sup>132</sup> *Idem.*

<sup>133</sup> Kidd M *Environmental Law: A South African guide* (1997) Juta Cape Town 37.



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.

In comparison with section 29 of the Interim Constitution, and despite the fact that the right remains negatively formulated, and does not impose expressly any duty on individuals or corporate entities to have regard for the environment itself,<sup>134</sup> the clause does reflect some improvements.

The right is a fundamental right<sup>135</sup> and although essentially anthropocentric in nature, it also includes the protection of the natural environment.<sup>136</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. In *HTF Developers (Pty) Ltd v The Minister of*

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<sup>134</sup> Winstanley T “The Final Constitution and the environment” (1997) 4 *South Africa Journal of Environmental Law and Policy* at 138.

<sup>135</sup> “Fundamental rights” is the modern name for what has been traditionally known as “natural rights”. These rights are primordial rights necessary for the development of human personality that enable man to chalk out its own life in the manner he likes best. The political implication of the theory of natural rights is that these rights, being inherent in humankind, existed prior to the birth of the state itself and cannot, therefore, be violated by the state. See Church Joan, Schulze Christian and Strydom Hennie *Human rights from a comparative and international perspective* (2007) 1<sup>st</sup> ed. University of South Africa Press Pretoria 113.

<sup>136</sup> Bray W “Towards sustainable development: Are we on the right track?” (1998) 5 *South African Journal of Environmental Law and Policy* at 9.

*Environmental Affairs and Tourism*,<sup>137</sup> Murphy suggests that the term is ‘open-ended and manifestly ... incapable of precise definition. Nevertheless it is critically important in that it defines for the environmental authorities the constitutional objectives of their task.’<sup>138</sup> 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>139</sup> The legislature has opened 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>140</sup> Moreover, it is not clear how the Court would deal with the question of resources. In this regard, Liebenberg asks: ‘First, how will the availability of resources be assessed? Will the Court’s scrutiny be confined to pre-existing budgetary allocations by the relevant spheres of government or will it be prepared to examine the policy decisions underlying budgetary allocations? Second, how stringent will the Court scrutinize the State’s obligations that the relevant social programme is reasonable in the light of its resource constraints?’<sup>141</sup> In other words, this means that the Court would have to look at the financial implications of realizing the right. The arguments held by the South African Constitutional Court in *Minister of Health v. Treatment Action Campaign (TAC)*<sup>142</sup> and *Khosa and Mahlaule v. Minister of Social Department*

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<sup>137</sup> 2006 (5) SA 512 (T).

<sup>138</sup> See also Kidd M *Environmental law* (2008) Juta Cape Town 20; Van der Linde Morne and Basson Ernst *Environment in Woolman S. et al. op. cit.* (n 6) 50-15.

<sup>139</sup> Kidd M *Environmental law op. cit.* (n 138) 37/38.

<sup>140</sup> *Idem.*

<sup>141</sup> Liebenberg quoted by Sibonile Khoza “Extrapolating from South Africa’s Jurisprudence on the right of access to adequate housing, health care and social assistance” in Borghi Marco, Blommestein Letizia Postiglione (eds.) *op. cit.* (n 110) 171.

<sup>142</sup> (1) 2002 (10) BCLR 1033 SA (CC) paragraphs 19, 24, 49, and 120.

*and Others*<sup>143</sup> reveal that the State will not take kindly to the defence that resources are limited to realise a right. In its stance, the South African Constitutional Court was not far from the Indian Supreme Court interpretation on this issue. Compelling the municipal authority to carry out its duties to the community by constructing sanitation facilities and giving directions to remove the nuisance caused due to human waste, the Court held that a municipality could not shirk its statutory obligations to provide sanitation facilities by pleading financial constraints.<sup>144</sup> However, according to Sibonile, realistically, the danger exists that the Court would not go far enough in questioning the availability of resources for a given right. There seems to be a real need for guidance on how the Court would practically approach the question of resources.<sup>145</sup>

Without any doubt, the environment protected ‘for the benefit of 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>146</sup> A duty of care is placed on every citizen to look after the environment and prevent

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<sup>143</sup> (2004) (6) SA 505 (CC) paragraphs 58-62, 34, 82.

<sup>144</sup> *Municipal Council, Ratlam v. Vardhichand and Ors* AIR 1980 SC 1622. See Charu Sharma “Human rights and environmental wrongs: Integrating the right to environment and developmental justice in the Indian Constitution” in Raj Kumar C. and Chockalingam K. *op. cit.* (n 89) 312.

<sup>145</sup> Sibonile Khoza “Extrapolating from South Africa’s Jurisprudence on the right of access to adequate housing, health care and social assistance” in Borghi Marco, Blommestein Letizia Postiglione (eds.) *op. cit.* (n 110) 173.

<sup>146</sup> Glazewski J “Environmental justice and the new South Africa democratic legal order” (1999) *Acta Juridica* at 6.

it from being damaged in terms of the National Environmental Management Act (NEMA).<sup>147</sup>

In considering the right to environment, this clause (section 24 of the Constitution) 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.<sup>148</sup> 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 circumstances, horizontally as well.<sup>149</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

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<sup>147</sup> Section 28 (1), (2) and (3) on duty of care and remediation of environmental damage of the National Environment Management Act 107 of 1998 provides that:

“(1) Every person who causes, has caused or may cause significant pollution or degradation of the environment must take reasonable measures to prevent such pollution or degradation from occurring, continuing or recurring, or in so far as such harm to the environment is authorized by law or cannot reasonably be avoided or stopped, to minimize and rectify such pollution or degradation of the environment.

(2) Without limiting the generality of the duty in subsection (1), the persons on whom subsection (1) imposes an obligation to take reasonable measures, include an owner of land or premises, a person in control of land or premises or a person who has a right to use the land or premises on which or in which –

(a) any activity or process is or was performed or undertaken; or  
 (b) any other situation exists, which causes, has caused or is likely to cause significant pollution or degradation of the environment.

(3) The measures required in terms of subsection (1) may include measures to –

(a) investigate, assess and evaluate the impact on the environment;  
 (b) inform and educate employees about the environmental risks of their work and the manner in which their tasks must be performed in order to avoid causing significant pollution or degradation of the environment;  
 (c) cease, modify or control any act, activity or process causing the pollution or degradation;  
 (d) contain or prevent the movement of pollution or the causant of degradation;  
 (e) eliminate any source of the pollution or degradation; or  
 (f) remedy the effects of the pollution or degradation.”

<sup>148</sup> Feris Loretta “Environmental rights and locus standi” in Paterson A and Kotzé JL (eds.) *Environmental compliance and enforcement in South Africa: Legal perspectives* (2009) Juta Cape Town 133.

<sup>149</sup> Devenish GE *The South African Constitution* (2005) Butterworths Durban 45.

private law relationship),<sup>150</sup> and all organs of state are accordingly bound. Currently, human rights are not only demanded against the State but also against individuals because, with time, it is becoming clear that individuals are also involved in the violation of human rights.<sup>151</sup>

The supportive rights are:

### Section 32: Access to information

It has been admitted that 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 be informed of environmental threats and the origins of those threats. In this respect and 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, to effectively empower members of the public to scrutinise and participate in government decision-making that affects them. Public participation is a crucial element of good and democratically legitimate environmental decision-making.<sup>152</sup> According to Sherry Arnstein, ‘the idea of citizen participation is a little like eating spinach: no one is against it in principle

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<sup>150</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 *South African Journal of Environmental Law and Policy* at 171.

<sup>151</sup> About 40% of human rights violations are committed by individuals and, therefore, demands against violations can also be legitimately made against individuals. See Shivji G. Issa *op. cit.* (n 42) 77.

<sup>152</sup> Holder Jane and Lee Maria *Environment protection, law and policy* (2007) 2<sup>nd</sup> ed. Cambridge University Press 85.

because it is good for you.’<sup>153</sup> 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>154</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. It is in the same vein that in *The Trustees for Time Being of the Biowatch Trust v The Registrar: Genetic Resources and Others*,<sup>155</sup> the applicant relied on the environmental right to support their request for access to information relating to genetically modified organisms, based on the right to access to information.

### Section 33: Just administrative action

In the light of this section, administrative action must be lawful, reasonable and procedurally fair. Written reasons should be given when administrative action affects rights adversely. The Promotion of 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>156</sup> the Court held that:

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<sup>153</sup> Sherry Arnstein A “A ladder of citizen participation” (1969) 36 *Journal of American Planning Association* 216 at 217; See also Holder Jane and Lee Maria *op. cit.* (152) 85.

<sup>154</sup> 1996 (1) SA 283 (C) 300B-F.

<sup>155</sup> 2005 (4) SA 111 (T).

<sup>156</sup> 1999 2 SA 709 (SCA) 718J-719A and B, paragraph 19. See also Feris Loretta “Environmental rights and locus standi” in Paterson A and Kotzé JL (eds.) *op. cit.* (n 148) 144.

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. The right to have access to court has been regarded as of special importance and protected in the common law by judicial review of particular rigour.<sup>157</sup> It is a matter that the courts themselves guard strictly.<sup>158</sup>

#### 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.<sup>159</sup> The court may grant appropriate relief (a remedy) in such a case.

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<sup>157</sup> Wade HWR and Forsyth CF *Administrative law* (2000) 8<sup>th</sup> ed. Oxford University Press New York 389.

<sup>158</sup> As by resisting attempts to oust their jurisdiction. Wade HWR and Forsyth CF *id.* 857.

<sup>159</sup> a) anyone acting in their own interest;  
 b) anyone acting on behalf of another person who cannot act in their own name;  
 c) anyone acting as a member of, or in the interest of, a group or class or persons;  
 d) anyone acting in the public interest; and  
 e) an association acting in the interest of its members.

See Section 38 of the 1996 South African Constitution.

### Section 237: Diligent performance of obligations

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

The above supportive rights are of crucial importance to flesh out the right to environment and open the door for an active role that must be played by the Courts in the protection and promotion of the right to environment, and further, the implicit recognition of the right to development in South Africa, as discussed below.

#### 3.3.2 The right to development in South Africa

Associated with the socio-economic and cultural rights, and taking into consideration the impact of the social imbalances created by the Apartheid<sup>160</sup> regime to the majority of the population of South Africa, the right to development has been a focal point in the heated debates amongst politicians and academics at different levels in South Africa. One may assume that civil and political rights are more important (fundamental) and easier to enforce than socio-economic rights, and further, that the right to development contains only aspirations. On the contrary, it is argued that all human rights are equally important, indivisible, interdependent and mutually re-enforcing. Without the realization of socio-economic rights, people will not be able to fully enjoy their

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<sup>160</sup> The apartheid government deliberately denied the majority of the people sovereignty over the country's wealth and resources. Political, civil and social rights were also denied to them. This was, in other words, a denial of the right to development of black people and it left the majority of the people in debilitating poverty. See National Plans of Action for the Promotion and Protection of Human Rights – South Africa, the right to development. Available at: [http://www2.ohchr.org/english/issues/plan\\_actions/safrica.htm](http://www2.ohchr.org/english/issues/plan_actions/safrica.htm) (accessed on 10 March 2008).



civil and political rights.<sup>161</sup> It is clear that in order to address and ensure that the needs of the most vulnerable are provided for, one should define and elaborate on the right to development in a holistic manner. Recognizing the interconnectedness of human rights in *Soobramoney v Minister of Health KwaZulu-Natal*,<sup>162</sup> the South African Constitutional Court upheld that:

We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality lies at the heart of our new constitutional order. For as long as these conditions continue to exist those aspirations will have a hollow ring.

The Court stated further that:

those who have no food, clothing and shelter are denied the fundamental right values of human dignity, freedom and equality. Guaranteeing socio-economic rights to all enables them to enjoy other rights contained in the Bill of Rights.<sup>163</sup>

It has also been underscored in the National Action Plans for the Promotion and Protection of Human Rights of South Africa that ‘the right to development is particularly relevant to the many poor and marginalized people and groups in our society. These are the people who cannot exercise their rights and freedoms

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<sup>161</sup> Sibonile Khoza “Extrapolating from South Africa’s Jurisprudence on the right of access to adequate housing, health care and social assistance” in Borghi Marco, Blommestein Letizia Postiglione (eds.) *op. cit.* (n 109) 153. See also Charlotte Vuyiswa McClain “The right to food and the role of the African Charter on Human and Peoples’ Rights” in Borghi Marco, Blommestein Letizia Postiglione (eds.) *op. cit.* (n 110) 82.

<sup>162</sup> (1997) 1 SA 765 (CC) paragraph 8.

<sup>163</sup> Paragraph 23 of *Grootboom* case.

fully because they are poor or have a low social status.’<sup>164</sup> In a similar vein, McCrudden states that: ‘A vital way in which equality guarantees are underpinned is by ensuring that basic social protections for the most vulnerable are secured, such as housing, food, and education. To the extent that such protections are provided to all, substantive equality will be furthered.’<sup>165</sup> Likewise, Sandra Fredman has also speculated that social rights provide ‘a better route to substantive equality.’<sup>166</sup>

As a right must not be seen in isolation from other rights, their interconnectedness needs to be taken into account in interpreting the socio-economic rights, and, in particular, in determining whether the State has met its obligations in terms of those rights.<sup>167</sup> For these reasons, all rights should be accorded similar protection by the constitution. The situation in South Africa seems to be of particular concern, because to date, the explicit recognition of the right to development as a fundamental human right and its incorporation within the constitution remains questionable.

No explicit mention is made of a right to development in the South African Constitution.<sup>168</sup> However, the formulation to the right to development is found in section 26 of the Interim Constitution, which provided:

1. Every person shall have the right freely to engage in economic activity and to pursue a livelihood anywhere in the national territory.

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<sup>164</sup> See National Plans of Action for the Promotion and Protection of Human Rights – South Africa, the right to development, *op. cit.* (n 160).

<sup>165</sup> McCrudden Christopher quoted by Murray Wesson “Equality and social rights: An exploration in light of the South African Constitution” (2007) *Public Law* at 748.

<sup>166</sup> Fredman Sandra “Providing equality: Substantive equality and the positive duty to provide” (2005) 21 *South African Journal on Human Rights* 164 at 180. See also Murray Wesson *idem*.

<sup>167</sup> Paragraph 24 of *Grootboom* case.

<sup>168</sup> Neither the Interim Constitution of 1993 nor the 1996 Constitution contain the right to development.

2. Subsection (1) shall not preclude measures designed to promote the protection or the improvement of the quality of life, economic growth, human development, social justice, basic conditions of employment, fair labour practices or equal opportunity for all, provided such measures are justifiable in an open and democratic society based on freedom and equality.

The huge constitutional obligations of the South African Government pertaining to the right to development may be drawn from the Preamble of the 1996 Constitution: the state must 'improve the quality of life of all citizens and free the potential of each person,' respect, protect, promote and fulfil all political, civil, social, economic, and cultural rights.<sup>169</sup> In addition, international obligations of the South African government related to the right to development are highlighted by international instruments on human rights, which recognize particularly and explicitly the right to development such as the African Charter on Human and Peoples' Rights ratified by the country.

Against the controversies on the right to development in South Africa, Van Reenen,<sup>170</sup> sets out that the transposition, and consequently the implementation and enforcement of the rules and principles contained in international instruments, have a possible bearing on the potential recognition of a right to development in South African law. The 1996 Constitution draws extensively from international law, including human rights law.<sup>171</sup> It has made it clear that international law has an important influence on the South African legal order, especially when interpreting the Bill of Rights. This can be seen in different sections of the Constitution:

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<sup>169</sup> Section 7 (2) of the Constitution.

<sup>170</sup> Van Reenen TP *op. cit.* (n 96) at 440.

<sup>171</sup> Makau wa Mutua *op. cit.* (n 120) at 66.

### Section 39

- (1) When interpreting the Bill of Rights, a court, tribunal or forum –
- (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
  - (b) must consider international law; and
  - (c) may consider foreign law.
- (2) When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.

### Section 233

When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.

These are important constitutional provisions which empower the courts to flesh out the right to development as it is provided for by international instruments such as the African Charter on Human and Peoples' Rights through its section 22.<sup>172</sup> In terms of section 39 (1) (b), the Court is under an obligation to take into account international law in the interpretation of the Bill of Rights. In any event, international law plays an important role in the interpretation of the Bill of Rights that was inspired by international human rights instruments binding South Africa and by the language and terminology on which it draws so heavily.<sup>173</sup> The current trend is towards an expansive and purposive interpretation of the laws, which the South African courts have already begun in

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<sup>172</sup> South Africa ratified this Charter on the 09 July 1996. See Heyns Christof and Killander Magnus (eds.) *op. cit.* (n 50) 356; Barney Pityana N “Toward a theory of applied cultural relativism in human rights” in Tiyambe Zeleza and McConnaughay *op. cit.* (n 7) 47.

<sup>173</sup> Dugard J *International law: A South African perspective* (2003) 3<sup>rd</sup> ed. Juta Cape Town 51-61.

the *Makwanyane* case.<sup>174</sup> On a number of occasions, the Court has invoked and emphasized this provision and the importance of international law, including non-binding international instruments as a guide to interpreting the rights embodied in the Bill of Rights.<sup>175</sup> However, it should be noted that the Court stated that:

... the weight to be attached to any particular principle or rule of international law will vary. However, where the relevant principle of international law binds South Africa, it may be directly applicable.<sup>176</sup>

In this respect, Sibonile Khoza points out that:

although South Africa has not yet ratified the most important instrument protecting socio-economic rights, the ICESCR, the Court relied heavily on this instrument and the general comments produced by the Committee on Economic, Social and Cultural Rights (CESCR) in interpreting the right of access to adequate housing ... the danger exists that the Court will not consider international law, nor will it consider it without reservations. It is neither clear when and how the Court, in the first place, decides to invoke international law .... unlike in *Grootboom*, in *TAC* and *Khosa/Mahlaule*, the Court did not make any reference to international law despite the fact that the rights in question are part of the international human rights law and jurisprudence which it had

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<sup>174</sup> *S v Makwanyane and Another* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) at paragraph 35. See also Barney Pityana N “Toward a theory of applied cultural relativism in human rights” in Tiyaambe Zeleza Paul and McConnaughay (eds.) *op. cit.* (n 7) 47.

<sup>175</sup> International and foreign law was extensively applied in the landmark judgment on the death penalty, *S v Makwanyane and Another* 1995 (3) SA 391 (CC), 1995 (6) BCLR 665 (CC) paragraph 35. See also the *Grootboom* case, paragraph 26.

<sup>176</sup> *Government of the Republic of South Africa and Others v Grootboom and Others* 2000 (11) BCLR 1169 (CC) paragraph 26. See also Sibonile Khoza “Extrapolating from South Africa’s Jurisprudence on the right of access to adequate housing, health care and social assistance” in Borghi Marco, Blommestein Letizia Postiglione (eds.) *op. cit.* (n 110) 159.

previously considered. This inconsistency and lack of clarity raises concerns and uncertainties.<sup>177</sup>

Despite the debate on the interpretation of section 39, one notes that this provision may have a great impact on the development of the South African human rights jurisprudence for various reasons. First of all, the judicial role in the promotion of human rights and democratic values of human dignity, equality and freedoms by means of the doctrine of precedent will be more spontaneous, easier and more thorough than in the case of legislation. This will contribute significantly to the entrenchment of a true human ‘rights culture’<sup>178</sup> which goes beyond the confines of the Bill of Rights. Secondly, by means of the comparative analysis of foreign municipal law, international treaties may find some useful application in South African law.<sup>179</sup> This is the reason why a comparative judicial law-making practice should be given an important consideration in the process of judicial review.

Admittedly, it could be a serious oversight to confine the interpretation of the Bill of Rights to a very narrow interpretation, and to take into account only those rights defined explicitly. The interpretation should go beyond a limited

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<sup>177</sup> Sibonile Khoza “Extrapolating from South Africa’s Jurisprudence on the right of access to adequate housing, health care and social assistance” in Borghi Marco, Blommestein Letizia Postiglione (eds.) *op. cit.* (n 110) 160; Mubangizi JC *The protection of human rights in South Africa: A legal and practice guide* (2004) Juta Durban 47.

<sup>178</sup> According to the South African Minister of Finance, human rights culture goes far beyond an ability to recite the Bill of Rights, memorise the UN Charter or be conversant with human rights case law. It is about communicating the values that underpin the culture, bringing out some of the tenets that may even be unconscious to those who hold them. It is also about working with others to develop and hone the shared objectives from shared values. None of this can be done without drawing attention to that which deviates from the underpinning values. Being complex in itself, culture is the cumulative deposit of knowledge, experience, beliefs, values, attitudes, meanings, hierarchies, religion, and material objects acquired by people in the course of generations through striving. By definition, culture cannot be static. See Trevor Manuel “Forum: The need for a human rights culture” (2007) Vol. 11 (1) *Law, Democracy and Development* at 87, 88.

<sup>179</sup> Van Reenen TP *op. cit.* (n 96) at 442.

understanding and to incorporate those rights recognized by international instruments to which South Africa is a party and, further, input from foreign law. In this order, the right to development should be considered as an implicit part of the Bill of Rights which must benefit from the protection extended to other human rights in South Africa. It is in this context that the Development Facilitation Act 67 of 1995 gives real expression to the right to development within the broader context of the Reconstruction and Development Programme (RDP).<sup>180</sup> This is a right to which anyone within the country should be entitled to and informed about to push forward the process of its implementation and enforcement.

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<sup>180</sup> The six basic principles of the RDP are: an integrated and sustained programme; a people-driven process; peace and security for all; nation-building; the link between reconstruction and development; and the democratization of South Africa. The five programmes of the RDP are: meeting basic needs; developing human resources; building the economy; democratizing the state and society; and implementing the RDP. See Makau wa Mutua *op. cit.* (n 120) at 90. See also Van Reenen *op. cit.* (n 96) at 442.

### 3.4 Conclusion

Having mentioned the observation of human rights as a whole,<sup>181</sup> the SADC Treaty has implicitly recognized the rights to environment and to development. Unfortunately, the unequivocal commitment to deal with human rights within the Region is not translated with equal force into the normative framework established by the Treaty or into SADC's programmatic activities. No institution has been established with the specific mandate to deal with human rights issues, neither are there any protocols or sectors especially entrusted with human rights protection and promotion.<sup>182</sup> There are no policies on how to promote and support democracy, good governance, human rights and further the rule of law. The reason for this is perhaps, as the member states themselves have acknowledged, these 'values' are not yet common to them all. This makes reaching agreement on a common understanding of such concepts a knotty issue.<sup>183</sup>

An overview of the national constitutions of SADC members reveals that the concept of human rights is recognised in one form or another in all these constitutions, and with some notable exceptions, elaborated upon in the same language that is to be found in comparable documents worldwide.<sup>184</sup> There is a high level of norm recognition in African countries, especially in the respective SADC countries, of human rights standards as valid norms at least in theory, and this holds promise for their practical realization. Arguably, the modern state is the primary guarantor of human rights, while it is simultaneously the target of

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<sup>181</sup> Oosthuizen Gabriël H *op. cit.* (n 11) 122, 135.

<sup>182</sup> Thoko Kaime "SADC and human security: Fitting human rights into the trade matrix" (2004) 13 (1) *African Security Review* 111. See also Thoko Kaime Commentary: SADC and human security: fitting human rights into the trade matrix. Available at: [www.issafrica.org/pubs/ASR/13No1/kaime.pdf](http://www.issafrica.org/pubs/ASR/13No1/kaime.pdf), (accessed on 06 December 2007).

<sup>183</sup> Oosthuizen Gabriël H *op. cit.* (n 10) 325.

<sup>184</sup> Heyns C and Viljoen F "The regional protection of human rights in Africa: An overview and evaluation" in Tiyambe Zeleza P and McConnaughay *op. cit.* (n 7) 132.



international human rights law prescribing the standard of treatment of individuals by their governments. The state plays a key role in the development of human rights law, meanwhile, it is the antithesis of human rights; the one exists to combat the other in a struggle for the supremacy over society.<sup>185</sup> A number of countries within the region have put a strong emphasis on the protection and promotion of environmental and developmental rights via their constitutional texts.

The provision in the 2006 Constitution of the DRC on the right to environment was modelled on the 2003 Constitution. In addition, other important clauses related to the management of the environment within the country are provided. The right to development is mentioned explicitly in the Constitution without further emphasis. The inception of these fundamental human rights within the DRC Constitution must be sustained by legislative measures to implement and enforce them, otherwise they will pay little more than lip service to the ratification of international instruments on human rights. Being part of the ‘constitutional bill of rights’, the respect and promotion of these rights within the country will not be elusive when everybody is bound by the law, because in a society governed by the rule of law, human rights can be a means for people to protect themselves from bureaucratic abuse and official lawlessness. Parliament must urgently put in place legislation which gives effect to these rights in compliance with the Constitution.

The South African legal system under the new constitutional dispensation has significantly improved the situation for environmental matters. The right to

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<sup>185</sup> Human rights norms, paradoxically, are codified by states although they meant to contain and control state power. The “good” state controls its despotic proclivities by internalizing human rights and submitting to their moral pre-eminence. The “bad” state rejects the authority of human rights norms and jealously guards its sovereignty from popular control. See Makau wa Mutua *op. cit.* (n 120) at 67.

environment in the Bill of Rights compels all organs of state and citizens to look after the environment for the benefit of present and future generations. The need for environmental justice within the country has been underlined by sustainable legislation and institutions.<sup>186</sup> No explicit mention is made of a right to development in the South African Bill of Rights. However, a significant way forward has been paved by the Constitution, which empowers the courts, tribunals and forums to interpret the Bill of Rights by taking into account international law and foreign law.<sup>187</sup> This is an important step that gives effect to those international instruments that provide for the right to development.<sup>188</sup> In the light of this understanding, one would like to ensure that reconstruction and development in South Africa has a sustainable foundation, which means integrating environment into development and paying attention to the environmental bottom line.<sup>189</sup>

It is unfortunate to note that due to the novelty of the subject matter, heated debates related to the contents of the rights to environment and to development among academics in both jurisdictions remain. In many instances, human rights, although recognized publicly, are often, in practice, not given real substance. Either, no clear constitutional provision is made for recourse to judicial or other mechanisms to enforce these norms, or, where such provision is made, in

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<sup>186</sup> One recognizes that environmental justice in the South African context is about social transformation directed toward meeting human need and enhancing the quality of life – economic equality, health care, shelter, human rights, species preservation, and democracy – using resources sustainably. A key point of environmental justice stresses equal access to natural resources and the right to clean air and water, adequate health care, affordable shelter, and a safe workplace ... Therefore, environmental problems remain inseparable from other social injustices such as poverty, racism, sexism, unemployment, urban deterioration. See Kidd M *Environmental law op. cit.* (n 138) 240.

<sup>187</sup> Section 39 of the Constitution.

<sup>188</sup> Section 233 of the Constitution.

<sup>189</sup> Whyte Anne (ed.) *Building a new South Africa: Environment, reconstruction and development* (1995) International Development Research Centre Johannesburg xii.

practice, it has often not been used to any significant effect.<sup>190</sup> We can learn from the evolving practice at international level where there is now a broad consensus<sup>191</sup> that all human rights places three types of obligations on States: the obligations to respect, to protect and to fulfil. A failure to perform any one of these three obligations constitutes a violation of such rights. The obligation to respect (negative duty)<sup>192</sup> requires a State to refrain from interfering with the enjoyment of the rights; the obligation to protect (negative and positive duties)<sup>193</sup> requires States to prevent the violations of such rights by third parties and to ensure provisions for redress. The obligation to fulfil (positive duty)<sup>194</sup> requires a State to take appropriate legislative, administrative, budgetary, judicial and other measures towards the full realisation of such rights. The respect-protect-fulfil framework is important because it allows economic, social, cultural, environmental and developmental rights to be perceived in a way which shifts our understanding from the simple allocation of resources<sup>195</sup> to the

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<sup>190</sup> Heyns C and Viljoen F “The regional protection of human rights in Africa: An overview and evaluation” in Tiyambe Zeleza P and McConnaughay *op. cit.* (n 7) 132.

<sup>191</sup> This applies to all human rights, though most clearly in relation to economic, social and cultural rights. See the Limburg Principles, the Maastricht Guidelines on violations of Economic, Social and Cultural Rights January 22-26 1997 point 6.

<sup>192</sup> This negative duty means the State must ensure that all its legislation, policies ... etc. must respect human rights. It would, for example, be unacceptable for the state to exclude certain people from access to health care or to arbitrarily close a school. See Wilson Emilie Filmer “The human rights-based approach to development: The right to water” (June 2005) Vol. 23 No 2 *Netherlands Quarterly of Human Rights* at 218.

<sup>193</sup> Under this obligation, the State must, for example, enforce anti-pollution laws so as to prevent private firms from polluting rivers and lands and putting the people’s health at risk. See *Idem*.

<sup>194</sup> Keeping with this obligation, the State must, for example, develop and implement a reasonable plan of action to achieve access to basic health care services for all and directly provide when groups or individuals are unable to meet their own needs. See *Idem*.

<sup>195</sup> The State may not decline to use its various resources to realise human rights claims because of such objectives as defence, business interests, etc. State authorities must be able to demonstrate that they are making every effort to realize human rights and to follow policies that will bring those rights to fruition, or leave office. See Sengupta A “The right to development and its implications for governance reform in Indian” in Raj Kumar C and Chockalingam K. (eds.) *op. cit.* (n 89) 191.

understanding that states have both negative and positive duties in this regard.<sup>196</sup> Steiner and Alston have extended this list to five obligations: ‘respect the rights of others’, ‘create institutional machinery essential to realization of rights’, ‘protect rights/prevent violations’, ‘provide goods and services to satisfy rights’, and ‘promote rights’, through advocacy, education, etc.<sup>197</sup> On the other side, Marks<sup>198</sup> regards these obligations as twofold: perfect and imperfect obligations. Perfect obligations can be enforced through the judicial process, where:

accountability takes the form of enforceable remedies’, such as the obligation to respect, preventing the State’s agents ‘from denying a right and punishing them for acts of commission and omission’, and the obligation to ensure or protect, ‘preventing others from violating a right and punishing them for prohibited acts and ensuring through regulatory mechanisms that domestic and multinational corporations do not engage in practices that contribute to the deprivation of rights.

Imperfect obligations, on the other hand, are:

general commitments to pursue a certain policy or achieve certain results which are typically not justiciable, that is, immediate individual remedies through the courts are not normally provided, where the state falls short of its

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<sup>196</sup> Way Sally-Anne “The right to food and access to justice: Understanding the right to food as a “negative” right” in Borghi Marco and Blommestien Letizia Postiglione (eds.) *op. cit.* (n 110) 49.

<sup>197</sup> Steiner Henry and Alston Philip *International human rights in context: Law, politics and morals* (2000) 2<sup>nd</sup> ed. Oxford University Press New York 182-184.

<sup>198</sup> Stephen Marks *The human rights framework for development : Five approaches Working Paper No. 6* (2000) FXB Centre for Health and Human Rights Harvard School of Public Health 13-14 quoted by Sengupta Arjun “Implementing the right to development” in Nico Schrijver and Friedl Weiss (eds.) *op. cit.* (n 9) 358.

responsibilities with respect to these obligations, although they are still legal obligations.<sup>199</sup>

In order to properly direct the progressive realization of rights, states have the responsibility to promote and facilitate through education, information, training and research in an enabling environment. They are obliged to fulfil or provide, to allocate resources and to supply goods and services. With regard to the forementioned approaches, the South African Constitution states clearly that ‘the State must respect, protect, promote and fulfil the rights in the Bill of Rights.’<sup>200</sup> Obviously, there is an urgent need for the courts, administrative bodies and other related institutions to flesh out these burning issues for the betterment of peoples’ lives in both the DRC and the RSA. In this light, the next chapter will examine the implementation and enforcement of the rights to environment and to development in the SADC and DRC and, thereafter in chapter 5, the RSA.

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<sup>199</sup> *Idem.*

<sup>200</sup> Section 7 (2) of the 1996 Constitution.

## CHAPTER 4:

### **IMPLEMENTATION AND ENFORCEMENT OF THE RIGHTS TO ENVIRONMENT AND TO DEVELOPMENT IN THE SADC AND THE DEMOCRATIC REPUBLIC OF CONGO**

It is only the implementation and enforcement of the rights to environment and to development that will ensure international, regional and national compliance with human rights legislation.<sup>1</sup> The peoples of the SADC region have had various opportunities to challenge the commitment of the members to their guarantee of democratic rights and to the observance of human rights<sup>2</sup> through regional and national administrative bodies, judicial review, national rules on standing and remedies.<sup>3</sup> The inception of human rights within the constitutions of SADC State members has paved the way for the relevant legislative measures to be put in place by the states and so guarantee the applicability of the 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 to do for its citizens.<sup>4</sup> Keeping this in mind, the rights to environment and development, recognised as inalienable human rights<sup>5</sup> and mentioned implicitly by the SADC Treaty, need to be analyzed in the light of the mechanisms of implementation and enforcement established, at the regional

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<sup>1</sup> Kamto Maurice *Charte Africaine, instruments internationaux de protection des droits de l'homme, de constitutions nationales: Articulations respectives* in Flauss Jean-François and Lambert-Abdelgawad Elisabeth (s/dir.) *L'application nationale de la Charte Africaine des Droits de L'Homme et des Peuples* (2004) Institut international des droits de l'homme Bruylant Bruxelles 38.

<sup>2</sup> Preamble and Article 5 of the Southern African Development Community (SADC) Treaty.

<sup>3</sup> Redgwell Catherine *National implementation* in Bodansky Daniel, Brunnée Jutta and Hey Ellen (eds.) *The Oxford handbook of international environmental law* (2007) Oxford University Press New York 923.

<sup>4</sup> Kihangi Bindu *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* (2006) University of South Africa Unisa [Unpublished LLM dissertation] Pretoria 33.

<sup>5</sup> Articles 24 and 22 of the African Charter on Human and Peoples' Rights of 1981.

level, by the SADC, and, at the national level, by the Democratic Republic of Congo.

#### **4.1 Implementation and enforcement of the rights to environment and to development within the SADC area**

There is a lack of structural frameworks and institutions to handle human rights matters, and so cases related to the implementation and enforcement of environmental and developmental rights within the region are extremely rare. The situation is critical. Regional institutions and structures need to be put in place to guide and inform the public of their existing rights and of the process by which they may challenge, at regional level, the commitment of their state (all too often preoccupied with the attainment of the Millennium Development Goals) to realizing these rights.<sup>6</sup> It is distressing that the binding character of the SADC Treaty provisions, in general, and the principles and objectives in particular, lack bite and do not have concrete impact on the SADC state members' behaviour. According to Khabele Matlosa, the basic tenets of the principles of the SADC Treaty are subordinate to national laws and, as such, where the national laws contradict these principles, the former will prevail.<sup>7</sup>

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<sup>6</sup> The SADC Treaty is legally binding on members, and provides for sanctions against member states that do not fulfil their obligations under the treaty, or that implement policies that undermine its principles and objectives. In terms of Article 16 (5) of the Treaty, the decisions of the Tribunal shall be final and binding. Despite the fact that the Tribunal is the SADC's supreme judicial body and has far-reaching powers, whether the member states would be eager for the Tribunal to deal with human rights issues is open to question. In practice, the Tribunal would probably seek to avoid clashes with other fora, such as the African Human Rights Commission and African Human Rights Court, over which institution has jurisdiction over a particular matter. See Oosthuizen Gabriël H *The Southern African Development Community: The organisation, its policies and prospects* (2006) Institute for Global Dialogue Midrand South Africa 212; The Institute for Global Dialogue (IGD) *Guide to the Southern African Development Community* (2001) Johannesburg 129.

<sup>7</sup> Khabele Matlosa *Democratisation at the crossroads: Challenges for the SADC principles and guidelines governing democratic elections* (October 2005) Institute for Security Studies 6.

Dealing with the legal force of the SADC principles, Tsunga<sup>8</sup> takes the view that:

although international human rights law has inspired the principles, they are subordinate to domestic law: This seems contrary to international human rights law that provides for international treaties to be observed in good faith, and discourages state parties from invoking the provisions of domestic laws in order to avoid implementation of treaties. It is submitted that the SADC principles must oblige state parties to the SADC Treaty to repeal or amend domestic laws that are inconsistent with the SADC principles and guidelines and further inconsistent to regional and international treaties ... as a result, in part, of the lack of legal force ... the SADC principles are merely inspirational, voluntary and non-binding. The Zimbabwean Minister of Justice, Legal and Parliamentary Affairs, Patrick Chinamasa ... referred to the principles of the SADC as simply a political roadmap without legal force.

Clearly, the principles are not backed up in any forceful way and that further diminishes their political influence. This is further compounded by the fact that the development of the principles was a predominantly state-centric process that lacked the vital participation of other non-state actors. Their implementation, therefore, will depend overwhelmingly upon state behaviour and attitude, with little regard to the input of civil society.

Within these disappointing circumstances and partly successful efforts, the SADC region is experiencing serious environmental problems which include inadequate access to clean water and sanitation services, unhealthy urban conditions, deforestation and pollution. These are factors which significantly

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<sup>8</sup> Tsunga quoted by Khabele Matlosa *idem*.



undermine the sustainability of the socio-economic development of the region.<sup>9</sup> To overcome the current situation, the region must define a development path that enables it to achieve its developmental goals without committing environmental suicide.<sup>10</sup> Looking closely at these issues, some areas have been identified at the regional level as focal points. One notes the following needs:

- the need to create the requisite harmonized environmental policy, as well as the legal and regulatory frameworks to promote regional cooperation on all issues relating to the environment and natural resources management;
- the need to mainstream environmental issues in order to ensure the responsiveness of all SADC policies, strategies and programmes for sustainable development;
- the need for regular assessment, monitoring and reporting on environmental conditions and trends in the SADC region.<sup>11</sup>

These are important points, but it is doubtful if they can be successfully implemented. While the SADC countries have committed themselves to foster regional cooperation in different sectors for social and human development, natural resources and environment,<sup>12</sup> by and large, this has not been translated into practical implementation at the national level. Cooperation has not impacted at the grass roots level within the countries. The success of regional cooperation depends largely on common political values, systems and institutions, and on national and regional strategies and programmes that complement one another,

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<sup>9</sup> Food, Agriculture and Natural Resources (FANR): Environmental and sustainable development. Available at: <http://www.sadc.int/fanr/environment/index.php> (visited 19/05/2008).

<sup>10</sup> Bhekumusa Maboyi *Trade, environment and sustainable development: Setting an agenda for Southern Africa* – Issues and insights from a workshop held 16-17 May, 1996, Harare, Zimbabwe, Special Paper Series No. 4, ZERO (A Regional Environmental Organization) at 7.

<sup>11</sup> Food, Agriculture and Natural Resources (FANR): Environment and sustainable development, *op. cit.* (n 9).

<sup>12</sup> Article 21 of the SADC Treaty.

and the sustainable utilization of natural resources and effective protection of the environment.<sup>13</sup>

Some progress has been made with different problems through institutions that empower people within the region. The Environment and Land Management Sector (ELMS) monitors, assesses, and reports on environmental conditions and changes in the region via its environment management programmes. It builds regional capacity to undertake these functions, raises environmental awareness, and facilitates environmental education.<sup>14</sup> In addition, the Organization has put in place a Regional Environmental Educational Programme intended to raise awareness of the importance of the protection of the environment. This should be supported and given ‘teeth’, bearing in mind the way in which population pressures impact on the environment and lead to environmental change and degradation, and that the population and environment interact and impact upon one another to detrimental effect.<sup>15</sup>

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

Through their entrenchment within the Constitution, environmental and developmental rights are recognized in the DRC as fundamental human rights which must receive the same protection as other fundamental human rights. Since then, an important challenge to their implementation and enforcement has faced all interested actors, namely, the administrative bodies, the courts and, to an extent, the citizens.

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<sup>13</sup> Munyaradzi Chenje, Mats Kullberg, and Tendayi Kureya *State of the environment 2000: Zambezi Basin* (2000) SADC/IUCN/ZRA/SARDC Maseru/Lusaka/Harare 271.

<sup>14</sup> The Institute for Global Dialogue (IGD) *op. cit.* (n 6) 154.

<sup>15</sup> Munyaradzi Chenje, Mats Kullberg, Tendayi Kureya, *et al. op. cit.* (n 13) 8.

## ENVIRONMENTAL RIGHTS

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

To have a good understanding, and to ensure the effective implementation and enforcement, of the environmental rights enshrined in the Constitution of the DRC, the focus is on the regulatory framework for environmental management; administrative and judicial control and remedies; the environmental impact assessment procedure<sup>16</sup> and the promotion of environmental rights in the DRC.

#### *4.2.1.1 General background of the regulatory framework for environmental management in the Democratic Republic of Congo*

In order to drive the human rights agenda forward, the management of the environment in the DRC deserves to be treated with the fullest respect by political leaders and the people. It is a fact that only human beings can implement these rights.<sup>17</sup> The evidence shows that, since independence, environmental management has been neglected in the country.<sup>18</sup> Obviously, political leaders are not particularly preoccupied with the fulfilment of constitutional environmental clauses and other relevant legislation, and further do not encourage the people to claim their right to environment or to sue on the grounds of environmental degradation.

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<sup>16</sup> Environmental Impact Assessment provides a participatory process whereby the public may contribute to environmental management and to the enforcement of environmental law. Public participation acts as an essential safeguard against states unable or unwilling to take action. Kidd M *Environmental law* (2008) Juta Cape Town 207, 210 and 222.

<sup>17</sup> Nukhet Turgut “The right to environment: Does it reflect environmental ethics?” (1998) 8 *Eubios Journal of Asian and International Bioethics* at 169-171.

<sup>18</sup> Kitambala Albert ... *et al. Les réfugiés et l’environnement au Sud-Kivu* in Mugangu Matabaro Séverin (s/dir.) *Les droits de l’homme dans la Région des Grands Lacs: Réalités et illusions* (2003) Fédération Internationale des Universités Catholiques FIUC Université Catholique de Bukavu UCB Academia Bruylant Belgique 400-410.

The Constitution includes the environmental and other fundamental human rights<sup>19</sup> and is the supreme law of the country.<sup>20</sup> Accordingly, it constitutes the most important source of environmental law in the DRC. The legislative power at the national level is vested in parliament which consists of two chambers: the National Assembly (*Assemblée Nationale*) and the Senate (*Sénat*).<sup>21</sup> Without prejudice to articles 202, 204, 205<sup>22</sup> and to other provisions of the Constitution, an important number of matters related to environment are subject to the concurring competence of the Central Authority and the Provinces.<sup>23</sup> Thus, Parliament is competent to pass legislation on different matters that include the protection of the environment by defining the fundamental principles.<sup>24</sup> It must be noted that since the promulgation and publication of the Constitution in the *Official Journal* in December 2006, Parliament has not yet passed any further legislation in this regard. Regulations are also part of the sources of the national legal system in the DRC. These regulations must be examined by the relevant authorities for their compliance with the Constitution and the relevant Act of

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<sup>19</sup> Title II of the Constitution on human rights, fundamental liberties and the duties of the citizens and the State.

<sup>20</sup> Articles 62, paragraph 2, and 168, paragraph 2.

<sup>21</sup> Article 100.

<sup>22</sup> These constitutional provisions are respectively related to the matters which are subject to the exclusive competence of the Central Authority (Article 202); exclusive competence of the Provinces and the cooperation which characterizes the legislative power across national and provincial spheres. However, national legislation takes precedence over provincial legislation (Article 205).

<sup>23</sup> Article 203 provides that: “Without prejudice to the other provisions of this Constitution, the following matters are subject to the concurring competence of the Central Authority and the Provinces:

1. the implementation of mechanisms for the promotion and protection of the human rights and fundamental liberties guaranteed in this Constitution;
2. Civil and customary rights;
3. Land and mining rights, environmental planning, regimes for waters and forests;
18. Protection of the environment, of natural sites, landscapes and the conservation of sites; ...”

<sup>24</sup> Article 123 provides that:

“Without prejudice to the other provisions of this Constitution, statutory law determines the fundamental principles concerning :

- c) the regime pertaining to real estate, mining, forestry and immovable property;
- n) agriculture, cattle breeding, fishing and aquaculture;
- o) the protection of the environment and tourism; ...”

parliament. The Constitution recognizes the regulatory power of, respectively, the President of the Republic<sup>25</sup> and of the Ministers.<sup>26</sup> Judicial precedents, or decisions of the Constitutional Court, which is the highest court of the judicial system in the DRC, are also a source of law. They are binding and have to be observed by the public institutions, by all administrative, jurisdictional, civil and military authorities and by the individual.<sup>27</sup> The doctrine and the general principles of law and the customary law, unless inconsistent or in conflict with the written law, are also a source of law in the country.

The international and regional treaties and agreements and, further, the international jurisprudence are important international legal sources in the DRC. In terms of article 215 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 and their implementation by other parties. In this regard, the DRC has become, and may still become, a party to a number of the international instruments. For instance, the DRC remains a signatory of the African Convention on the Conservation of Natural Resources adopted in Algiers on 15 September 1968 and signed by the DRC on 13 November 1976; the Treaty of the Southern African Development Community (SADC) signed in Windhoek, 17 August 1992; the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) of 3 March 1973 signed by the DRC on 20 July 1976. It is distressing to note that almost all environmental agreements ratified by the DRC have not been sustained or followed by legislation in the municipal legal system to define the proper

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<sup>25</sup> Article 79, par. 3 provides that: “The President of the Republic ... decides by way of ordinance ...”

<sup>26</sup> Article 93, par. 2 states that “The Minister ... decides by way of ministerial order (*Arreté*) ...”

<sup>27</sup> Article 168. However, until the establishment of the Constitutional Court, of the Council of State and the *Cour de Cassation*, the Supreme Court (*Cour Suprême de Justice*) exercises the functions which are conferred upon it by the Constitution (article 223).

measures for their application.<sup>28</sup> Therefore, opportunities for their implementation and enforcement are that much less likely to occur. There are no proper mechanisms to allow people to be apprised of these texts and therefore to sue the government should it fail to respect its international environmental obligations. The ratification of treaties has become the ‘national sport’, and a form of ‘international showing off’ by the public authorities which does not have any concrete impact at grass roots level. Having taken an important step forward through organized successful general elections in respect of the new Constitutional dispensation, one hopes that during their mandate the elected public authorities will give audience to a democratic public debate that challenges their governance and its shortcomings across the country.

Despite the call made by the Transitional Constitution of 2003, followed by the 2006 Constitutional dispensation, Parliament has not yet passed legislation to give effect to the right to environment guaranteed by the Constitution. For the purpose of the present work, reference will be limited to the regulatory framework<sup>29</sup> that existed in the country prior to the coming into force of the 2006 Constitution and, to some extent, to the *Draft Environmental Act* of 18 September 2007 ‘*Loi-Cadre sur l’environnement*.’<sup>30</sup> The current regulatory

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<sup>28</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. The DRC has attended a number of important international conferences pertaining to environmental matters, namely, the United Nations Conference on the Environment and Development held in Rio de Janeiro in 1992. See *Document Synthèse du Ministère de L’Environnement, Conservation de la Nature et Tourisme, Plan National d’Action Environnemental (Septembre 1997) Programme des Nations Unies pour le Développement, République Démocratique du Congo PROJT ZAI 94/004: Appui à la gestion stratégique* 23.

<sup>29</sup> Mbalanda Kisoka P, Mponyi Mbunga A, and Mopiti Ilanga D *Idem*.

<sup>30</sup> It has been underlined by the Ministry of Environment, Nature Conservation, Waters and Forests that there is a real need to review and update the Congolese environmental regulatory framework. An Environmental Act ‘*Loi-Cadre*’ which should play an ‘umbrella’ role remains

framework remains valid in terms of article 221 of the Constitution, which states that:

Provided that they are not contrary to this Constitution, the legislative and regulatory texts in force remain valid until their abolition or modification.

Indeed, it is against the general environmental management background and environmental legislative framework of the country, that the responsibilities of administrative bodies for the implementation and enforcement of environmental rights are examined below. The courts have an equally vital and ongoing role to play through judicial control of administrative (environmental) actions and their role is discussed later in the following paragraphs.

#### *4.2.1.2 Administrative environmental management*

Owing to the predominantly public law character of the administration of environmental affairs, nature conservation and management, water, air, and soil pollution, are primarily entrusted to administrative (public) bodies. It is in this respect, for instance, that an important number of Ministries<sup>31</sup> are involved and share responsibilities in the DRC at national, provincial and local levels.<sup>32</sup> Other

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a necessity. This text should contain the general principles on the management of the environment throughout the country. See Secrétariat Général à l'environnement, conservation de la nature, eaux et forêts/ Direction de développement durable *Programme d'Action Nationale (PAN) de la lutte contre la dégradation des terres et la forêt* (Mai 2006) Ministère de l'Environnement, Conservation de la Nature, Eaux et Forêts République Démocratique du Congo pp. 29-30 ; République Démocratique du Congo *Programme du Gouvernement* (Octobre 2008) 14.

<sup>31</sup> The Ministry of Environment, Nature Conservation and Tourism plays the leading role; Ministry of Agriculture; Ministry of Rural Development; Ministry of Urbanisation; Ministry of Mines; .... See for instance Article 24, paragraph 2, of the Forestry Code, Law No 11/2002 of 29 August 2002 which has repealed and replaced the Decree of 11 April 1949 on the Forest Regime; and Article 1(B) of the Ordinance No 08/074 of 24 December 2008 on the Attributions of Ministries.

<sup>32</sup> Article 36 of the Law No. 08/012 of 31<sup>st</sup> July 2008 on Fundamental Principles Pertaining to the Free Administration of Provinces, *Official Journal of the Democratic Republic of Congo*;

relevant bodies such as the Congolese Institute for the Conservation of Nature (*Institut Congolais pour la Conservation de la Nature* [ICCN])<sup>33</sup> and the National Centre of Information on Environment are also involved.<sup>34</sup> In the light of Ordinance No 08/074 of 24 December 2008 on the Attributions of Ministries,<sup>35</sup> important powers are conferred on the Ministry of Environment, Nature Conservation and Tourism. The Ministry has, for instance, 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.

In fact, from the above viewpoint, legal powers were vested in the administrative bodies. Therefore, it is obvious that the success of the protection and promotion of environmental rights, in particular, and environmental legislation, at large, depends on the discretionary powers conferred by the law upon these administrative bodies. Their ability to exercise these powers in the public interest and with respect for the rule of law, especially the principle of legality of administrative (environmental) action, remains a key factor.

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Articles 39, 84 of the Organic Law No 08/016 of 7 October 2008 on the Composition, Organisation and Functioning of the Decentralised Territorial Entities and their relations with the State and the Provinces; Articles 11, 49, 71, 119, 161 and 169 of the Act No 95-005 of 20 December 1995 on Territorial Decentralization, Administrative and Political of the Republic of Zaire (currently DRC) during the transitional period.

<sup>33</sup> Act No 75-023 of 22 July 1975 on the Status of the Congolese Institute for the Conservation of Nature.

<sup>34</sup> By-law No 029/CAB/MIN/EPF/98 of 25 June 1998.

<sup>35</sup> The Decree No 03/027 of 16 September 2003 on the Attributions of the Ministries and the Ordinance No 75/231 of 22 July 1975 defining the Attributions of the Department of the Environment, Nature Conservation and Tourism have been abrogated.



a. Powers of administrative bodies

The powers conferred on administrative bodies through the regulatory environmental framework are varied: extensive powers; powers to legislate and to authorize specific performance; and powers to execute or enforce legislation.

- Extensive powers

Public bodies and officials (usually ministers) are granted extensive powers of management over natural resources like mines<sup>36</sup> and water.<sup>37</sup> It is in this respect that, for instance, the President of the Republic,<sup>38</sup> the Minister,<sup>39</sup> the Governor of

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<sup>36</sup> Law No. 007/2002 of 11 July 2002 related to the Mining Code.

<sup>37</sup> Decree of 6 May 1952 on Concessions and Administration of Water.

<sup>38</sup> Article 9 of the Mining Code of 2002 provides that:

Pursuant to the provision of the present Code, the President of the Republic has jurisdiction over:

- a) the enactment of the Mining Regulations in order to implement the present Code;
- b) classify, declassify or reclassify mineral substances as mines or as quarry products, or vice versa;
- c) declare, classify or declassify an area as a prohibited area for mining activities or quarry works;
- d) declare, classify or declassify a mineral substance as a 'reserved substance';
- e) confirm the reservation of a deposit which is subject to tender pursuant to a Ministerial Decree;

The President of the Republic shall exercise the above powers by Decree made on his own initiative or on the proposal of the Minister, after having obtained the opinion of the Geological Department or the Mining Registry.

The exercise of the powers conferred on the President of the Republic under item (a) of the present article cannot be delegated.

The Decree of the President of the Republic is published in the *Official Gazette*.

<sup>39</sup> Article 10 of the Mining Code of 2002 states that:

Pursuant to the provisions of the present Code, the Minister has jurisdiction over:

- a) the granting or refusal of mining and/or quarry rights for mineral substances other than standard construction materials;
- b) the cancellation of mining and/or quarry rights, the withdrawal of a holder's mining or quarry rights, the acknowledgment of the declarations of relinquishments of mining and/or quarry rights and the certification of the expiry of mining and quarry rights;
- c) the authorization of the export of unprocessed ores;
- d) the creation of artisanal exploitation zones;
- e) the granting and withdrawal of approval for authorized traders for the purchase of artisanal exploitation products;

the Province, and the Heads of the Provincial Authority of Mines have important powers in the management of mines.<sup>40</sup>

- Powers to legislate and to authorize specific performance

In the DRC, an important number of statutes delegate a legislative function to public bodies and officials. They perform a limited legislative function because they are required to adopt subordinate legislation in the form of regulations, statutory directives, permits or licensing requirements, abatement notices and other important measures. Among the regulations adopted as subordinate

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- f) the supervision of the institutions, public or semi-public entities which carry out mining activities and quarry works;
  - g) the reservation of deposits to be submitted for tender;
  - h) the approval for the creation of mortgages;
  - i) the acceptance or refusal of the extension of a mining or quarry title to associated or non-associated substances;
  - j) the issuing of authorizations for the processing or transformation of artisanal exploitation products;
  - k) the proposal to the President of the Republic regarding the classification, reclassification or declassification of reserved substances, mineral substances classified as mines or quarry products and vice-versa, as well as Prohibited Areas;
  - l) the setting up of restricted access areas;
  - m) the appointment and convening of the members of the Inter-Ministerial Committee in charge of examining the lists of items to be imported for mining activities;
  - n) the approval of mine and quarry agents;

With the exception of the powers set forth under item (k) of the present code, the Minister shall exercise the above-noted powers by way of Decree.

The Minister's Decree shall be published in the *Official Gazette*.

<sup>40</sup> Article 11 of the Mining Code of 2002 notes that:

Pursuant to the provisions of the present Code:

The Governor of the Province has jurisdiction over:

- a) the issuing of traders' cards for artisanal exploitation products;
- b) the decision to open quarries for the purposes of carrying out public utility works on public land;

The Governor of the province exercises the above-mentioned powers by means of a provincial Decree. The provincial Decree is published in the *Official Journal*.

The Head of the provincial Mining Division has jurisdiction over:

- a) the issuing of artisanal miners' cards;
- b) the granting of exploitation rights for quarry products, and of permanent or temporary quarry exploitation rights for standard construction materials.

legislation are the Ministerial By-Law on the Forestry Transaction Procedure<sup>41</sup> and the Ministerial By-Law on Measures Pertaining to Forestry Exploitation.<sup>42</sup> The exercise of certain environmental activities is subject to permits and licensing requirements, for example the forestry exploitation permit/licence;<sup>43</sup> the hunting permit<sup>44</sup> and the personal authorization of prospecting permits subject to the requirements defined by the Ordinance on General Legislation on Mines and Hydrocarbon.<sup>45</sup>

- Powers to execute

A public body may itself execute the provisions of the legislation.<sup>46</sup> This is the case, for example, in article 39 of the Law on Hunting Regulation of 1982,<sup>47</sup> 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 order to give effect to the 'rule of law' enshrined in the Constitution,<sup>48</sup> Ministers and other authorities (provincial and local), when performing their functions, are requested to act in accordance with the Constitution<sup>49</sup> and the law.

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<sup>41</sup> No CAB/MIN/AF.F-ET/259/2002 of 3 October 2002.

<sup>42</sup> No CAB/MIN/AF.F-E.T/262/2002 of 3 October 2002.

<sup>43</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>44</sup> Chapter 3 of the Act No 82-002 of 28 May 1982 on Hunting Regulation.

<sup>45</sup> No 81-013 of 2 April 1981.

<sup>46</sup> Article 92, 206 of the Constitution.

<sup>47</sup> No 82-002 of 28 May 1982.

<sup>48</sup> Article 1 paragraph 1 of the Constitution.

<sup>49</sup> Articles 62 of the Constitution.

b. The principle of legality

Due to its importance, the principle of legality has been defined as a clear-cut concept.<sup>50</sup> Every act of governmental power, for instance, or any act that affects the legal rights, such as the right to environment, of any person must be shown to have a strictly legal ‘pedigree’. The affected person may always resort to the courts of law, and if the legal requirements are not found to be perfectly in order the court will invalidate the act, which can then safely be disregarded.<sup>51</sup> One must understand the principle of legality in line with the rule of law<sup>52</sup> or *Etat de droit*<sup>53</sup> which demands something more. In Dicey’s words, this principle ensures that the administration obeys the rule of law.<sup>54</sup> The exercise of administrative action in the DRC is subject to the principle of legality because the State is based on the rule of law<sup>55</sup> and all persons are obliged to respect the Constitution, the supreme law of the land, and to comply with the laws of the Republic.<sup>56</sup> Therefore, all administrative actions or decisions in the DRC 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.<sup>57</sup>

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<sup>50</sup> Wade HWR and Forsyth CF *Administrative law* (2000) 8<sup>th</sup> ed. Oxford University Press New York 21.

<sup>51</sup> *Id* at 20.

<sup>52</sup> The primary meaning of the rule of law is that everything must be done in compliance with the law. It requires that every governmental authority which violates a right or liberty must be able to justify its action as authorised by law. In nearly every case this will mean an act authorized directly or indirectly by an Act of Parliament. Wade HWR and Forsyth CF *op. cit.* (n 50) 20.

<sup>53</sup> A French phrase borrowed from Yves Gaudemet who has emphasized that: “Les autorités administrative sont tenues dans leur activité de se conformer à la loi ou plus exactement à la légalité, qui est une notion plus large que celle de la loi. Le principe de la légalité constitue une limitation du pouvoir administratif, on parle volontiers à ce sujet *d’Etat de droit*.” See Gaudemet Yves *Droit administratif* (2005) 18<sup>ème</sup> éd. Librairie Générale de Droit et de Jurisprudence LGDJ Paris 99.

<sup>54</sup> Dicey, quoted by Neville L and Bell John S *French administrative law* (1993) 4<sup>th</sup> ed. Oxford University Press New York 173.

<sup>55</sup> Article 1 of the 2006 Constitution of the DRC .

<sup>56</sup> Article 62 paragraph 2.

<sup>57</sup> Articles 154 and 155 of the Constitution.

Judicial review by the courts usually remains the final resort for legal redress. In order to protect human rights, the principle of administrative legality, which underlies the exercise of all administrative powers, means that the administration is bound by the law to promote the public interest and to recognize and protect individual rights and liberties.<sup>58</sup>

Obviously, administrative bodies and their officials, despite their discretionary powers,<sup>59</sup> can never override the fundamental right of a person to a clean and healthy environment and related rights such as the rights to access to information and to lawful and fair administrative action in the DRC,<sup>60</sup> unless special circumstances exist in terms of the Constitution (for example, limitations of those rights).<sup>61</sup> The Constitutional Court must declare whether the urgent or

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<sup>58</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>59</sup> However, restrictions to be put on discretionary power are matters of degree. Faced with the fact that Parliament freely confers discretionary powers with little regard to the dangers of abuse, the courts must attempt to strike a balance between the needs of fair and efficient administration and the need to protect citizens against oppressive government. They must rely on their own judgment, sensing what is required by the interplay of forces in the Constitution. Considering the fact that this involves questions of degree, this has led critics to disparage the rule of law, treating it as a merely political phenomenon which reflects one particular philosophy of government. Wade HWR and Forsyth CF *op. cit.* (n 50) 21.

<sup>60</sup> In terms of Article 60 of the Constitution “The respect of human rights and fundamental liberties guaranteed by the Constitution is incumbent on the public authorities and all persons.”

<sup>61</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. More emphasis has been placed by the drafter of the new Constitutional dispensation on rights and fundamental liberties that may not be the subject of derogation. Article 61 provides that: In no case, not even when the state of siege or the state of emergency has been proclaimed in accordance with the Articles 85 and 86 of this Constitution, is a derogation admissible from the following rights and fundamental principles:

- right to life;
- the prohibition of torture and of cruel, inhumane or degrading punishment or treatment;
- the prohibition of slavery and servitude;
- the principle of legality of offences and penalties;
- the right to defense and the right to a remedy;

special measures justifying the limitation of the rights concerned are consistent with the Constitution as a whole.<sup>62</sup>

c. Administrative control and remedies

In order to meet the requirements of administrative legality and the rule of law in the DRC, different legal measures to control administrative action on environmental matters have been put in place. To safeguard the rights of private individuals who are in a subordinate and unequal bargaining position with public authorities, the State must ensure that the exercise of administrative powers does not violate the environmental rights of individuals.<sup>63</sup> For their part, individuals are called upon to conduct themselves in accordance with the administrative environmental requirements. Limitations on environmental rights and sanctions have been defined in the legislation and expect compliance with the code of conduct. In this respect, administrative bodies, in the light of the legislation, are granted powers to put in place administrative regulations that can be challenged through the process of administrative control (appeal and remedies).

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- the prohibition of imprisonment for debt;
  - the freedom of thought, of conscience and religion.

Scholars qualify these rights as “*noyau dur des droits de l’homme*” or “*human rights core*”. See Mazyambo Makengo Kisala André *Introduction aux droits de l’homme: Théorie générale, instruments, mécanismes de protection* in Programme des Nations Unies pour le Développement (PNUD) Projet “Appui aux Institutions de la Transition” *Mandats, rôles et fonctions des pouvoirs constitués dans le nouveau système politique de la République Démocratique du Congo: Journées d’information organisées à l’intention des parlementaires, des députés provinciaux et hauts cadres de l’administration Février – Juin 2007* (2007) modules de formation Kinshasa 244.

<sup>62</sup> Article 145, paragraph 2, of the Constitution.

<sup>63</sup> Burns Y *op. cit.* (n 58) 269.

- Administrative regulations

First of all, it should be mentioned that administrative regulations are aligned with the Constitution and parliamentary Acts. Considering that they take different forms, one may mention the following: the abatement notice procedure, the administrative suspension or cancellation of authorization, detention as a security measure and investigation and seizure.<sup>64</sup> In terms of Article 127, for instance, of the Mining Code:

the authorisation as a trading house for the purchase and sale of artisanal mining mineral substances may be withdrawn by the Minister if the authorized trading house does not remedy the breach to comply with its obligations set forth in article 126 of the present Code within 30 days. Failing that, the trading house stripped of its rights is not eligible for authorization as a trading house for five years. The withdrawal of authorization as a trading house for the purchase and sale of artisanal mining mineral substances is subject to the right to an appeal, as set forth in the provisions of article 313 of the present Code.<sup>65</sup>

- Internal administrative control on environmental affairs

It is important to note that internal appeal is used only in respect of purely administrative actions and for the individual cases. These purely administrative actions must be seen as those actions performed by the administration for the purpose of creating, varying and terminating individual administrative law relationships. This would automatically exclude legislative acts because these,

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<sup>64</sup> Title VII on forestry exploitation (Chapter 1: The modes of exploitation; Chapter 2: Rights and obligations of the forest exploiter; chapter 3: Local communities forests exploitation; and Chapter 5: Withdrawal of the forestry exploiter rights), Law No 11/2002 of 29 August 2002 related to the Forestry Code. Article 88 of the Act No 82-002 of 28 May 1982 on Hunting Regulation.

<sup>65</sup> Article 127 related to the withdrawal of authorization as a trading house for the purchase and sale of artisanal mining substances, Law No 007/2002 of July 11 2002 on Mining Code.

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.<sup>66</sup> Accordingly, Wiechers notes that the term ‘purely administrative action’ is used to indicate the normal activities of the organs of the executive in the state.<sup>67</sup>

In this way and in order to give positive effect to the principle of legality and the rule of law, Gaudemet explains that internal administrative control over administrative actions is exercised by the administration itself through the process of internal review and appeal. It comprises an appeal to a higher body in the same administrative hierarchy and a *mero motu* by that body (*recours hiérarchique*).<sup>68</sup> Mainly, it takes the form of a re-hearing 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>69</sup> Mazyambo points out that the author of the administrative act may also be approached by the aggrieved subject through the so-called *recours administratif gracieux*.<sup>70</sup> According to Burns,<sup>71</sup> internal control occurs generally within the relationship of deconcentration. The superior administrator controls the actions of subordinate administrators by examining the manner in which the function was executed. In this respect, he or she could be able to scrutinize the validity of the action in question, its desirability or efficacy, and the subordinate administrator will have to accept the superior officer’s action. Administrative appeal remains a powerful instrument to guarantee the respect and promotion of

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<sup>66</sup> Kihangi Bindu *op. cit.* (n 4) 39.

<sup>67</sup> Wiechers M *Administrative law* (1985) Butterworths Durban 115.

<sup>68</sup> Gaudemet Yves *op. cit.* (n 53) 121. See also De Laubadere A, Venezia JC and Gaudemet Y *Traité de droit administratif* (1988) T1 10th éd. Librairie Générale de Droit et de Jurisprudence Paris 516.

<sup>69</sup> Wiechers M *op. cit.* (n 67) 104.

<sup>70</sup> Mazyambo Makengo Kisala André *op. cit.* (n 61) 275; Gaudemet Yves *op. cit.* (n 53) 121; De Laubadere A *et al. op. cit.* (n 68) 516.

<sup>71</sup> Burns Y *op. cit.* (n 58) 277.



human rights, more specifically the right to environment, against any abuse of administrative power or the discretionary power of public authorities. It is in this regard that the right to administrative appeals is set forth by the Mining Code of 2002 through articles 313 and 314 which provide respectively that:

Subject to the provisions of articles 46 and 315 of this Code, appeals made against administrative acts by the administrative authorities pursuant to or in breach of the provisions of the present Code or the provisions of the Mining Regulations are governed by the relevant provisions of substantive law, in particular, by the provisions of articles 146 to 149 and 158 of the Ordinance-Law No. 82-020 of March 31, 1982 relating to the code organizing and setting the jurisdiction of the courts as modified and by Ordinance-Law No. 82-017 of March 31, 1982 relating to the procedure before the Supreme Court, as modified and supplemented up to this date.<sup>72</sup>

Contrary to the provisions of Articles 79, 88 and 89 paragraph 1 of the aforementioned Law/Decree No. 82-017 of March 31, 1982, the prior claimant, actionable before the Administrative Section of the Supreme Court of Justice, must be lodged within thirty days following the date of publication or personal notification of the administrative act, to the authority who is able to revoke or modify said act. The petition for annulment (of the act) must be lodged within twenty days from the date on which total or partial rejection of the claim has been notified.

The time limit for filing a reply and for filing the administrative documents is fifteen working days from the date of serving of the petition. The same time limit applies to the opinion of the Public Prosecutor. The extension of time limits imposed on parties for sending the petition and the reply may be decided by reasoned order of the Head of the Administration Office of the Supreme Court, and may not exceed twelve working days.

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<sup>72</sup> Article 313 of the Mining Code of 2002. The Supreme Court has been replaced by the *Cour de Cassation* under the new constitutional dispensation of 2006.

The shortening of the time limits set forth in the previous paragraph relate only to the refusal to grant mining and/or quarry rights as well as approval or execution of mortgages.

In any event, the sentence of the Supreme Court shall be rendered within thirty working days from the date on which the case is heard.<sup>73</sup>

In the same vein, Article 12 of the Decree of 12 July 1932 on Fishing Regulation Concessions asserts that 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.

Taking into consideration the above-mentioned elements related to the internal administrative control of environmental affairs, one shares the view that this form of control remains potentially and significantly the most comprehensive and understandable since all aspects of the environmental dispute are subject to control in an open society based on the defence, and promotion, of human rights and values. Administrative authorities are bound by the law to safeguard the promotion of the principle of legality and the rule of law, and to further constitutionalism. At this stage, it is important to recognize the fact that the spirit and the philosophy outlined in the Preamble of the Constitution,<sup>74</sup> based on the rule of law, and, which form the milestones of the Congolese democracy, are not far from this understanding. However, this will only be achievable if the institutions established under the new constitutional dispensation are put in place and operate without political interference from leaders.

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<sup>73</sup> Article 314 of the Mining Code of 2002.

<sup>74</sup> The Preamble to the Constitution proclaims the attachment to the principles of rule of law, democracy and human rights. It underlines the adherence to the Universal Declaration of Human Rights, to the African Charter on Human and Peoples' Rights and all other international instruments pertaining to human rights ratified by the DRC.

Beyond the internal administrative control of administrative actions on environmental matters, one may make recourse to an independent judicial administrative body provided by the law. This is an ‘administrative appeal’ lodged before an administrative tribunal provided for that purpose.

#### - Administrative tribunals

The system of administrative tribunals has long been an essential part of the administrative machinery of government<sup>75</sup> and has become a prominent feature of democratic society. Their function involves the protection of individual rights and freedoms to ensure that public policy is applied properly.<sup>76</sup> It has been acknowledged that these bodies offer the prospect of providing more accessible conciliation and at greater speed and lower cost.<sup>77</sup> It is only recently, under the current Constitution, that administrative jurisdictions have been created in the DRC.<sup>78</sup> An organic law determining the organization, competences and the operation of the institutions with administrative jurisdiction has not yet been passed by Parliament.<sup>79</sup> Until the effective installation and operation of administrative courts, the Courts of Appeal exercise the competences conferred upon the Administrative Courts of Appeal.<sup>80</sup> A separate environmental tribunal is provided for in either the administrative or judicial system. Environmental

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<sup>75</sup> Wade HWR and Forsyth CF *op. cit.* (n 50) 887; Burns Y and Beukes M *Administrative law: Under the 1996 Constitution* (2006) LexisNexis Durban 270.

<sup>76</sup> Baxter L *Administrative law* (1984) Juta Cape Town 263.

<sup>77</sup> Leyland Peter and Woods Terry *Textbook on administrative law* (2002) 4<sup>th</sup> ed. Oxford University Press New York 210. See also Wade H.W.R and Forsyth C.F *op. cit.* (n 50) 886.

<sup>78</sup> Article 154 provides that: “A hierarchy of institutions with administrative jurisdiction is established, consisting of the Council of State (*Conseil d’Etat*) and the administrative courts and tribunals.”

<sup>79</sup> Article 155, paragraph 4.

<sup>80</sup> Article 224 of the Constitution.

matters of an administrative nature are subject to the competence of the courts and tribunals.<sup>81</sup>

#### 4.2.1.3 *Judicial control over administrative environmental actions and legal remedies*

Considering that judicial control presupposes the existence of judges who impose upon the administration obedience to the law, the new constitutional order of the DRC of 2006 encapsulates important transformations of the organization and structure of the judicial system of the country. New jurisdictions have been created to allow judges to specialise in, and to scrutinize, specific issues with more attention and to decide legitimately on the appropriateness of legal remedies when human rights issues are in question.

##### a. Judicial system of the Democratic Republic of Congo

The judicial power, which is independent from the legislative and executive powers, is entrusted to courts and tribunals, namely: the Constitutional Court (*Cour Constitutionnelle*), the *Cour de Cassation*, the Council of State (*Conseil d'Etat*),<sup>82</sup> the Military High Court (*Haute Cour Militaire*), the civil and military courts and tribunals as well as the prosecutors' offices attached to these jurisdictions.<sup>83</sup> The Constitutional Court is charged with the control of the

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<sup>81</sup> Ordinance Law No 82-020 of 31 March 1982, *Official Journal* No 7 of 1<sup>st</sup> April 1982 completed by Ordinance Law No 83/009 of 29 March 1983, *Official Journal* No 7 of 1<sup>st</sup> April 1983, Chapter III. See also Mazyambo Makengo Kisala André *op. cit.* (n 61) 272.

<sup>82</sup> Until the establishment of the Constitutional Court, of the Council of State and the *Cour de Cassation*, the Supreme Court of Justice (*Cour Suprême de Justice*) exercises the functions which are conferred upon them by the Constitution (Article 223 of the Constitution). For more information on the former Congolese judicial system, one may refer to: Kihangi Bindu *op. cit.* (n 4) 41-42.

<sup>83</sup> Article 149 of the Constitution.

constitutionality of laws and of measures having the force of law.<sup>84</sup> Any individual may appeal to the Constitutional Court as to the unconstitutional nature of a statutory or regulatory measure. Furthermore, he or she may appeal to the Constitutional Court by way of raising the objection of unconstitutionality in a matter affecting him or her before a court.<sup>85</sup> This is a significant step to prevent any misinterpretation of constitutional provisions. The inception of civil, political, economic, social and cultural rights and, further, the right to environment and to development within the Constitution obliges judges to have a strong academic knowledge of human rights law. The interpretation of the foreign jurisprudence, for instance, South African and Indian jurisprudence on the justiciability of socio-economic and cultural rights, and further, environmental rights and the right to development, will certainly be helpful. The *Cour de Cassation* hears the appeals brought against the final sentences and judgments of the civil and military courts and tribunals.<sup>86</sup> The Council of State and the administrative courts and tribunals have administrative jurisdiction. The Council of State hears, as court of first and final instance, the applications for violations of the law brought against the measures, regulations and decisions of the central administrative authorities. It also hears the appeals against the decisions of the administrative Courts of Appeal. In addition, it hears, in cases where no other competent courts exist, the claims for compensation relating to the reparation of exceptional material or moral damage resulting from a measure taken or ordered by the authorities of the Republic. In this respect, it decides *ex aequo et bono*, taking into account all affected public and private interests.<sup>87</sup> Through courts and tribunals, human rights within the country should be respected, promoted and fulfilled with the judiciary as the guarantor of the

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<sup>84</sup> Article 160 of the Constitution.

<sup>85</sup> Article 162 of the Constitution; See also Mazyambo Makengo Kisala André *op. cit.* (n 61) 244, 271.

<sup>86</sup> Article 153 of the Constitution.

<sup>87</sup> The organic law which must define the organization and competences of these jurisdictions has not yet been passed by parliament. Article 155 of the Constitution.

individual liberties and fundamental rights of citizens.<sup>88</sup> The judges must oversee the rights proclaimed by the Constitution, but they must also apply the duly ratified international instruments on human rights.<sup>89</sup> This will certainly lead to the establishment of a ‘human rights culture’<sup>90</sup> sustained by the rule of law in the DRC.

b. Legal standing and other requirements for the employment of legal remedies aimed at controlling administrative actions

In terms of Article 27 of the Constitution, all Congolese have the right, individually or collectively, to submit a petition to the public authority which must respond to it within three months. It has been emphasized that no one may be incriminated or discriminated against in any way for taking such an initiative. This provision clearly opens the door to legal standing in the country for those wishing to litigate human rights concerns (including environmental rights). An important basis for any claim that can be formulated before the court by any individual or non-governmental organisation (NGO) involved in environmental activities<sup>91</sup> against any administrative action that threatens the enjoyment of

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<sup>88</sup> Article 150 of the Constitution.

<sup>89</sup> Articles 153, paragraph 5, and 215 of the Constitution.

<sup>90</sup> “Human rights culture” leads people to believe in rights. This means that one will not do certain things to fellow citizens or fellow human beings, no matter what. Human rights are the rights we have as human beings, and therefore are the ones we cannot lose. They are not connected to political or civil status, moral worth or conduct. Any human beings within the society, whatever the circumstances – poor and rich – are beneficiaries of rights. See Michael Ignatieff *Human rights, the laws of war, and terrorism* in Richard Falk Hilal Elver and Lisa Hajjar (eds.) *Human rights: Critical concepts in political science* (2008) Vol. III Routledge London and New York 27.

<sup>91</sup> See for instance Article 134 of the Forestry Code of 2002 which provides that: “The local communities representative associations and Non-Governmental Organisations recognized at the national level which contribute to the fulfilment of the governmental politics on environment may act on behalf of the civil parties on the facts that constitute a violation of the present law ... and a direct or indirect prejudice to the collective interests they are defending”. In French : “Les associations représentatives des communautés locales et les organisations non gouvernementales nationales agréées et contribuant à la réalisation de la politique gouvernementale en matière environnementale peuvent exercer les droits reconnus à la partie

environmental rights has, thus, been established and the courts can now play a pioneering role in developing a body of environmental jurisprudence.

However, it should be borne in mind that, before the legal remedies aimed at controlling the actions of public authorities may be sought from the court, various procedural requirements must be met by the applicant. It has been admitted that the administration itself is in the best position to remedy its own mistakes.<sup>92</sup> Internal administrative remedies available should be exhausted before an aggrieved person approaches the administrative or any other court<sup>93</sup> that represent a separate form of control foreign to the internal structure of an administration (*recours gracieux et recours hiérarchique*). Courts or tribunals will only be able to assist in the interpretation of fundamental rights, such as environmental rights, where they are at stake, if this procedure has been followed by the aggrieved person.

### c. The interdict and mandamus

In the process of judicial control over administrative actions, the interdict and mandamus are remedies of greatest importance for the purpose of compelling the administrative bodies to act lawfully and to perform their duties. 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

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civile en ce qui concerne les faits constituant une infraction aux dispositions de la présente loi ... et causant un préjudice direct ou indirect aux intérêts collectifs qu'elles ont pour objet de défendre.”

<sup>92</sup> Burns Y *op.cit.* (n 58) 290.

<sup>93</sup> Article 155 of the Constitution; *Articles 6 et 18 de l'Ordonnance 82-031 du 19 Mars 1982 portant Règlement d'Administration Relatif au Régime Disciplinaire et aux Voies de Recours du Personnel de Carrière des Services Publics de l'Etat (J.O.Z, no 8, 15 Avril 1982, p. 25) in Les Codes Larciens République Démocratique du Congo T. VI Droit public et administratif Vol. 2 Droit administratif Afrique Editions p. 267 ; See also Mazyambo Makengo Kisala André *op. cit.* (n 61) 275;*

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>94</sup> Conventionally, administrative bodies do not use the remedy of an interdict in cases where a person fails to comply with legislation. Amongst the reasons, one notes the fact that legislation usually provides methods for securing compliance with the legislation, like criminal sanctions, and that an interdict is a remedy which is available only where there is no other suitable remedy available to the applicant.<sup>95</sup>

On the other hand, a mandatory order is another legal weapon in the armoury of the court. This is a legal remedy aimed at compelling an administrative organ to perform a prescribed statutory duty. A mandamus, for instance, may be sought to compel the administrative organ to exercise its statutory discretionary power, but not to prescribe how it may exercise that discretion. A case relevant to this is (United Kingdom) *R v Camden London Borough Council, ex p Gillan* (1988) 21 HLR 114, in which the council was found to be in breach of its statutory duty under the Housing Act 1985 when dealing with applications for homelessness. The homeless persons unit was open only from 9.30 to 12.30 on weekdays, and applications could be made only by telephone. Financial constraints caused by rate-capping were not accepted as mitigating this administrative failure, and the mandamus was granted against the authority, together with a declaration. However, according to Leyland and Woods, a mandatory order is more often denied in circumstances where a local authority is doing everything it can to meet its statutory obligations. It may so happen that where the failure to meet its commitments arises from a lack of resources that are deemed to arise from

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<sup>94</sup> Wiechers *M op. cit.* (n 67) 267; Burns Y and Beukes *M op. cit.* (n 75) 514.

<sup>95</sup> Kidd *M op. cit.* (n 16) 220.



factors outside its control, then a mandatory order would be denied. This is because the balance of interests has to be weighed. In this order, if the courts make a decision compelling expenditure in one area, to the benefit of one class of applicants, the overall budget may be depleted, which may prove to be very much to the detriment of other essential services in the same locality.<sup>96</sup>

Admittedly, an interdict and a mandamus are two sides of the same coin; unauthorized action is prevented by means of interdict and compliance with a statutory obligation is enforced by means of a mandamus.<sup>97</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.

#### *4.2.1.4 Judicial review and statutory appeal*

Judicial review and statutory appeal are important ways to reinforce the principle of legality in a democratic society because, according to Sedley, administrative law is 'at base about wrongs, not rights'.<sup>98</sup> 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 met, while the function of a court of appeal is to determine whether the decision taken by the administrator is right or wrong.<sup>99</sup> USA law establishes a distinction between

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<sup>96</sup> Leyland Peter and Woods Terry *op. cit.* (n 77) 509.

<sup>97</sup> Wiechers M *op. cit.* (n 67) 268.

<sup>98</sup> Sedley LJ quoted by Cane Peter *Administrative law* (2004) 4<sup>th</sup> ed. Oxford University Press New York 78.

<sup>99</sup> In other words, judicial review is the exercise of the court's inherent power to determine whether action is lawful or not and to award suitable relief. For this no statutory authority is necessary: the court is simply performing its ordinary functions in order to enforce the law. The basis of judicial review, therefore, is common law. Thus, judicial review is a fundamental

judicial review of primary (i.e. parliamentary) legislation and judicial review of public decisions / rule making. Traditionally, in Britain, the courts lacked the power to review primary legislation to ensure its compliance with some 'higher law'. Currently, English courts can invalidate parliamentary legislation that is inconsistent with the European Community Law, and can make a declaration that parliamentary legislation infringes Convention rights in terms of the Human Rights Act of 1998.<sup>100</sup> In terms of articles 43, 54, 94, 95, 98, 114, 115, 146, 147, 148 and 149 of the Ordinance Law<sup>101</sup> on the Organization and Judicial Competence Code, the administrative sections of the Court of Appeal and of the Supreme Court of Justice, before the creation of administrative jurisdictions under the 2006 Constitution,<sup>102</sup> will continue to play a key role on these matters in the DRC until the effective establishment of the administrative courts. The evidence shows that not only must the courts take into account the requirements of administrative legality, but they must, further, apply environmental criteria in their decision-making because of the inclusion of environmental rights in the Constitution. With regards to respect for environmental concerns and other important aspects related to the lawfulness of administrative decisions, the Mining Code provides a judicial framework within which administrative decisions may be challenged. This is possible in terms of Article 46 of the Mining Code which provides that:

If the Mining Registry does not proceed to register the mining or quarry right in accordance with paragraph 4 of article 43 of the present Code within five

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mechanism for keeping public authorities within due bounds and for upholding the rule of law. See Wade HWR and Forsyth CF *op. cit.* (n 50) 33-34.

<sup>100</sup> Judicial review of legislation is usually treated as an aspect of constitutional law not administrative law. The distinction rests on the conception of the province of administrative law in terms of the threefold separation of governmental functions into legislative, executive (or 'administrative') and judicial, and an identification of the executive branch of government. See Cane Peter *op. cit.* (n 98) 28.

<sup>101</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>102</sup> Articles 154 and 155.

working days as of the date of the request for registration, the applicant can obtain a judgment granting mining or quarry rights, as applicable, by submitting a request addressed to the Chairman of the Tribunal of the High Court who has territorial jurisdiction, with a copy and the documents of the file to the Officer of the Public Ministry of this jurisdiction.

Within forty-eight hours following receipt of the petition, the Chairman of the Tribunal of the High Court who has territorial jurisdiction will decide the matter at the first available hearing in his jurisdiction. The Court will notify the applicant and the Officer of the Public Ministry through a clerk of the day and the time of the hearing.

Pursuant to the provisions of article 9 of Ordinance no 82-020 of March 31, 1982, relating to the Code for the Organisation and Jurisdiction of the Magistrates, as amended, the Public Ministry issues its opinion orally from the bench. This opinion is recorded by the clerk of the court.

Because there is no possibility of adjournment, the matter is docketed, processed, argued in court and the court adjourns for deliberation at the hearing set forth in the notice which notifies the hearing date.

Unless the request referred to in the previous paragraph fulfils the following conditions, it will be considered to be inadmissible:

- a) It must be submitted within a period of eight working days, commencing as of the expiry of the period of five days set forth in the first paragraph of the present article;
- b) It must contain the original or a certified copy, in addition to the requirements for the application set forth in article 35 of the present Code, receipt of his application, proof of payment of the filing costs, and the copies of the required registrar and technical opinions, and if applicable, the environmental opinion.

The Court's decision is made within 72 hours, as of the time the court adjourns to deliberate the matter and must:

- a) Determine that the decision to grant the rights by the competent authority has not been rendered within the deadline set forth by law;
- b) Determine the perimeter relating to the mining or quarry rights applied for, its geographical location and also the number of whole grid quadrangles constituting the surface area;
- c) Instruct the Mining Registry to register the terms of the judgment in its registers and to issue the corresponding mining or quarry titles and to insert the mining or quarry perimeter on the Mining Registry Map.

In any event, the judgment obtained is deemed to have the force of a mining or quarry title.

In addition, the Code defines the matters which are subject to court appeal through section 315 which states that:

Without prejudice to the provisions of article 46 of the present Code, the following are subject to court appeals, in particular:

- the withdrawal and the refusal to renew artisanal miner's and trader's cards;
- the refusal to transfer titles in cases of transfer or lease, by the person in charge at the  
Mining Registry or his local representative;
- overlaps between holders of mining rights;
- disputes between the holders or with the occupants of the land;
- confiscation of the guarantee or the provision for site rehabilitation in favour of the Mines Authority;
- disputes concerning compensation for expropriation;
- appeals against fines decided by the Mines Authority in case of irregular keeping of documents;

- the ban on leaving the National Territory;
- the imposition of a fine in case of failure to submit reports;
- the increase of penalties for late payment of the mining royalties and disputes due to cases of *force majeure*, as well as civil actions relating to the infringements provided for by this Code.

#### 4.2.1.5 Statutory criminal sanctions

Criminal sanctions are the most extensively used sanctions in environmental disputes when the legislative provisions are contravened. The criminal sanction can be imposed either as a primary, direct or independent sanction or as a subsidiary, indirect or supporting sanction.<sup>103</sup>

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>104</sup> It is from this perspective that, for instance, 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 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 *concessionnaire* 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

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<sup>103</sup> Kidd *op. cit.* (n 16) 210.

<sup>104</sup> *Idem.* See also Bray W *Environmental Law: Study Guide for LCP 407-P* (2003-2004) University of South Africa Pretoria at 98.

sanctions are applied as a last resort. This is also true in the light of the regime of sanctions provided by the Forestry Code in articles 143 to 154.

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. 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>105</sup>

Obviously, criminal law is designed to react to offences that have already been committed and that might often be too late to prevent damage to the environment.<sup>106</sup> In order to protect the environment efficiently, one needs to focus on prevention<sup>107</sup> through education rather than punishing those who harm the environment. The process of environmental impact assessment could present such a preventive mechanism and will be helpful to appreciate people's commitment to the management of the environment for the benefit of present and future generations.

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<sup>105</sup> Bray W *op. cit.* (n 104) at 98.

<sup>106</sup> Kidd M *op. cit.* (n 16) 212.

<sup>107</sup> Prevention has to be considered as the golden rule for the environment. See Kihangi Bindu *The precautionary principle in the protection of the environment*, United Nations International Law Seminar 45 Session (6 – 24 July 2009), International Law Commission: Working Group on the Selection of Future Topics, paragraph 161.

#### 4.2.1.6 *Environmental Impact Assessment procedure and the promotion of environmental rights in the Democratic Republic of Congo*

The Environmental Impact Assessment (EIA) was first introduced by the USA in 1969 to obtain adequate and early information on the likely harmful environmental consequences of development projects and to seek possible alternatives and measures to prevent or mitigate harm.<sup>108</sup> This is a prerequisite to decisions to undertake or to authorize designed construction, processes or activities. Due to its pertinence related to environmental rights protection and promotion, the Environmental Impact Assessment procedure has been sustained and provided for by different international instruments, namely, the 1998 Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, adopted in Aarhus, Denmark on 25 June 1998, and entered into force in 2001,<sup>109</sup> and the 1991 Espoo Convention on Environmental Impact Assessment in a Transboundary Context that provides, in terms of its article 2(6), for:

an opportunity to the public in areas likely to be affected to participate in relevant impact assessment procedures regarding proposed activities and shall ensure that the opportunity provided to the public of the affected area is equivalent to that provided to the public of the State of origin.

Environmental Impact Assessment is a procedure whereby the procedural approach of environmental human rights (right to information, to participation and access to justice) constitute the backdrop of the study or survey which must

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<sup>108</sup> Kiss A and Shelton D *Manual of European environmental law* (1997) 2<sup>nd</sup> ed. Cambridge University Press United Kingdom 123.

<sup>109</sup> The following states are parties to the Convention: Albania, Armenia, Azerbaijan, Belarus, Denmark, Estonia, Georgia, Germany, Hungary, Italy, Kazakhstan, Kyrgyzstan, Republic of Moldova, Romania, Tajikistan, the Former Yugoslav Republic of Macedonia, Turkmenistan and Ukraine. See Giorgetta Sueli “The right to healthy environment” in Nico Schrijver and Friedl Weiss (eds.) *International law and sustainable development: Principles and practice* (2004) Martinus Nijhoff Publishers Leiden / Boston 399.

be conducted. One recognizes that in the field of the environment, improved access to information and public participation in decision-making enhance the quality and the implementation of decisions, contributes to public awareness of environmental issues, gives the public the opportunity to express its concerns and enables public authorities to take due account of such concerns. The Aarhus Convention has been devoted to the procedural environmental human right: ‘an individual must be granted the right to receive information, be entitled to participate in the decision-making process in environmental matters and to have access to environmental justice. Failure to comply with these obligations implies a breach of a treaty by a State.’<sup>110</sup> In 2002, Article 24 of the African Charter<sup>111</sup> formed the basis for a petition filed by two non-governmental organisations (NGOs) before the African Commission, on behalf of the Ogoni people, against the Nigerian government and the Shell Oil Company.<sup>112</sup> The claim was filed on such human rights grounds as the right to life and the right to health. An environmental human right was interpreted by the Commission broadly as not only providing a clean environment and unimpaired access to resources, but also as containing a duty to conduct environmental impact assessment studies prior to any activity that may impact adversely on the environment. In addition, it also emphasized the right to information and the right to be heard as being part and parcel of the provisions of the environment impact assessment. By the way, it may be stated that the Environmental Impact Assessment constitutes, undoubtedly, a procedural human right to a clean environment. However, this is

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<sup>110</sup> Preamble and Article 9 of the Aarhus Convention (Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters of 1998). See also Malgosia Fitzmaurice and Marshall Jill “The human right to a clean environment – phantom or reality? The European Court of Human Rights and English Courts perspective on balancing rights in environmental cases” (2007) Vol. 76 No. 2-3 *Nordic Journal of International Law* at 107.

<sup>111</sup> Article 24 of the Charter provides that: “All peoples shall have the right to a general satisfactory environment favourable to their development.”

<sup>112</sup> Kaniye Ebeku SA The right to a satisfactory environment and the African Commission (2003) *African Human Rights Law Journal* at 163.



often overlooked.<sup>113</sup> For some time the DRC has not had proper legislation to govern the practice of Environmental Impact Assessment studies<sup>114</sup> and so normally uses the World Bank's practices and procedures as a model. The legal vacuum has been a source of misunderstanding and conflict between the public authorities and local communities.<sup>115</sup> Article 15 of the Forestry Code of 11 August 2002 of the Democratic Republic of Congo and Articles 5, 6, 7, 8, 9, and 10 of the Decree No 08/08 of 08 April 2008, which define the Procedure on the Classification and Declassification of Forests, require the approval of the Provincial Council in partnership with the administrative authorities concerned. They must first contact and talk to the population before any decision may be undertaken by the Minister on the environmental matter concerned. An Environmental Impact Assessment study must follow the correct process as defined by Articles 18, 19 and 20 of the Decree No 08/08 of 08 April 2008 defining the Procedure of Classification and Declassification of Forests.<sup>116</sup> It is

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<sup>113</sup> Malgozia Fitzmaurice and Marshall Jill *op. cit.* (n 110) at 108.

<sup>114</sup> See Environmental Impact Assessment (EIA) legislative requirements for SADC Member States, Annexure 1.

<sup>115</sup> In this order, one may mention the Ministerial By-Law No 13/CAB/MIN/ECN-EF/2006 of 3 April 2006 on the Creation of a Nature Reserve called "*Réserve des Primates de Kisimba – Ikobo, en abrégé RPKI*" from the Ministry of Environment, Nature Conservation, Waters and Forests, that has been the subject of disapproval from the interested local communities in Walikale/North-Kivu Province. In their correspondence to the Minister on 12 September 2007, the local communities considered that the above Ministerial By-Law must be cancelled on the ground that they have not been informed or involved in the decision-making process. In French words: *La population dénonce une violation flagrante de l'article 15 du Code Forestier du 11 Août 2002 qui dispose que le classement s'effectue par arrêté ministériel après avis conforme du conseil consultatif provincial des forêts concernées, fondé sur la consultation préalable de la population riveraine.*

<sup>116</sup> The Environmental Impact Study contains the following elements:

- A non-technical summary of the Environmental Impact Study file;
- General information, namely, the description of the suggested project, the features and limitations of the study area, the main concerned parties;
- The presentation of the threats to the environment;
- A compilation of the regulatory framework pertaining to the suggested project;
- An identification and assessment of possible positives and negatives, direct and indirect, immediate and non-immediate, important, local and other environmental impacts of the suggested project;
- An analysis of solutions for the replacement;

only in the light of the above procedure that the Minister will be well equipped and informed enough to make a decision. The Mining Code of 2002 contains some provisions related to environment and to an Environment Impact Study (EIS)<sup>117</sup> as an a priori scientific analysis of the foreseeable potential effects a

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- An estimation of types and quantities of emission (water pollution, air and soil, noise, vibration, etc.) and the impact on the conservation of biological diversity caused by the project;
  - A description of measures to prevent, to reduce or to compensate the grave deterioration of the environment and the description of appropriate alternative measures;
  - A brief description of methods used to consult the populations living around the forest, territorial collectives, concerned organizations and possible results;
  - Costs analysis and advantages;
  - A follow-up plan and the monitoring of impact;
  - Demographic analysis of results concerning the populations that may be affected.

<sup>117</sup> Article 15 reads:

In co-ordination with the other States responsible for the protection of the environment, the Department in charge of the protection of the Mining Environment within the Ministry of Mines exercises the powers which are devolved to it by the present Code and by all other regulations regarding the protection of the environment, in particular:

- a) The definition and the implementation of the mining regulations concerning environmental protection with regard to:
  - the rules governing exploration;
  - the rules governing artisanal miners;
  - the guidelines for exploration and exploitation activities for mines and quarries;
  - the conditions to supervise the obligations with regard to environmental protection.
- b) The technical evaluation of the Mitigation and Rehabilitation Plan (MRP) in relation to the prospecting operations for mineral substances classified as mines and quarries; and
- c) The technical evaluation of the Environmental Impact Study and the Environment Management Plan of the Project (EMPP) presented by the applicants requesting mining or quarry exploitation rights.

Article 42, In accordance with the provisions of article 15 of the present Code and the provisions concerning each type of mining and/or quarry right, the department responsible for the protection of the mining environment evaluates the Environmental Impact Study and the Environmental Management Plan of the Project (EMPP) relating to the application for mining exploitation rights or Permanent Quarry Exploitation Authorization, as well as the Mitigation and Rehabilitation Plan relating to an application for a temporary Quarry Exploitation Authorization in accordance with the provisions of the present Code. At the end of the evaluation, it provides its opinion on the environmental aspects to the Mining Registry, within the deadline/time period set forth for each type of mining and/or quarry right.

Within a maximum period of five working days following receipt of the opinion on the environmental aspects, the Mining Registry proceeds:

- a) To display the opinion on environmental aspects provided by the department responsible for the mining environment, in the premises set forth in the Mining

given activity will have on the environment, as well as the analysis of the acceptable levels thereof and the mitigating measures to be taken to ensure the conservation of the environment, subject to the best technology available, at a viable economic cost.<sup>118</sup> However, the Code does not define the manner in which the study must be conducted and how the citizen will be involved in the process. In addition, the Draft Environmental Act of 18 September 2007 (*Loi - Cadre*), which is not yet law and is under discussion by Parliament, provides for a social and environmental evaluation in articles 51 to 56.

The rights to information, to public participation in the decision-making process and to access to justice are all supposed to be promoted as part of the process of Environmental Impact Study, but in practise, they are hardly taken into account. Most of the time, provisions for environmental impact studies to be conducted for all projects within the country suffer from the lack of implementation and enforcement. It is likely that impunity, within the country, and bad governance are the main reasons for this disappointing situation.

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Regulations. A copy of the opinion on the environmental aspects is provided to the applicant.

b) To send the file relating to the application, including with the registrar and the technical opinion, to the competent authority for decision.

The department responsible for the protection of the mining environment will also examine the Mitigation and Rehabilitation Plan (MRP) submitted by the holder of a mining right or quarry exploration right and, on completion, will submit its opinion on the environmental aspects to the Mining Register within the deadline/time limit set forth in the Mining Regulations.

<sup>118</sup> Article 1, point No 19.

## RIGHT TO DEVELOPMENT

### 4.2.2 Implementation and enforcement of the right to development in the Democratic Republic of Congo

The right to development is novel and its composite nature, underscored by the United Nations Declaration on the Right to Development, means the implementation and enforcement of the right to development is a complex issue. It requires, at the international level, and more particularly, at the national level, a correct understanding of the appropriate mechanisms at grass roots level. Any initiative to legislate these rights is more than welcome, but designing a programme of action that would facilitate the realization of these rights would be even better. The programme for realizing the right to development should be built upon the identification and specification of duties for different agents that clearly outline the accountability of the agents, making their obligations clear-cut, and increasing the validity of the right to that programme. If it is properly designed, the execution of that programme would very likely lead to the realization of first and second generation rights as the outcome of the process of development, and increase the likelihood of its execution. In addition, the programme should also be built upon the interdependence of all human rights both at a point in time and over a period of time and of the rights and policies for realizing these rights. The obligations appropriately defined and specified, and based on this interdependence, would then make possible the fulfilment over time and in a sustainable manner all of these rights which by their nature will have to be realized through progressive improvement. Thus, what may be required is a monitoring authority or a dispute settlement agency, other than a court of law, to settle claims.<sup>119</sup> The democratic institutions of local bodies, or

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<sup>119</sup> Sengupta Arjun “Implementing the right to development” in Nico Schrijver and Friedl Weiss (eds.) *op. cit.* (n 109) 350. See also Sengupta Arjun “On the theory and practice of the right to development” (November 2002) Vol. 24 No. 4 *Human Rights Quarterly* at 861.

non-governmental organisations, or public litigation agencies, may prove to be quite effective in dealing with the rights-based issues.

#### 4.2.2.1 *Understanding the right to development as a right to a process of development in the Democratic Republic Congo*

It is certain that in the implementation of any right, one can hardly make an abstraction of the context in which it is invoked and applied, and relating it to the context is necessary to its vindication in the *cas d'espèce*.<sup>120</sup> The understanding of the right to development as a right to a *process* of development<sup>121</sup> in the Democratic Republic of Congo is no exception.

Emerging from colonial rule, the Congolese considered their independence as the beginning of a new process of development and an era of the protection and promotion of human rights. Unfortunately, the political regimes that emerged in the country during the First and the Second Republic were not only shaken up by various internal and external threats, but also, fulfilled an agenda which did not merge with the peoples' expectations.<sup>122</sup> The context of human rights violations was in direct conflict with the process of development that should have been brought about. After a hiatus, the organization of general Presidential

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<sup>120</sup> Antonio Augusto Cançado Trindane *Human rights and the environment* in Janusz Symonides (ed.) *Human rights: New dimensions and challenges* (1998) Ashgate Dartmouth USA 135.

<sup>121</sup> Taking into account the provisions of article 1 and the Declaration's Preamble on the right to development that defines the concept of development as a "comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom", the right to development has been defined as a right to the process of development in which all human rights and fundamental freedoms can be fully realized. See Sengupta Arjun "Implementing the right to development" in Nico Schrijver and Friedl Weiss (eds.) *op. cit.* (n 109) 343; Aguirre D *The human right to development in a globalized world* (2008) Ashgate Publishing Limited UK / USA 67.

<sup>122</sup> Nzongola Ntalaja G *The Congo from Leopold to Kabila: A people's history* (2002) Zed Books London New York 253 – 255.

and Parliamentary elections<sup>123</sup> held in 2006 was a significant event for the Congolese people and all partners of the DRC to think about, and to find ways to build up, and/or to strengthen the culture of human rights protection and promotion along with the process of development. It is in keeping with this approach that a process of development, elaborated around the ‘*Cinq Chantiers du Chef de l’Etat*’,<sup>124</sup> sustained by a strong moral commitment to good governance<sup>125</sup> and to the promotion and fulfilment of human rights protection, has been launched by the new State institutions. This is a process<sup>126</sup> which

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<sup>123</sup> Loi No 06/006 du 09 Mars 2006 portant Organisation des Elections Présidentielles, Législatives, Provinciales, Urbaines, Municipales et Locales ; Décision No 0003/CEI/BUR/06 du 09 Mars 2006 portant Mesures d’Application de la loi No 06/006 du 9 Mars 2006 portant Organisation des Elections Présidentielles, Législatives, Provinciales, Urbaines, Municipales et Locales.

<sup>124</sup> These are five points drawn from the national Governmental Programme considered as priorities by the President of the Republic for the reconstruction and the development of the country: the reconstruction of infrastructure; health and education; housing; water and electricity; and job creation. This plan will be realized progressively and will continue after the mandate of the current government. All Congolese are invited to participate actively in this long process of reconstruction and development of the country. See *Les cinq chantiers de la République Démocratique du Congo*. Available at: <http://www.cinqchantiers-rdc.com/chantier.htm> (visited 21/01/2008). See also *The Governmental Programme of the Democratic Republic of Congo* (October 2008) P. 3.

<sup>125</sup> Good governance is a fundamental principle of governmental action characterized by participation, transparency, accountability, adherence to the rule of law, efficacy and equity. The pillars of good governance for successful development have been defined by the government: judicial independence, upholding human rights, combating impunity, rooting out corruption, fraud and the mismanagement of public companies, cleaning up of the procedures of the public markets, redistribute equitably the national wealth between citizens and between provinces. See *The Governmental Programme of the Democratic Republic of Congo: 2007-2011* (Février 2007) Kinshasa 35; *Le programme du gouvernement de coalition de la République Démocratique du Congo* Octobre 2008. Available at: <http://www.societecivile.cd/node/3240>. (visited 24/01/2008). Tshingombe Mulubay Fidèle “La promotion de la bonne gouvernance dans le Programme du Gouvernement de la RD Congo (2007-2011)” (Mars 2008) No 423 *Congo – Afrique XLVII Economie – Culture – Vie Sociale* 177.

<sup>126</sup> Arjun Sengupta points out that the Gross Domestic Product (GDP) reflects the richer groups able to access capital and human resources and who increase their prosperity on a daily basis, unlike the majority of the poor. Growing industrialization may occur without the additional income generated necessarily feeding into other sectors, and while exports may be thriving industries, the “economic hinterland” is not always included in the benefits of growth. Thus, all of these economic phenomena may be classified as development but they do not meet the criteria of Sengupta’s *process* of development as they do not include a process whereby equal opportunities are promoted. Sustainable economic growth that realizes the

implies the full participation of individuals in the decision-making process and the benefits of governmental actions carried out in conjunction with international cooperation. Fundamental human rights and freedoms, respect and access for all to basic resources and services are not only requirements but permanent priorities.<sup>127</sup> Equity and justice are two values that can offer the majority of the poor the capacity to improve and strengthen their position, and can lead to the well-being of the entire population, because all the Congolese have the right to enjoy the national wealth. The State has the duty to share and to redistribute the wealth equitably.<sup>128</sup>

Learning from the provisions of the Declaration on the Right to Development,<sup>129</sup> human development constitutes the core of the right to development, but the right cannot be limited or confined to human development, but goes beyond it.<sup>130</sup> This right builds upon the notion of human development and can be defined as a development process that expands substantive freedom and thereby realises all human rights.<sup>131</sup> In this regard, the Constitution proclaims the right of

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right to development must be supported by the principle of equality to avoid unwieldy concentrations of economic wealth and power. Economic growth should create opportunities that will improve development indicators for, among others, education, gender equity, and respect for environmental protection and human rights. See Sengupta Arjun “On the theory and practice of the right to development” *op. cit.* (n 119) at 848.

<sup>127</sup> Maria Magdalena Kenig-Witkowska “The UN Declaration of the Right to Development in the light of its travaux preparatoires” in Paul De Waart, Paul Peters and Erik Denters (eds.) *International law and development* (1988) Martinus Nijhoff Publishers Dordrecht Boston London 386.

<sup>128</sup> Article 58 of the Constitution.

<sup>129</sup> Article 1.

<sup>130</sup> The right to development essentially integrates the human development approach into the human rights-based approach to development. It goes beyond accepting the goals of development in terms of human development and assesses the different forms of social arrangement conducive to those outcomes in terms of these goals of development. It converts those goals into the rights of individuals and identifies the responsibility of all the duty holders, in compliance with human standards. See Sengupta Arjun “Implementing the right to development” in Nico Schrijver and Friedl Weiss *op. cit.* (n 109) 346.

<sup>131</sup> The *Human Development Report 2000* underlines that “human development thinking focuses on the outcomes of various kinds of social arrangements and many of the tools of that approach measure the outcomes of social arrangements in a way that is not sensitive to how

all persons to the free development of their personality.<sup>132</sup> The Governmental Programme highlights humanism by putting the citizen at the centre of all governmental actions.<sup>133</sup> However, when human development is claimed as a human right, it undergoes or takes on a qualitatively different approach according to Sengupta.<sup>134</sup> It should not be understood as just achieving the objectives of development, but also means that the way those objectives are achieved are essential to the process. The objective is to fulfil human rights and the process of achieving this fulfilment is also a human right. In other words, the outcomes of development as well as the way in which the outcomes are realized, constitute the process of development, which is simultaneously regarded as a human right. It is a process in time, not a finite event, and the elements that constitute development are interdependent, both at a point in time and over a period of time.<sup>135</sup> In this ongoing process, all features of human rights must be taken into account: respect for the notion of equity and participation, not to violate human rights, a clear specification of obligations and responsibilities, to

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these outcomes were brought.” In contrast, human rights’ thinking focuses on how outcomes are brought about, if the State’s obligations have been met and if human rights’ standards have been upheld. The human rights approach is not about mere material welfare, but goes further to the realization of such values as empowerment, the voice of the individual and human dignity. The central placement of people in the development process brings much needed integrity and humanity to development. See UNDP, *Human Development Report 2000* (2000) Oxford University Press New York 22; Emilie Wilson Filmer “The human rights-based approach to development: The right to water” (June 2005) Vol. 23 No. 2 *Netherlands Quarterly of Human Rights* at 240; Sengupta Arjun “Implementing the right to development” in Nico Schrijver and Friedl Weiss (eds.) *op. cit.* (n 109) 346. Sengupta Arjun *op. cit.* (n 119) at 851.

<sup>132</sup> Article 16 Paragraph 2. See also Ngondankoy Nkoy-ea-Loongya *Droit Congolais des droits de l’Homme* (2004) Bruylant Belgique 261.

<sup>133</sup> See The Governmental Programme of the Democratic Republic of Congo: 2007-2011 (Février 2007) Kinshasa p. 37. See also *Le Programme du Gouvernement de Coalition de la République Démocratique du Congo*, *op. cit.* (n 124).

<sup>134</sup> Sengupta Arjun *op. cit.* (n 119) at 851.

<sup>135</sup> Sengupta Arjun “Implementing the right to development” in Nico Schrijver and Friedl Weiss (eds.) *op. cit.* (n 109) 343. See also Sengupta Arjun “The right to food in the perspective of the right to development” in Wenche Barth Eide and Uwe Kracht (eds.) *Food and human rights in development: Evolving issues and emerging applications* (2007) Vol. II Intersentia Oxford 110.



establish culpability and to have a mechanism for monitoring and correcting the failures of the process in place.

Looking at the right to development as an integrated process<sup>136</sup> which brings together all human rights, one must not merely be, in the light of the Congolese Governmental programme, preoccupied with the realization of those rights individually, but the realization of them together in a manner that takes into account their effects on each other, both at a particular time and over a period of time.<sup>137</sup> It has been indicated clearly by the Congolese Government that the execution or realization of the programme or the rights contained in it will be phased in and will continue after the mandate of the current Government ends in 2011.<sup>138</sup> The progressive option taken by the Government is reflected in the words of Odinkalu Chidi.<sup>139</sup> He asserts that the many African States that have ratified the International Covenant on Economic, Social and Cultural Rights<sup>140</sup> demonstrates that the African Charter States prefer the ‘progressive realization’ standards to the immediacy of the time frame, and peremptory obligations of the

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<sup>136</sup> Sengupta Arjun “Implementing the right to development” in Nico Schrijver and Friedl Weiss (eds.) *op. cit.* (n 109) 347.

<sup>137</sup> Sengupta Arjun *op. cit.* (n 119)) at 873.

<sup>138</sup> *Le Cinq chantiers de la République Démocratique du Congo*, *op. cit.* (n 124).

<sup>139</sup> Odinkalu Chidi Anselm “Implementing economic, social and cultural rights under the African Charter on Human and Peoples’ Rights” in Evans Malcolm D. and Murray Rachel (eds.) *The African Charter on Human and Peoples’ Rights: The system in practice 1986 – 2000* (2002) Cambridge University Press UK New York 200.

<sup>140</sup> UN GA Res. 2200 (XXI), UN GAOR, 21<sup>st</sup> Session, Supp. No. 16, UNDoc.A/6316, adopted 16 December 1966, entered into force 3 January 1976, 993 UNTS 3. The Democratic Republic of Congo ratified the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights on the 1<sup>st</sup> November 1976. See Nobirabo Musafiri Prosper *Droit foncier des peuples autochtones et le droit international: Cas des peuples de la forêt “Pygmées” de la RD Congo* (2007) Stämpfli Editions Berne 492. See also *Journal Officiel de la République Démocratique du Congo Instruments internationaux relatifs aux droits de l’homme ratifiés par la République Démocratique du Congo* (9 Avril 1999) 40<sup>ème</sup> Année Numéro Spécial Cabinet du Président de la République 12.

African Charter.<sup>141</sup> The African Charter avoids qualifying the concept of progressive realization in guaranteeing the socio-economic and cultural rights, except for article 16(1) that guarantees the *best attainable* state of physical and mental health.<sup>142</sup> The realization of the rights is a process of integration which means that the realization of rights, separately or jointly, must be based on comprehensive development programmes using all possible resources for output. The realization of human rights is the goal of the programme and the resources and policies affecting technology, finance and institutional arrangements are the instruments for achieving this goal. In fact, the Congolese Governmental Programme has been designed in line with the Constitution which provides for these economic, social and cultural rights.<sup>143</sup> In spite of the fact that all human rights are taken into consideration, the drafters were particularly concerned by the economic, social and cultural rights: the rights to health and education, the rights to decent housing, access to clean drinking water and to electricity, and the right to work. Without neglecting the composite nature of the right to development in the process of development launched through the

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<sup>141</sup> Article 2(1) of the International Covenant on Economic, Social and Cultural Rights provides that:

Each State Party to the present covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures. On the other side, Article 62 of the African Charter on Human and Peoples' Rights reads:

Each State Party shall undertake to submit every two years, from the date the present Charter comes into force, a report on the legislative or other measures taken with a view to giving effect to the rights and freedoms recognized and guaranteed by the present Charter. See Hamalengwa M, Flinterman C and Dankwa EVO *The international law of human rights in Africa: Basic documents and annotation bibliography* (1988) Martinus Nijhoff Publishers Dordrecht Boston London 168; Office of the United Nations High Commissioner for Human Rights *Human rights: A compilation of international instruments: Regional instruments* (1997) Vol. II United Nations New York and Geneva 345.

<sup>142</sup> Odinkalu Chidi Anselm "Implementing economic, social and cultural rights under the African Charter on Human and Peoples' Rights" in Evans Malcolm D. and Murray Rachel (eds.) *op. cit.* (n 139) 196.

<sup>143</sup> Chapter 2, Title II of the Constitution: Human rights, fundamental liberties and the duties of the Citizens and the State.

Governmental Programme, the rights referred to (and discussed below) will be fulfilled gradually.

a. The right to health

Inspired by international instruments on human rights providing the right to health to which the DRC is a signatory, the Constitution guarantees this right in terms of article 47 which reads:

The right to health and to food security is guaranteed.

The law defines the fundamental principles and the rules of organization for public health and food security.

As the fulfilment and promotion of the right to health is considered a priority, the Governmental Programme has elaborated upon it in more detail. No one may enjoy his life or be productive if he is not healthy. This seems to be why the drafters of the Constitution put the right to health and the right to food together.<sup>144</sup> Food security offers the opportunities for health and human production in different sectors of development. According to the Government, this will be realized through mechanisms which will take into account ethics, equity, solidarity and the humanization of health care services. The quality of health care services, community participation, decentralized productive services at all levels of decision-making remain the principles that will guide the fulfilment of the national policy on health.

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<sup>144</sup> A policy to realize the right to food cannot be properly designed and implemented without taking into consideration the policies to implement other rights, or at least those rights which have close linkages with it. In other words, the realization of the right to food would be integrally related to the realization of other rights. See Sengupta Arjun “The right to food in the perspective of the right to development” in Wenche Barth Eide and Uwe Kracht (eds.) *op. cit.* (n 135) 111.

Along the way, different actions need to be undertaken by the Government, namely:

- to decentralize the national health;
- to improve the accessibility to adequate health care services and infrastructures, the availability of equipment and essential medicines, the deployment of human resources all over the country and raising of funds;
- to improve the quality of services through the motivation of the staff, to develop activities related to information on sanitation, the training of the staff, research and communication on health;
- to promote a healthy environment conducive to good health through appropriate hygienic activities, the cleaning up of the environment, the control of the quality of drinking water and food supplies.

This should be done as part of the global aim to combat poverty.<sup>145</sup> In spite of the above-mentioned programme, it is important to know the current state of health in the country. Compliance with the level of fulfilment envisaged by the Millennium Development Goals (MDGs) within the health sector of the DRC remains very poor. For instance, a survey conducted on mortality rates revealed that as many as 126 children out of each 1000 die before the age of 5 years. The maternal mortality rate is likewise high: with 1 289 cases of death for every 100 000 cases of birth. In addition, 97% of the Congolese population is dangerously exposed to malaria. It is estimated that between 150 000 and 250 000 children under the age of 5 years have died from malaria.<sup>146</sup> These alarming statistics have moved the Government to implement the measures contained in its

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<sup>145</sup> See The Governmental Programme of the Democratic Republic of Congo: 2007-2011 (Février 2007) Kinshasa 28, 49-50; The Governmental Programme of the Democratic Republic of Congo (October 2008) 25 *op. cit.* (n 124).

<sup>146</sup> République Démocratique du Congo *Document de la Stratégie de Croissance et de Réduction de la Pauvreté (DSCR)* (Juillet 2006) Kinshasa 35.

document defining the growth strategy for poverty reduction: *Document de la Stratégie de Croissance et de Réduction de la Pauvreté* (DSCR). This document plans, for example, to improve the health care services by reducing the infant mortality rate from its level of 104% in 2007.<sup>147</sup> This remains an ambitious and sustainable programme that will have a positive impact if it can operate successfully through a legitimate process of good governance.

#### b. The right to education

In compliance with international human rights instruments, such as the African Charter on Human and Peoples' Rights,<sup>148</sup> the right to education has been entrenched in some detail in the Constitution. All persons have the right to a school education. It is provided by the national system of education which consists of public, and approved private, establishments. Primary education is compulsory and free of charge in the public establishments.<sup>149</sup> All persons have access to establishments of national education without discrimination on the grounds of place of origin, race, religion, sex, political or philosophical opinions, physical, mental or sensorial condition in accordance with their capacities.<sup>150</sup> In this context, the eradication of illiteracy is a national duty<sup>151</sup> and it has been emphasized in the Governmental Programme.<sup>152</sup> With the aim of achieving the Millennium Development Goals quickly, particularly those for education, the government would like to put in place a policy that proclaims the compulsory character of education and to make education free. In its 2006

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<sup>147</sup> *Id.* at 82.

<sup>148</sup> Article 17, paragraph 1.

<sup>149</sup> Article 43 of the Constitution.

<sup>150</sup> Article 45, paragraph 3, of the Constitution.

<sup>151</sup> Article 44 of the Constitution.

<sup>152</sup> See The Governmental Programme of the Democratic Republic of Congo: 2007-2011 (February 2007) Kinshasa p. 29; The Governmental Programme of the Democratic Republic of Congo (October 2008) 26, 61-64. See also *Les Cinq Chantiers du Chef de l'Etat: Santé et éducation*, *op. cit.* (n 124) (visited 22/01/2008).

programme, the government planned to reach 80% of schooling in 2008 and 100% in 2015.<sup>153</sup> This is a real challenge that needs to be tackled urgently by the government because investment in education and health care make for healthy and educated citizens who will then themselves become agents of development.<sup>154</sup>

c. The rights to decent housing, access to clear drinking water and to electric energy

Under the ‘umbrella’ of the International Covenant on Economic, Social and Cultural Rights,<sup>155</sup> and other international instruments on human rights, the Constitution of the DRC provides for the rights to decent housing, of access to clear drinking water and to electricity.<sup>156</sup> The Governmental Programme views housing as an important element for human subsistence and dignity, which contributes greatly to the improvement of the standard of living of the population. Coming out of damages and disruption of the armed conflict, housing is a major issue that needs a higher priority on the agenda of the Government. In this respect, the Government has committed to an attractive policy on investment sustained by a more flexible procedure for granting land to this sector. In the same vein, water and electricity have also been defined as necessities to improve the living conditions of the population and to sustain the economic sector.<sup>157</sup> As important factors in the process of development, the

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<sup>153</sup> *République Démocratique du Congo op. cit.* (n 146) 80.

<sup>154</sup> USAID Millennium challenge account update, Fact Sheet, 3 June 2002. Available at: [http://www.usaid.gov/press/releases/2002/fs\\_mca.htm](http://www.usaid.gov/press/releases/2002/fs_mca.htm) (visited 20/12/2002) in Marks Stephen *Obstacles to the right to development* Harvard University at 15; See also Marks Stephen “The human right to development: between rhetoric and reality” (2004) Vol. 17 *Harvard Human Rights Journal* 157. See also the Governmental Programme of the Democratic Republic of Congo (October 2008) 59-61, *op. cit.* (n 124).

<sup>155</sup> Article 11.

<sup>156</sup> Article 48 of the Constitution.

<sup>157</sup> The Governmental Programme of the Democratic Republic of Congo: 2007-2011 (February 2007) Kinshasa 48-49. *Les Cinq chantiers du Chef de l’Etat: Logement, Eau et Electricité, op. cit.* (n 124).

Government would like to increase the people's access to potable water from 22% in 2005 to 26,9% in 2008, to reach the level of 49% in 2015,<sup>158</sup> and 60% to have access to electricity throughout the country before 2025.<sup>159</sup> Considering the hydrographic and energy potential of the country, it is regrettable that after more than 40 years of independence people are still struggling to have these basic needs met.<sup>160</sup>

#### d. The right to work

Considered a sacred right and duty for every Congolese citizen, everyone must contribute, through their work, to national reconstruction and prosperity. The Constitution guarantees the right to work in line with international instruments on human rights. In terms of Article 36 Paragraph 2, of the Constitution:

the State guarantees the right to work, protection against unemployment and an equitable and satisfactory pay, thus ensuring the worker as well as his/her family of a life in accordance with human dignity, together with all other means of social protection, in particular retirement and lifetime pensions.

The rate of unemployment, which has increased over the decades in the DRC,<sup>161</sup> has been an important reason why so many young people join armed groups. With this in mind and to get rid of juvenile threats for the benefit of peace-building and development, a national policy on employment, sustained by a plan of execution, must be established and given 'teeth' through reinforced statutes

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<sup>158</sup> *République Démocratique du Congo op. cit.* (n 146) 84.

<sup>159</sup> *Id* at. 75, 84.

<sup>160</sup> The Governmental Programme of the Democratic Republic of Congo (October 2008) 22-24 *op. cit.* (n 124).

<sup>161</sup> The Governmental Programme of the Democratic Republic of Congo: 2007-2011 (February 2007) Kinshasa 22; The Governmental Programme of the Democratic Republic of Congo (October 2008) 19 *op. cit.* (n 124).

and policies on employment.<sup>162</sup> A survey conducted by the government in 2006 reveals that 80% of the population between 15 and 64 years are unemployed!<sup>163</sup> The government underlined the fact that important measures and strategies must be undertaken to promote employment and revenue for the population within the country for the well-being of all. Job creation is to be considered as a significant means to fight against poverty. Contrary to what has been outlined by the Congolese Government in its Programme of 2006, little has been done to actively alleviate unemployment in the country. This attitude of government leaders may be interpreted as a lack of willingness to lead the country on the road to development.<sup>164</sup>

Indeed, the implementation of the aforementioned rights, and those others which fall under the ‘umbrella’<sup>165</sup> of the right to a process of development taking place in the DRC, are still outstanding. The discovery of strong and proper mechanisms, defined through the policies related to them, must be given high priority both at the national and provincial levels. There is a real need to flesh them out through the judicial process, and to build up within the country a ‘good

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<sup>162</sup> The Governmental Programme of the Democratic Republic of Congo: 2007-2011 (February 2007) Kinshasa 46 *op. cit.* (n 124).

<sup>163</sup> *République Démocratique du Congo op. cit.* (n 146) 78. Read also *Document public adressé au Ministre National des Droits Humains en mission à Goma/République Démocratique du Congo par l'ONG locale de défense des droits de l'homme ASPD (Action Sociale pour la Paix et le Développement) Août 2009.*

<sup>164</sup> Statistics are not available at the Department of Labour.

<sup>165</sup> The right to development can be seen as an umbrella concept and programme rather than a single human right. It may be of particular relevance as a summary and pointer of the human rights dimension for development cooperation and development aid purposes, including the notion of ‘human rights impact statements’ See the UN study on the international dimensions of the right to development, UN doc. E/CN.4/1334, paragraph 314; Alfredsson G “A possible first step in the implementation of the right to development” (1987) Vol. 5 *Mennesker og Rettigheter – Nordic Journal on Human Rights* at 78-81; Rosas Allan “The right to development” in Eide Asbjorn, Krause Catarina and Rosas Allan (eds.) *Economic, social and cultural rights: A textbook* (2001) 2<sup>nd</sup> rev. ed. Martinus Nijhoff Publishers Dordrecht / Boston / London 129.



governance culture'<sup>166</sup> to open the door to the protection and promotion of human rights as a whole. This is a prerequisite in the execution of the Governmental Programme focused on the '*Cinq Chantiers du Chef de l'Etat*'<sup>167</sup> and to fight against poverty. An acceptable programme under the right to development would certainly be one aimed at the reduction of poverty. However, one needs to highlight the ambitious character of the Governmental Programme,<sup>168</sup> but also point out that the need to stimulate a climate of growth highlighted within the programme is not sustained by proper and tangible mechanisms of implementation. In addition, there is a lack of defined objectives along with suitable means for governmental actions to take focus. It is noted, for instance, that regarding infrastructure the Government mentions the number of kilometres of a defined road which will be built or rehabilitated, the mechanisms of economic growth or the number of re-visited or re-examined mining contracts. On the other hand, the Programme does not show clearly how the poorest will benefit from this.<sup>169</sup> To fulfil its Programme, the Government must put in place a 'watchdog institution' to report any case of corruption or theft of public funds by governmental functionaries, a practise which has become the 'rule' within the country. This is a serious concern when it is well-known that Mobutu Sese Seko<sup>170</sup> looted over \$10 billion (US) from the country's treasury.<sup>171</sup> It is a dramatic and regrettable instance and should not be tolerated again if the rule of law and development are to be given a proper chance.

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<sup>166</sup> One asserts that bad governance seems to be the reason why a large country rich in natural resources, like the DRC, could be overwhelmed by poverty. See Tshingombe Mulubay Fidèle *op. cit.* (n 125) 178.

<sup>167</sup> Infrastructure reconstruction, health and education, housing, water and electricity.

<sup>168</sup> Tshingombe Mulubay Fidèle *op. cit.* (n 125) 181.

<sup>169</sup> *Idem.*

<sup>170</sup> Former President of Zaire (now of the Democratic Republic of the Congo).

<sup>171</sup> There is no longer any doubt that corruption has contributed to the underdevelopment of the country since such stolen monies are usually siphoned into foreign banks where they are subsequently redirected back to the country as loans. The securities for such loans are the unborn children. Their greedy leaders have mortgaged their future. See Udombana N.J. "The

#### 4.2.2.2 *Justiciability and enforcement of the right to development in the Democratic Republic of Congo*

Academics around the world lack unanimity about the justiciability and the enforcement of economic, social and cultural rights in general and of the right to development in particular. The question remains: can and should the courts of the country use these rights as a basis for decision in specific cases? Norway is amongst the countries in which the justiciability of socio-economic rights is questioned. Arguments against making such rights justiciable, or even part of domestic law, have been put forward by important legal authorities.<sup>172</sup> South Africa's legal position as regards the justiciability of socio-economic rights is unique. It has been admitted through the Constitutional Court in the *Nevirapine* case that 'the question in the present case, therefore, is not whether socio-economic rights are justiciable. Clearly they are.'<sup>173</sup> This unequivocal statement indicates that in South Africa there is no room for discussion about the justiciability of socio-economic rights. It would be useful to consider whether or not the South African experience on the justiciability and enforcement of socio-economic rights and, to some extent, the right to development, may serve as a model for the DRC? This is a critical and challenging question for the DRC which is in its infancy as a democracy. Theoretically, these rights are justiciable and enforceable by the courts of law as provided by the Constitution under Title 2 of the Constitution which is related to human rights, and the fundamental liberties and respective duties of the citizen and the State. In practice, there still

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Third World and the right to development: Agenda for the next millennium" (August 2000) Vol. 22 No. 3 *Human Rights Quarterly* at 776.

<sup>172</sup> The Attorney-General for Civil Affairs, for instance, made a statement against the inclusion of the International Covenant on Economic, Social and Cultural Rights in the Human Rights Act, in Proposition No 3 (1998-1999) to the Odelsting (Ot. prp. nr. 3 (1998-1999) pp. 34-35. See also Margit Tveiten "Justiciability of socio-economic rights: Reflections on Norwegian and South African debate experience" in Wenche Barth Eide and Uwe Kracht (eds.) *op. cit.* (n 135) 165.

<sup>173</sup> *Minister of Health and Others v Treatment Action Campaign and Others*, 2002 (5) SA 721 (CC) at Para 25; 2002 (10) BCLR 1033 (CC).

is a long way to go. The novel character of these rights does not allow people to claim them before the courts of law despite their pre-eminence within the country. The matter has not yet been a subject of discussion at the national judicial level. However, it should be remembered that the country has been involved in proceedings conducted before the African Commission on Human and Peoples' Rights for violations of the right to health since the State failed to provide safe drinking water, electricity and medicines.<sup>174</sup>

According to Sengupta,<sup>175</sup> it should be noted that human rights can be fulfilled in different ways depending on the acceptability of the ethical basis of the claims. Placing an emphasis on this understanding, the author highlights that this should not obfuscate how useful it is when such human rights are translated into legislated legal rights. Attempts should be made to adopt appropriate legislative instruments to ensure the realization of the claims of a human right once it is accepted by consensus. In this order, the rights would then be backed by justiciable claims in the courts and by the authorities capable of enforcement. Sengupta<sup>176</sup> is mindful of the fact that many of the socio-economic rights and the right to development require positive actions that make it difficult to identify precisely the obligations of particular duty-holders so that where they are legally liable they can be prosecuted. The enactment of suitable legislative tools for any of these rights would often be a monumental task, and it would probably be wise and necessary to find alternative methods of enforcement of the obligations rather than through the courts of law. A country-specific empirical analysis

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<sup>174</sup> *Union InterAfricaine des Droits de l'Homme v Zaire*. See Tomuschat C *Human rights: Between idealism and realism* (2003) Academy of European Law European University Institute Oxford University Press New York 40. See also *Free Legal Assistance Group v Zaire* (2000) AHRLR 74 (ACHPR 1995) in Mbazira Christopher "Enforcing the economic, social and cultural rights in the African Charter on Human and Peoples' Rights: Twenty years of redundancy, progression and significant strides" (2006) 6 *African Human Rights Law Journal* at 345.

<sup>175</sup> Sengupta Arjun *op. cit.* (n 119) at 860.

<sup>176</sup> *Idem.*

would be a good route to follow as each country must develop and put in place a programme that fits and meets the needs of its population in line with the requirements of its fundamental law.

It may be concluded that in spite of the fact that the right to development has been part of the international debate on human rights for over thirty years,<sup>177</sup> it has not yet entered the practical realm of development planning and implementation. A number of states tend to express rhetorical support for this right but neglect its basic precepts in development practice.<sup>178</sup> In fact, the right to development must not be seen or understood as a ‘*dream*’, ‘*illusion*’ or a simple ‘*aspiration*’ but must be a reality in the daily lives of the people. It must not be a slogan used to make politicians, diplomats and bureaucrats sound good. Through its constitutionalization, the drafter wanted to highlight the necessity of its protection and promotion so that Congolese citizens may benefit from the country’s rich resources equitably and not be cursed by them.<sup>179</sup> The willingness of all partners identified by the Government (governmental bodies, civil society participation, Non Governmental Organizations, international cooperation and others) remains a very critical point of concern at the grass roots level. National, provincial and local authorities are called upon to respect the principle of cooperation in the fulfilment of this ambitious Governmental Programme. It is in this respect that the Government has promised to the Parliament in the coming days a draft of a bill on the establishment of an Economic and Social Council (*Conseil Economique et Social* [CES]). This institution will be able to assess independently the governmental programme. One believes that through this process it could be possible for the Government to achieve its global objectives:

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<sup>177</sup> Alston Philip “Making space for new human rights: The case of the right to development” (1988) 1 *Harvard Human Rights Year Book* 320 quoted in Marks Stephen *op. cit.* (n 154) at 137.

<sup>178</sup> *Idem.*

<sup>179</sup> Human Rights Watch *The curse of gold: Democratic Republic of Congo* (2005) USA New York 129.

economic growth, poverty reduction and the step-by-step attainment of the Millennium Development Goals (MDGs).<sup>180</sup>

#### 4.2.3 Other mechanisms for the protection and promotion of environmental and developmental rights in the Democratic Republic of Congo

In contrast to the 2003 Transitional Constitution, which contained five institutions to support democracy,<sup>181</sup> the 2006 Constitution reduced their number to the following two: the Independent National Electoral Commission<sup>182</sup> and the High Council for Audiovisual Media and Communication.<sup>183</sup> These are the only existing institutions to formally support democracy. However, Parliament may, by organic law, find it *necessary* to establish other institutions to protect democracy.<sup>184</sup> Without neglecting the role of the judiciary, the Ministry of Human Rights is still playing a key role in the protection and promotion of human rights (including the rights to environment and to development).

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<sup>180</sup> *République Démocratique du Congo op. cit.* (n 146) 5; See also The Governmental Programme of the Democratic Republic of Congo: 2007-2011 (February 2007) Kinshasa pp. 63-65; The Governmental Programme of the Democratic Republic of Congo (October 2008) 117, 119 *op. cit.* (n 124).

<sup>181</sup> Article 154 of the 2003 Transitional Constitution provides that:  
The institutions supporting democracy are:

- the Independent Electoral Commission;
- the National Observer of Human Rights;
- the High Authority of Media.
- the Truth and Reconciliation Commission;
- the Commission on Ethics and the Fight Against Corruption.

<sup>182</sup> Article 211 of the Constitution.

<sup>183</sup> Article 212 of the Constitution.

<sup>184</sup> Article 222, paragraphs 2 and 3, of the Constitution.

#### 4.2.3.1 *Role of judicial power in the protection and promotion of human rights in the Democratic Republic of Congo*

In terms of the Constitution, the judiciary is an independent institution and the guarantor of the individual liberties and fundamental rights of the citizens.<sup>185</sup>

According to the Chief Justice of Tasmania, quoted by Nicholson:

Judicial independence is the capacity of the courts to perform their constitutional function free from actual or apparent interference by, and to the extent that it is constitutionally possible, free from actual or apparent dependence upon, any persons or institutions including, in particular, the executive arm of government over which they do not exercise direct control.<sup>186</sup>

A closer look at this definition reveals that the essence of the principle of judicial independence remains the attainment of impartiality in the conduct of the business of the judicial branch. Judicial independence encapsulates both individual and institutional relationships: the individual independence of a judge, and the institutional independence of the court over which the judge presides. The relationship between these two aspects of judicial independence is that an individual judge may enjoy essential conditions of judicial independence, but if the court over which he or she presides is not independent *vis-à-vis* the other branches of government in what is essential to its function, he or she cannot be said to be an independent court or tribunal.<sup>187</sup> Thus, in order to make the guarantee of substantive independence, as it is called in Germany, a reality, the personal independence of the judge is significant. The guarantee of freedom from instructions would be ineffective if the judge had to fear dismissal or

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<sup>185</sup> Articles 149, paragraph 1, of the Constitution and 150, paragraph 1.

<sup>186</sup> Nicholson RD “Judicial independence and accountability: Can they co-exist?” (1993) Vol. 67 *The Australian Law Journal* at 405.

<sup>187</sup> *Idem*.

transfer in the event of an unpleasing decision.<sup>188</sup> For this reason, the decisions of the Constitutional Court in Germany have made clear that the general guarantee of judicial independence places strict limits on the legislature's power to tamper with judicial salaries. Compensation may not be left to executive discretion lest it be manipulated to influence judicial decisions. A judge's salary must assure an appropriate standard of living, though reductions are not *per se* prohibited.<sup>189</sup> Giving effect to the current understanding of judicial independence for the protection and promotion of human rights in a country based on the rule of law, the executive power, in the DRC, may neither give instructions to the judges in the exercise of their jurisdiction, nor rule on controversies, nor obstruct the course of justice, nor oppose the execution of a judicial decision. In the same vein, the legislature may not rule on controversies of jurisdiction, nor modify a judicial decision, nor oppose its execution.<sup>190</sup> In the exercise of their functions judges must take into consideration the fundamental rights provided for by the Constitution and international instruments on human rights duly ratified by the DRC.<sup>191</sup> Through the process of interpretation of the

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<sup>188</sup> Currie DP "Separation of powers in the Federal Republic of Germany" (1993) Vol. 41 *The American Journal of Comparative Law* at 244.

<sup>189</sup> Currie DP *id.* at 248.

<sup>190</sup> Article 151 of the Constitution.

<sup>191</sup> Controversies exist among academics on the direct or indirect (process of incorporation of treaties in the municipal law) applicability of international instruments by the Congolese courts and tribunals. In the light of article 215, 216 and 153 of the Constitution, a duly ratified treaty must be directly applicable before a court of law, in other words, one may claim any right provided by an international instrument duly ratified by the DRC before any court within the country. On the other hand, one considers the publication of the treaty duly ratified by the DRC within the *Official Journal* as a prerequisite for its applicability within the country through the judicial process. Clearly, this is a procedural matter which remains an open debate. However, it should be borne in mind that some treaties have direct applicability once they are ratified following the procedure defined by the Constitution (articles 215 and 216) and others must wait for a legislative act organizing their incorporation within the national legislation. Without opposing them to the citizens, treaties which create rights and obligations for the citizens, once ratified are directly applicable and taken into account by the administrative bodies. Citizens may only be subject to the obligations contained in these treaties after their publication in the *Official Journal* to give effect to the maxim '*Nul n'est censé ignorer la loi*' (there is no presumption of ignorance of the law) [Article 62, paragraph 1, of the Constitution]. Undoubtedly, it is difficult for the citizens of the Democratic Republic

Constitution, arbitration or facilitation, courts or tribunals must play a decisive role in the protection and promotion of human rights in the country. Undoubtedly, this is a task of great importance because it allows judges to develop a jurisprudence on the judicial enforceability of human rights and to define clearly their contents, most particularly, environmental and development rights, because in the DRC all rights are justiciable.

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of Congo to claim successfully any right provided by treaties, for instance, international instruments on human rights, before the courts of law before their publication in the *Official Journal*. See Nobirabo Musafiri Prosper *op. cit.* (n 140) 401-419; Articles 70–73 of the Ordinance no 08/073 of 24 December 2008 on the Organization and Functioning of the Government, mechanisms of collaboration between the President of the Republic, the Government and between the Members of the Government. French words of the author: “Le traité dans le droit interne Congolais est subordonné à trois conditions : le traité ou l’accord doit être régulièrement ratifié ou approuvé et être publié au Journal Officiel (ce qui en pratique suppose une ordonnance présidentielle). Dire qu’un traité régulièrement ratifié ou approuvé a, dès sa publication, une autorité supérieure à celle des lois ne proscrit pas l’application de ce traité dans l’ordre juridique interne avant sa publication. Seulement si ce traité crée des droits et des obligations pour les particuliers, il doit être publié avant son application. La règle ‘nul n’est censé ignorer la loi’ impose aux pouvoirs publics l’obligation de publier les traités, et justifie les prescriptions de l’article 215 de la Constitution Congolaise. Cependant un traité comportant des droits et des obligations pour les particuliers peut être appliqué sans toutefois leur être opposable. Ainsi, l’Administration peut faire bénéficier aux particuliers des droits stipulés dans un accord international, mais elle ne saurait leur imposer des obligations contenues dans le même instrument s’il n’a été publié. De même, il est douteux que les particuliers puissent réclamer avec succès, par voie judiciaire, ces droits”; See also Mazyambo Makengo Kisala André *op. cit.* (n 61) 243. The author states that in the light of Article 215 of the Constitution of 2006 of the DRC, the condition of publication of the treaties in the *Official Journal* and the principle of reciprocity should not be considered as obstacles to the direct applicability, in favour of individuals, of international instruments pertaining to human rights. French words: “La Constitution fait de la RDC un Etat moniste, c’est – à – dire un Etat qui incorpore les traités dans son ordre juridique sans aucune formalité particulière. Les traités internationaux conclus par l’Etat Congolais font d’office partie de son ordre juridique. La publication et la réciprocité sont des conditions de leur application dans l’ordre juridique interne et non de leur incorporation. Toutefois, ces deux conditions ne s’appliquent pas à l’égard des traités internationaux relatifs aux droits de l’homme. En principe, l’absence de publication d’un traité international relatif aux droits de l’homme ne devrait pas empêcher son application au profit des individus.” Lire aussi *Ministère Public et Partie Civile v SLt Baseme Ofidi et Autres Tribunal Militaire de Garnison de Goma* RP 356/2009 RMP 0042/KNG/09 (24 Avril 2009) 19 *et seq.* (*République Démocratique du Congo*). Available at: <http://www.justice.gov.cd> (visited 04/06/2009).



#### 4.2.3.2 *The Ministry of Human Rights*

In the light of the functions allocated to the DRC's Ministry of Human Rights it is an institution which plays a vital role in the promotion and protection of human rights. Clearly, one expects from this institution:<sup>192</sup>

- the promotion and protection of human rights and fundamental liberties;
- the dissemination of human rights;
- to oversee that human rights are respected;
- the 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 on Human Rights, the African Commission on Human Rights and other national, regional and international institutions competent in human rights matters.

The Ministry of Human Rights is also known as the 'Mediator of the Republic',<sup>193</sup> because of its significant role in the field of human rights in the country. The role is similar to that of the '*Ombudsman*' in the Scandinavian countries and the 'Mediator' in France.<sup>194</sup> Inspired by the success of these

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<sup>192</sup> Article 1 B 35 of the Ordinance No 08/074 of 24 December 2008 on the Attributions of Ministries.

<sup>193</sup> Ngondankoy *op. cit.* (n 132) 400.

<sup>194</sup> Caught up by the 'Ombudsman' fever of the early 1970s, when countries throughout the world adopted their own version of this Scandinavian institution, the French established the 'Mediator' or '*Médiateur*' by the Law of 3 January 1973. In the French understanding, the Mediator is an institution that helps to restrain the excesses of the administration by providing a 'simple, free and readily accessible' remedy that could extend beyond the limits of judicial control into the sensitive area of *l'opportunité* (or policy), and allow the public to denounce a

institutions in their respective countries, the DRC's conception has been criticized because the Ministry cannot drive the 'protection and promotion' of human rights and mediate between the citizen and the Administration when it is not independent *vis-à-vis* the government. As a part of the structure of government, it makes sense that it would be difficult for this institution to control violations of human rights by fellow administrative authorities. Furthermore, due to the status of the Minister as a member of the government, appointed and dismissed by political or administrative authority, he may not be free to fully exercise and with complete independence the function of protector of human rights. It would be more effective to create an institution that will enjoy and run its investigations independently from government. Even though there is no guarantee that the advent of the Mediator as an independent institution in the DRC will diminish the flood of cases to the administrative courts and tribunals, this is an institution which will have a considerable impact on the promotion and protection of human rights (including environmental and developmental rights) and will surely help the judicial system as a whole, and promote democracy and good governance within the country.

The dissolution of the National Observer on Human Rights (*Observatoire National des Droits de l'Homme*) by the new Constitution is a serious blow if one recalls the important mission the Resolution of 9 April 2002 intended it to accomplish, 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

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bad decision or rule and so render the administration 'less oppressive, more accessible and, above all, more human.' As its name indicates, the Mediator is often engaged in reconciling differences between the citizen and the administration. See Brown Neville L and Bell John S *French administrative law* (1993) 4<sup>th</sup> ed. Oxford University Press 29-30.

- 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;
  - to train human rights activists, and to ensure their protection and to guarantee their status;
  - to create a Commission for the Protection of Children and Women.<sup>195</sup>

This institution was dissolved four years after the 2003 Transitional Constitution came into force. It is unfortunate that Parliament did not see this matter as a priority. Considering our chequered past, it is doubtful if the current Parliament is truly aware of the importance of this institution to the maintenance of democracy and good governance, and to the development of a strong human rights culture and the value of restoring this institution.<sup>196</sup> It is understood that an independent national human rights institution is an important organ to build up a culture of democracy and good governance. It would empower civil society activism, and lead to greater government transparency and accountability. Expanding its role would certainly ensure that it can monitor matters arising from a lack of transparency and accountability within government. Democratic

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<sup>195</sup> Ngondankoy N *op. cit.* (n 132) 415.

<sup>196</sup> Article 222 Paragraph 3 provides that “... However, the Parliament may by organic law establish other democratic supporting institutions, if necessary.”

governance would thus consist not only of the citizenry electing politicians to public office, but would encompass citizens having a say in the governance process,<sup>197</sup> including political participation through consultative processes for policy implementation.<sup>198</sup> A human rights perspective gives meaning to participation as understood in a managerial sense. The Human Rights Council of Australia, for example, asserts participation as a right that recognizes that people should have control over the direction of the development process, rather than enduring the charade of being consulted about projects or policies already decided upon.<sup>199</sup> Participation, in a human rights sense, means having the power to direct or to exercise authoritative influence over the development process, rather than simply being consulted about pre-determined outcomes that do not reflect the public's input. Participation, if understood as control, cannot easily be confused with 'involved', 'consulted', 'empowered' or 'ownership'. To ask who has control, authority, or direction over a particular aspect of the development programme is a much tougher question than to ask who is involved or empowered by it. It also leads to significantly more meaningful answers.<sup>200</sup> The positive effects on the human rights situation of an independent national human rights institution within the country may certainly be appreciated in the light of the cases of glaring human rights violations. Displacement, a major example of an economic, social and cultural rights violation, occurs when mega-projects that affect people's lives are implemented without proper consultation.<sup>201</sup> This is

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<sup>197</sup> Franck Thomas M "The emerging right to democratic governance" (1992) 86 *American Journal of International Law* at 46.

<sup>198</sup> Gregory Fox H "The right to political participation in international law" (1992) 17 *Yale Journal of International Law*. at 539.

<sup>199</sup> Human Rights Council of Australia Inc., *The rights way to development: A human right to development assistance* (1995) 118-21. See also Orford Anne *Globalization and the right to development* in Alston Philip (ed.) *Peoples' rights* (2001) Vol. IX/2 Academy of European Law, European University Institute Oxford University Press New York pp. 138-139.

<sup>200</sup> *Idem*.

<sup>201</sup> There are numerous concrete examples on this matter: Uganda, Darfur, Brazil, Nigeria, India. See Pooja Metha "Internally-displaced persons and the Sardar Sarovar Project: A case for Rehabilitative Reform in Rural India" (2005) 20 *American University of International*

how easily human rights and development can come into conflict with each other.<sup>202</sup> Obviously, the role of such an institution would provide a significantly helpful forum able to ensure that all affected parties can come together to alleviate the perceived conflict<sup>203</sup> and take a great leap forward for the process of development. In this respect, the African Charter urges its State Members to establish appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the Charter.<sup>204</sup>

#### 4.2.4 Conclusion

For many years the issues of human rights implementation, justiciability or enforcement in the DRC have not been taken seriously by the State institutions and the citizens. In spite of the fact that environmental and developmental rights have been recognized through various constitutional dispensations, in practice, the attitude towards their realization at grass roots level has been indifferent. Experience has shown that since the independence of the country from the Belgian colonial power, the public authorities are ever less committed to being bound by the legislation on economic, social, environmental and further developmental concerns. The reason perhaps lies in the politics that characterized the country during the First Republic (1960-1965), the Second Republic (1965-1990) and the Transitional Period (1990-2006). It has been noted that after independence in 1960, the country was seriously disrupted by

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*Law Review*. 623; Sally Anne Way “The right to food and access to justice: understanding the right to food as a “negative” right” in Borghi Marco, Letizia Postiglione Blommestein (eds.) *The right to adequate food and access to justice* (2006) Bruylant Bruxelles Schulthess Geneva pp. 52-55; Wenche Barth Eide and Uwe Kracht (eds.) *Food and human rights in development* (2007) Vol. II Oxford USA.

<sup>202</sup> See Upenda Baxi “What happens next is up to you: Human rights at risk in dams and development” (2001) 16 *American University of International Law Review* at 1507, 1519.

<sup>203</sup> Kumar Raj C “National human rights institutions and economic, social and cultural rights: Towards the institutionalization and developmentalization of human rights” (August 2006) Vol. 28 No. 3 *Human Rights Quarterly* at 768.

<sup>204</sup> Article 26 of the African Charter on Human and Peoples’ Rights of 1981.

socio-political conflicts that ended in the *Coup d'Etat* of President Mobutu Sese Seko in 1965. During this period, no specific duty to uphold human rights was placed upon state institutions, while the constitutional provisions to abide by the Bill of Rights (containing first generation rights) lacked sanction or remedies where these rights might be violated or threatened.<sup>205</sup> The President of the Republic was the sole possessor of governmental power, as Legislator, Judge and Executive Officer. Other organs existed to advise or assist the President in the exercise of power that allegedly emanated from the people.<sup>206</sup> It is in this atmosphere of human rights violation and dictatorship that those who ran the country during the transitional period lost respect for the rule of law. The clarity of the administrative measures contained in the legislation that bound officials in terms of environmental and developmental matters, failed to guarantee that the constitutional rights of the people were living rights. The people and the courts were at the mercy of the non-elected political rulers' whims. Given the repercussions of preceding regimes that ignored constitutionalism, there is concern about the commitment of the current regime to abide by the new constitutional dispensation that proclaims environmental and development rights. After proclaiming that the country is based on the rule of law, the dissolution by the 2006 Constitution of important institutions in support of democracy, namely, the National Observer of Human Rights is disturbing. Power has been given to Parliament to establish, *if necessary*, any institution to support democracy,<sup>207</sup> whereas under the transitional period Parliament was unable or unwilling to pass legislation on this matter. It has been noted that in states that are in transition to democracy or who are trying to strengthen and

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<sup>205</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 LL D thesis] 389.

<sup>206</sup> Article 9 of the Amendment of the Constitution of 1967 of 1974. Lunda Bululu *La conclusion des traités en droit constitutionnel Zaïrois: Etude de droit international et de droit interne* (1984) Bruylant Bruxelles 398.

<sup>207</sup> Article 222 of the Constitution.

consolidate their democratic structure, national human rights institutions will often have a more important place in the protection of human rights and in administrative oversight.<sup>208</sup> This may occur because the judicial branch is weak or politicised or complainants cannot afford litigation. Obviously the DRC is no exception.

Although the human rights legislation in DRC is flawed and the national institutions lack independence, the situation could be saved if the political agenda gave them the priority they deserved. The lack of specific courts or tribunals to deal with environmental and developmental concerns remains an important challenge that will hamper the protection of the environment, the improvement of living conditions and the nurturing of human development. In spite of the maxim '*nemo censetur ignorare legem*,'<sup>209</sup> confirmed by the Constitution in terms of Article 62, Paragraph 1, the people cannot help but be ignorant of the law. Various reasons explain the scarcity of jurisprudence which is a vital tool to flesh out the content of the above rights, for example, the judiciary's unfamiliarity with public interest litigation on economic, social, environmental and developmental rights, and the failure of the government to set up appropriate machinery to implement these constitutional duties. These are daunting challenges that call for particular attention from the governors, not least because of the peoples' expectations and needs on this matter.

To sum up, the implementation, justiciability or enforcement of environmental and developmental rights in the DRC remain poor and in need of urgent attention. Political leaders have not yet put on the table the questions related to

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<sup>208</sup> Linda Reif C "Building democratic institutions: The role of national human rights institutions in good governance and human rights protection" (2000) Vol. 13 *Harvard Human Rights Journal* at 69.

<sup>209</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' at 19.

the protection and promotion of human rights as a whole. Parliament must be pressurised to pass legislation to give effect to the environmental and developmental rights contained in the Constitution and to improve and enforce the environmental regulations already in force. Otherwise, it will be difficult to overcome the increasing degradation of the environment, or to win the fight against poverty recognized by the Governmental Programme, the '*Cinq Chantiers du Chef de l'Etat*,' and the United Nations Millennium Development Goals (MDGs). Further, the opportunity to preserve the rights of present and future generations to a healthy environment as guaranteed by the Constitution will be compromised or virtually lost.

Taking into consideration the neglect that characterises the implementation and enforcement of the regulatory environmental and developmental framework, can guidance come from the South African experience? This question is explored in the next chapter.



## CHAPTER 5:

### **IMPLEMENTATION AND ENFORCEMENT OF ENVIRONMENTAL AND DEVELOPMENTAL RIGHTS IN THE REPUBLIC OF SOUTH AFRICA**

Two of the toughest issues which face South African administrative bodies and courts today are the implementation and justiciability, or enforcement, of human rights (including environmental and developmental rights).<sup>1</sup> These rights require particular attention in the light of the values proclaimed by the Constitution,<sup>2</sup> and the vital reliance of the new South African State on the human rights discourse as the engine of change.<sup>3</sup> The existing human rights legislation needs to be fulfilled if the people's expectations of a better life are to be met. All the human rights institutions provided for by the Constitution are giving this matter particular attention.<sup>4</sup> Keeping this in mind, one needs to elaborate more on the fulfilment of environmental and developmental rights within the country for the benefit of all.

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<sup>1</sup> Legislation usually depends for its effectiveness on implementation and enforcement by the state. The role played by the state is vital. See Burns Y and Kidd M "Administrative law and implementation of environmental law" in Strydom HA and King ND (eds.) *Environmental management in South Africa* (2009) 2<sup>nd</sup> ed. Juta Cape Town 240.

<sup>2</sup> Section 1 of the Constitution in full reads:

The Republic of South Africa is one, Sovereign, democratic state founded on the following values:

- a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.
- b) Non-racialism and non-sexism.
- c) Supremacy of the Constitution and the rule of law.
- d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

<sup>3</sup> While South Africa does turn to alternative discourses like international diplomacy, the need still remains to nurture a human rights culture and democratic values in order to maintain constitutional democracy. See Sarkin Jeremy "The development of a human rights culture in South Africa" (August 1998) Vol. 20 No. 3 *Human Rights Quarterly* at 628; Makau wa Mutua "Hope and despair for a New South Africa: The limits of rights discourse" (1997) Vol. 10 *Harvard Human Rights Journal* at 68.

<sup>4</sup> Sarkin Jeremy *idem.*; Krista Johnson and Sean Jacobs "Democratization and the rhetoric of rights: Contradictions and debate in post-apartheid South Africa" in Harri Englund and Francis Nyamnjoh B. (eds.) *Rights and the politics of recognition in Africa* (2004) Zed Books London New York 84.

## ENVIRONMENTAL RIGHTS

### **5.1 Implementation and enforcement of environmental rights in South Africa**

To get a clear picture of the effectiveness of environmental rights in South Africa one needs to interrogate the level of their implementation and enforcement and elaborate on their impact at the grass roots level. Therefore, a definition of the regulatory framework on environmental management is a good starting point.

#### 5.1.1 General background of the regulatory framework for environmental management in South Africa

In comparison with the DRC, the RSA has a much larger regulatory framework for environmental management. It was only after the fall of the Apartheid regime and the introduction of new legislation in terms of the Constitution that one could openly engage with the implementation and justiciability or enforcement of environmental rights concerns.

For many years, environmental concerns were not of prime importance in the traditional legal systems of the RSA. 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 law. In addition, case law (the courts' decisions), common law and customary and indigenous law are also part of the sources of law in the RSA.<sup>5</sup> The Constitution is the supreme law of the land,<sup>6</sup> and it guarantees the right to environment,<sup>7</sup> and establishes the

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<sup>5</sup> Glazewski J *Environmental law in South Africa* (2005) 2<sup>nd</sup> ed. Butterworths Durban 11.

<sup>6</sup> Section 2 of the Constitution.

<sup>7</sup> Section 24 of the Constitution.

principal framework for the administration of environmental law in terms of which other legislation has to be interpreted. The Constitutional Bill of Rights includes not only an environmental right that prompts the development of environmental legislation, but also an important number of other clauses which are crucial, relevant and supportive to the subject. Thus, one may register and underscore a multiplicity of statutes and administrative legislation such as regulations, proclamations and departmental rules. These are neither general in nature such as the National Environmental Management Act (NEMA),<sup>8</sup> nor dealing with specific resources such as the Development Facilitation Act 67 of 1995 (DFA) and the National Water Act 36 of 1998. The National Environmental Management Act is, to date, the only true environmental framework law<sup>9</sup> containing relevant principles that not only provide a framework and guidelines for environmental policy-making and implementation, but also aids in the interpretation, administration, implementation and enforcement<sup>10</sup> of any act or law concerned with the protection or management of the environment within the country.<sup>11</sup> Obviously, the National Environmental Management Act is an Act of particular importance to environmental management and has a significant ‘umbrella’ role. The national government is responsible for policy and may override provincial legislation in spite of the fact that the responsibility to legislate and administer

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<sup>8</sup> Act 107 of 1998 of the RSA.

<sup>9</sup> Nel J and Du Plessis W “An evaluation of NEMA based on a generic framework for environmental framework legislation” (2001) 8 *South African Journal of Environmental Law and Policy* 1-33 at 2.

<sup>10</sup> To improve environmental compliance and enforcement in South Africa, the Department of Environmental Affairs and Tourism (DEAT) created in 2003 an Enforcement Directorate and through legislative amendments to the National Environmental Management Act (NEMA) provided for the appointment of Environmental Management Inspectors (EMIs). See National Environmental Management Amendment Act, No 46 of 2003; Craigie F, Snijman P and Fourie M “Environmental compliance and enforcement institutions” in Paterson A and Kotzé L (eds.) *Environmental compliance and enforcement in South Africa: Legal perspectives* (2009) Juta Cape Town 66.

<sup>11</sup> Section 2 (1), (b) (c) and (e) of the National Environmental Management Act.

environmental law is delegated to the provinces.<sup>12</sup> However, control over key natural resources such as water, fisheries and minerals is retained at national government level. This process is sustained by the principle of cooperation which characterizes the South African Government in its national, provincial and local spheres.<sup>13</sup> The case law, another source of environmental law, refers to the judicial decisions of the higher courts. Further, a number of common law and customary law rules dealing with environmental management have, currently, been incorporated into legislation. It is also relevant to note that South African environmental law has been significantly influenced by international law. Considering treaties an important source of international law, South Africa is a party to many international treaties which require cooperation with other nations with the aim of environmental protection.<sup>14</sup> For instance, South Africa was one of the original 12 founding members of the Antarctic Treaty of 1959.<sup>15</sup> In the light 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 instance, human rights concerns including environmental rights. The opportunity to refer to foreign law where applicable is also available.<sup>16</sup>

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<sup>12</sup> Peart Raewyn and Wilson Jessica “Environmental policy-making in the new South Africa” (1998) 5 *South African Journal of Environmental Law and Policy* at 243.

<sup>13</sup> Craigie F, Snijman P and Fourie M “Environmental compliance and enforcement institutions” in Paterson A and Kotzé L *op. cit.* (n 10) 68-69; Sections 40 and 41 of the Constitution; Chapter 3 of NEMA. In order to flesh out the principle of cooperation, the Department of Provincial and Local Government has been replaced by the Department of Cooperative Government and Traditional Affairs. See South Africa’s new-look cabinet. Available at: <http://www.southafrica.info/about/government/zumacabinet.htm> (visited 22/06/2009).

<sup>14</sup> Müller K “Environmental governance in South Africa” in Strydom HA and King ND (eds.) *op. cit.* (n 1) 81.

<sup>15</sup> Glazewski J *op. cit.* (n 5) 42.

<sup>16</sup> Sections 39 and 233 of the Constitution.

### 5.1.2 Administrative environmental management

First of all, it should be mentioned that the implementation and administration of environmental legislation are firmly in the hands of the government departments in the three spheres of government performing functions which involve the management of the environment, namely: the Department of Environmental Affairs and Tourism, the Department of Minerals and Energy, the Department of Water Affairs and Forestry, the Department of Land Affairs, the Department of Health and the Department of Labour.<sup>17</sup> In addition, there are the governmental institutions or functionaries such as 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 (e.g the South African National Parks [formerly the National Parks Board], and the Council for Nuclear Safety). In terms of section 11 of the National Environmental Management Act (NEMA),<sup>18</sup> the relevant national

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<sup>17</sup> Section 11 (2), Schedule 2 of NEMA; Craigie F, Snijman P and Fourie M “Environmental compliance and enforcement institutions” in Paterson A and Kotzé L *op. cit.* (n 10) 100. The Department of Minerals and Energy has been split into two separate departments: Department of Mining and Department of Energy. The Department of Water Affairs merged with Environmental Affairs in the Department of Water and Environmental Affairs. To this list one must also add the Department of Agriculture, Fisheries and Forestry and the Department of Tourism. See South Africa’s new-look cabinet *op. cit.* (n 13).

<sup>18</sup> Section 11 of NEMA:

- (1) Every national department listed in Schedule 1 as exercising functions which may affect the environment and every province must prepare an environmental implementation plan within one year of the promulgation of this Act and at least every four years thereafter.
- (2) Every national department listed in Schedule 2 as exercising functions involving the management of the environment must prepare an environmental management plan within one year of the promulgation of this Act and at least every four years thereafter.
- (3) Every national department that is listed in both Schedule 1 and Schedule 2 may prepare a consolidated environmental implementation and management plan.
- (4) Every organ of state referred to in subsections (1) and (2) must, in its preparation of an environmental implementation plan or environmental management plan, and before submitting such plan take into consideration every other environmental implementation plan and environmental management plan already adopted with a view to achieving consistency among such plans.
- (5) The Minister may by notice in the *Gazette* –

departments and provincial governments are required to furnish environmental implementation plans and environmental management plans within one year of promulgation of the Act and at least every four years thereafter. Thus, the Committee for Environmental Coordination, established by section 7 of the National Environmental Management Act, 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.<sup>19</sup> This reveals the applicability of the principle of cooperation in environmental administration.<sup>20</sup> In this respect, government cooperation 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. The meaningful participation of the people as a whole remains crucial for effective environmental governance.<sup>21</sup> Providing for public participation and input gives a

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a. extend the date for the submission of any environmental implementation plans and environmental management plans for periods not exceeding 12 months;

b. on application by any organ of state, or on his or her own initiative with the agreement of the relevant Minister where it concerns a national department, and after consultation with the Committee, amend Schedules 1 and 2.

(6) The Director General must, at the request of a national department or province assist with the preparation of an environmental implementation plan.

(7) The preparation of environmental implementation plans and environmental management plans may consist of the assembly of information or plans compiled for other purposes and may form part of any other process or procedure.

(8) The Minister may issue guidelines to assist provinces and national departments in the preparation of environmental implementation and environmental management plans.

<sup>19</sup> Section 16 (4) (a) and (b) of the National Environmental Management Act (NEMA).

<sup>20</sup> Chapter 3 of the Constitution on Co-operative Government and Chapter 3 of NEMA on the procedure for co-operative governance.

<sup>21</sup> Kotzé explains environmental governance as a management process carried out in both the public and private sectors by institutions and individuals so as to regulate, formally and informally, through law, the impact of human activity upon the global environment from the highest to the lowest levels so as to guard the interests of all human beings, including future generations, in the environment. See Kotzé JL “Environmental governance” in Paterson A and Kotzé JL (eds.) *op. cit.* (n 10) 107.

voice to society and legitimacy to the decision-making processes, whereas failing to provide for public input can lead to conflict and resistance.<sup>22</sup> Certainly, the intention is to decentralize environmental administration. Accordingly, a number of environmental functions have been allocated to provincial government by the Constitution.<sup>23</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>24</sup> Due to the cross-sectoral nature of the environment, cooperation between government spheres and on all levels remains necessary and a key point for its management protection.

Against this background, it is obvious that the effectiveness of environmental legislation cannot be realised without taking into account the cooperation and interaction between the relevant legislative and the executive organs within each sphere of government. Moreover, 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>25</sup> Courts are always the final forums for enforcement of the law and their decisions are authoritative, final and binding.<sup>26</sup>

Indeed, almost all environment-related statutes endow administrative officials and authorities with extensive powers of decision-making and enforcement. In this context, it seems important that the public be informed and assured that these powers are properly exercised in accordance with the law as a whole.

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<sup>22</sup> Department of Environmental Affairs and Tourism *South Africa Environment Outlook: A report on the state of the environment* (2006) Republic of South Africa at 63.

<sup>23</sup> Schedule 5 Part B of the Constitution.

<sup>24</sup> Glazewski J *op. cit.* (n 5) 109.

<sup>25</sup> Section 40 of the Constitution. See also Kotzé JL *Environmental governance* in Paterson A and Kotzé JL (eds.) *op. cit.* (n 10) 122.

<sup>26</sup> Section 165 of the Constitution; Craigie F, Snijman P and Fourie M “Environmental compliance and enforcement institutions” in Paterson A and Kotzé L (eds.) *op. cit.* (n 10) 69.

### 5.1.2.1 Powers of administrative bodies<sup>27</sup>

In the light of the environmental legislation, a variety of powers have been conferred on public bodies and officials.<sup>28</sup>

#### a. Extensive powers

It is in the public interest that the bodies themselves regulate the use of the national resources that are entrusted to their care. For instance, in terms of the National Parks Act 57 of 1976,<sup>29</sup> 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 invasive plants, in order to achieve the objectives of the Act.<sup>30</sup>

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<sup>27</sup> To have a good understanding of the present analyses, one refers to the term ‘Administor’ in accordance with its definition in the Promotion of Administrative Justice Act 2000 (PAJA). ‘Administrator’ means an organ of state or any natural or juristic person taking administrative action.

<sup>28</sup> Kidd M *Environmental law* (2008) Juta Cape Town 207; Burns Y and Kidd M “Administrative law and implementation of environmental law” in Strydom HA and King ND (eds.) *op. cit.* (n 1) 241.

<sup>29</sup> The National Parks Act 57 of 1976 has been repealed (except for section 2(1) and Schedule 1) and replaced by the National Environmental Management: Protected Areas Act 57 of 2003.

<sup>30</sup> Section 6 of the Conservation of Agricultural Resources Act No. 43 of 1983 reads as follows:

(1) In order to achieve the objects of this Act the Minister may prescribe control measures which shall be complied with by land users to whom they apply.

(2) Such control measures may relate to –

- a) the cultivation of virgin soil;
- b) the utilization and protection of land which is cultivated;
- c) the irrigation of land;
- d) the prevention or control of water logging or salination of land;
- e) the utilization and protection of veils, marshes, water sponges, water courses and water sources;
- f) the regulating of the flow pattern of run-off water;
- g) the utilization and protection of the vegetation;
- h) the grazing capacity of veld, expressed as an area of veld per large stock unit;
- i) the maximum number and the kind of animals which may be kept on veld;



b. Powers to legislate and to authorize specific performance

Obviously, in many cases statutes delegate power to executive officers such as the State President, Minister, Premier or Members of the Executive Council (MEC) to make subordinate legislation in the form of regulations, proclamations or departmental notices. In terms of section 44-45 of the National Environmental Management Act (NEMA), for example, 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 pertaining to the furnishing of information and other relevant matters. In the National Environmental Management: Biodiversity Act 10 of 2004, the Minister has several legislative powers the exercise of which is necessary for effective operation of the Act, such as enacting a list of protected and threatened species and alien species.<sup>31</sup>

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- j) the prevention and control of veld fires;
  - k) the utilization and protection of veld which has burned;
  - l) the control of weeds and invader plants;
  - m) the restoration or reclamation of eroded land which is otherwise disturbed or denuded;
  - n) the protection of water sources against pollution on account of farming practices;
  - o) the construction, maintenance, alteration or removal of soil conservation works or other structures on land; and
  - p) any other matter which the Minister may deem necessary or expedient in order that the objects of this Act may be achieved, and the generality of this provision shall not be limited by the preceding paragraphs of this subsection;
- (3) A control measure may -
- a) contain a prohibition or an obligation with regard to any matter referred to in subsection (2);
  - b) provide that the executive officer may exempt a person from such prohibition or obligation by means of a written consent;
  - c) prescribe the procedure with regard to the lodging of an application for such written consent.
- (4) Different control measures may be prescribed in respect of different classes of land users or different areas or in such other respects as the Minister may determine.
- (5) Any land user who refuses or fails to comply with any control measure which is binding on him, shall be guilty of an offence.

<sup>31</sup> Kidd *M op. cit.* (n 28) 208.

In the case of the authorization function, provisions that enable bodies to authorize individuals to perform actions that would otherwise be prohibited or restricted, means that the public body has a discretionary power to permit or forbid potentially harmful conduct and to determine conditions for its performance. The Nuclear Energy Act 46 of 1999, for example, requires licences for any activities connected with nuclear installations, sites and hazardous nuclear material,<sup>32</sup> and these licences may be withdrawn when the state authority sees fit.<sup>33</sup>

### c. Power to execute

It has been observed that in some cases, a public body may itself execute some provisions of the legislation. In this respect, one may refer, for example, to the terms of sections 20 and 25 (3) (c) of the Sea Fishery Act 12 of 1988<sup>34</sup> regarding the granting and termination of the rights of exploitation. These provisions reveal that a right to exploit fish may be suspended or terminated by the Minister if he or she is of the opinion that a conviction of an exploiter of an offence in terms of this Act is such that his or her continued participation is no longer in the interest of either the resource in question or the industry in question or both the resource and the industry. The registration of products that pose a danger to the public interest may, under the Fertilizers, Farms Feeds, Agricultural Remedies and Stocks Remedies Act 36 of 1947, be cancelled. Thus, the official who initially authorizes the registration of a product has an onerous responsibility to meet the conditions of such authorizations.<sup>35</sup>

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<sup>32</sup> Chapter III of the Natal Nature Conservation Ordinance 15 of 1974; See also Kidd M *idem*.

<sup>33</sup> Burns Y and Kidd “Administrative law and implementation of environmental law” in Strydom HA and King ND (eds.) *op. cit.* (n 1) 242.

<sup>34</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 collect shells).

<sup>35</sup> Kidd M *op. cit.* (n 28) 208.

The National Environmental Management Act (NEMA) contains a number of new provisions (inserted by the National Management Amendment Act, 46 of 2003) which grants Environmental Management Inspectors<sup>36</sup> wide powers over an increasing number of environmental management legislation, including powers of inspection,<sup>37</sup> powers of investigation,<sup>38</sup> enforcement powers,<sup>39</sup> and administrative powers.<sup>40</sup> These inspectors are now being trained at national and provincial levels with the aim of eventually providing an all-encompassing and integrated monitoring and policing service in environmental management in South Africa.<sup>41</sup>

The powers granted to administrative bodies in South Africa in the field of environmental administration thus operate within the wider constitutional and

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<sup>36</sup> See ss 31A-Q which grants inspectors compliance and enforcement powers over NEMA, the National Environmental Management: Biodiversity Act, National Environmental Management: Protected Parks and the National Environmental Management: Air Quality Act to name the a few. Environmental Management Inspector means a person designed as an environmental management inspector in terms of section 31B or 31C of NEMA.  
Section 31B: Designation of environmental management inspectors by Minister.

(1) The Minister may

- a) designate as an environmental management inspector, any staff member of
  - (a) the department; or
  - (ii) any other organ of state; and
- b) at any time withdraw a designation made in terms of paragraph (a).

(2) A designation in terms of subsection (1) (a) (ii) may only be made by agreement between the Minister and the relevant organ of state.

Section 31C: Designation of environmental management inspectors by MEC.

(1) A MEC may

- (a) designate as an environmental management inspector, any staff member of
  - (i) the department responsible for environmental management in the province;
  - (ii) any other provincial organ of state; or
  - (iii) any municipality in the province; and
- (b) at any time withdraw a designation made in terms of paragraph (a).

(2) A designation in terms of subsection (1) (a) (ii) or (iii) may only be made by agreement between the relevant MEC and the relevant provincial organ of state or municipality.

<sup>37</sup> Section 31K.

<sup>38</sup> Section 31H.

<sup>39</sup> Section 31J.

<sup>40</sup> Administrative powers are defined by sections 31L and 34G of the National environmental Management Amendment Act 46 of 2003.

<sup>41</sup> Craigie F, Snijman P and Fourie M “Environmental compliance and enforcement institutions” in Paterson A and Kotzé L (eds.) *op. cit.* (n 10) 91, 95.

legislative context. This means, in other words, that all administrative rules and regulations and any action taken must ultimately be done in accordance with the constitutional provisions. The Constitution remains the supreme law of the land and laws or conduct inconsistent with it are invalid, and the obligations imposed by it must be fulfilled.<sup>42</sup>

### 5.1.2.2 *The principle of legality*

The general principle of legality, which implies the idea that the administration is compelled to observe the law,<sup>43</sup> is the foundation of all administrative action within the state and applies within the administration of environmental rights. This principle requires compliance with specific conditions defined by the law for validity, which apply to all administrative action.

In the light of the Constitution,<sup>44</sup> the requirements for administrative legality are laid down in the Promotion of Administrative Justice Act (PAJA), 2000. In terms of section 6, a number of requirements must be considered, namely: 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. Moreover, strong mechanisms of control of administrative action in cases where these

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<sup>42</sup> Section 2 of the Constitution.

<sup>43</sup> Brown Neville L and Bell John S *French administrative law* (1993) 4<sup>th</sup> ed. Oxford New York 202; Kidd M *op. cit.* (n 28) 182; Burns Y and Beukes M *Administrative law: Under the 1996 Constitution* (2006) 3<sup>rd</sup> ed. LexisNexis Durban 204.

<sup>44</sup> Section 33 reads:

- (1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
- (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.
- (3) National legislation must be enacted to give effect to these rights, and must –
  - a) provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
  - b) impose a duty on the state to give effect to the rights in subsections (1) and (2); and
  - c) promote an efficient administration.

requirements have not been complied with have been provided by the Act.<sup>45</sup> Undoubtedly, these mechanisms are significant tools that protect and promote

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<sup>45</sup> Section 6 of the Promotion of Administrative Justice Act (PAJA) reads as follows:

(1) Any person may institute proceedings in a court or a tribunal for judicial review of an administrative action.

- (2) A court or tribunal has the power to judicially review an administrative action if -
- a) the administrator who took it -
    - (i) was not authorized to do so by the empowering provision;
    - (ii) acted under a delegation of power which was not authorized by the empowering provision; or
    - (iii) was biased or reasonably suspected of bias;
  - c) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;
  - d) the action was procedurally unfair;
  - e) the action was materially influenced by an error of law;
  - f) the action was taken -
    - (b) for a reason not authorized by the empowering provision;
    - (ii) for an ulterior purpose or motive;
    - (iii) because irrelevant considerations were taken into account or relevant considerations were not considered;
    - (iv) because of the unauthorized or unwarranted dictates of another person or body;
    - (v) in bad faith; or
    - (vi) arbitrarily or capriciously;
  - (f) the action itself -
    - (i) contravenes a law or is not authorized by the empowering provision; or
    - (ii) is not rationally connected to -
      - (aa) the purpose for which it was taken;
      - (bb) the purpose of the empowering provision;
      - (cc) the information before the administrator; or
      - (dd) the reasons given for it by the administrator;
    - (g) the action concerned consists of a failure to take a decision;
    - h) the exercise of the power or the performance of the function authorized by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function; or
    - (i) the action is otherwise unconstitutional or unlawful.
- (3) If any person relies on the ground of review referred to in subsection (2) (g), he or she may in respect of a failure to take a decision, where -
- (a) (i) an administrator has a duty to take a decision;
  - (ii) there is no law that prescribes a period within which the administrator is required to take that decision; and
  - (iii) the administrator has failed to take that decision, institute proceedings in a court or tribunal for judicial review of the failure to take the decision on the ground that there has been unreasonable delay in taking the decision; or
  - (b) (i) an administrator has a duty to take a decision;
  - (ii) a law prescribes a period within which the administrator is required to take that decision; and

the human rights guaranteed by the Constitution in its Bill of Rights. In fact, one should remember that in terms of section 8 (1), the Bill of Rights applies to all law and binds the legislature, the executive and the judiciary and all organs of the state. Therefore, 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 provided by section 36 of the Constitution.<sup>46</sup> The requirements are that the limitation must be reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.<sup>47</sup>

There are various mechanisms in place by which the validity of an administrative action affecting environmental rights can be challenged, and these mechanisms serve to ensure transparency, accountability and openness in the young South African constitutional democracy.<sup>48</sup> This is important to the

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(iii) the administrator has failed to take that decision before the expiration of that period, institute proceedings in a court or tribunal for judicial review of the failure to take the decision within that period on the ground that the administrator has a duty to take the decision notwithstanding the expiration of that period.

<sup>46</sup> Section 36 provides that:

(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including –

- a) the nature of the right;
- b) the importance of the purpose of the limitation;
- c) the nature and extent of the limitation;
- d) the relation between the limitation and its purpose; and
- e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

<sup>47</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>48</sup> Bray E "Administrative justice" in Paterson A and Kotzé JL (eds.) *op. cit.* (n 10) 174.

cultivation of a 'human rights culture' based on constitutionalism and the rule of law within South Africa.

### *5.1.2.3 Administrative control and remedies*

In order to give effect to the general principle of legality, administrative control constitutes an integral part of the day-to-day running of the administration responsible for environmental issues. By the way, different administrative bodies and officials exercise control and remedies are available to aggrieved persons because rights (including environmental rights) depend upon remedies. Rights and remedies cannot be kept in separate compartments, and it is the nature of the remedy which determines the nature of the right.<sup>49</sup> Thus, remedies are of the greatest importance when compelling administrative bodies and officials to act lawfully and to perform their duties effectively.

#### a. Administrative regulations

To ensure that individuals comply with their administrative environmental rights and duties, an Act may empower administrative bodies to make administrative regulations, which must be published in official publications (e.g. the *Government Gazette* or the *Provincial Gazette*) to inform the public about what the administrative bodies expect of them. In terms of the National Environmental Management Act (NEMA), the Minister may make regulations in respect of different activities, provinces, geographical areas and owners or classes of owners of land. He may also make regulations concerning procedures for the inclusion of environmental management cooperation agreements that must include procedures for public participation and requirements pertaining to

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<sup>49</sup> Wade HWR and Forsyth CF *Administrative law* (2000) 8<sup>th</sup> ed. Oxford University Press New York 31, 551.

the furnishing of information.<sup>50</sup> Unfortunately, despite the publication, most individuals do not have access to the Gazettes, and a certain percentage of South African people are illiterate. As observed in the case of the Democratic Republic of Congo (DRC), 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 criticized in terms of environmental and other matters. Snyman has highlighted this point: '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>51</sup> The applicability of the maxim would necessitate ignoring Africa's realities where so many are beset with illiteracy and poverty at the grass roots level in a way that is most unfair. This remains an important challenge to be tackled by both the DRC and the RSA to sustain their evolving democratic processes.

\* Abatement notice and directives:<sup>52</sup>

This particular procedure empowers certain administrative bodies to serve a notice and/or directives requiring offenders to stop, within a specific time, activities that are detrimental to the environment. Failure to comply with the notice usually amounts to an offence. Generally, the power to issue an abatement notice is followed by a provision allowing the concerned authority or official to take steps to remedy the situation when the offender defaults, and allowing the costs of such action to be recovered from the offender. According to Kidd, the best known directives in South African environmental law are those found in section 28 of the National environmental Management Act (NEMA)<sup>53</sup>

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<sup>50</sup> Sections 44 – 47 of the National Environmental Management Act (NEMA).

<sup>51</sup> Snyman CR *Criminal law* (2002) 4th ed. Butterworths Durban 202.

<sup>52</sup> Bray E "Administrative justice" in Paterson A and Kotzé JL (eds.) *op. cit.* (n 10) 186.

<sup>53</sup> Section 28 of NEMA.



and section 31A<sup>54</sup> of the Environment Conservation Act.<sup>55</sup> Considering the terms of section 28 of the National Environmental Management Act (NEMA), a directive is when the authority requires various measures to be taken to clean up or prevent pollution. Certain aspects of section 28, as well as a number of other aspects concerning pollution regulation, were taken into account in the case of *Hichange Investments (Pty) v Cape Produce Company (Pty) Ltd/ a Pelts*

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<sup>54</sup> Section 31A of the Environment Conservation Act provides:

“Powers of the Minister, competent authority, local authority or government institution where environment is damaged, endangered or detrimentally affected

- a. If, in the opinion of the Minister or the competent authority, local authority or government institution concerned, any person performs any activity or fails to perform any activity as a result of which the environment is or may be seriously damaged, endangered or detrimentally affected, the Minister, competent authority, local authority or government institution, as the case may be, may in writing direct such person-
  - i. to cease such activity; or
  - ii. to take such steps as the Minister, competent authority, local authority or government institution, as the case may be, may deem fit, within a period specified in the direction, with a view to eliminating, reducing or preventing the damage, danger or detrimental effect.
- b. The Minister or the competent authority, local authority or government institution concerned may direct the person referred to in subsection (1) to perform any activity or function at the expense of such person with a view to rehabilitating any damage caused to the environment as a result of the activity or failure referred to in subsection (1), to the satisfaction of the Minister, competent authority, local authority or government institution, as the case may be.
- c. If the person referred to in subsection (2) fails to perform the activity or function, the Minister, competent authority, local authority or government institution, depending on who or which issued the direction, may perform such activity or function as if he or it were that person and may authorize any person to take all steps required for that purpose.
- d. Any expenditure incurred by the Minister, a competent authority, a local authority or a government institution in the performance of any function by virtue of the provisions of subsection (3), may be recovered from the person concerned”.

<sup>55</sup> Kidd has demonstrated the complex character of the provision of section 28 of NEMA, particularly in respect of its enforcement. Section 31A of the Conservation Act focuses particularly or is aimed at essentially the same kind of situation envisaged by section 28 of NEMA, except is confined to situations where there is ‘serious’ damage or endangerment of the environment, whereas the National Environmental Management Act provision could possibly be used in wider circumstances because it relates to ‘significant’ pollution or degradation of the environment. Kidd *M op. cit.* (n 28) 136, 137, 138, 219. See also *Bareki NO and Another v Gencor Ltd and Others* (2006) (1) SA 432 (T).

*Products, and Others*,<sup>56</sup> concerning the emission of chemical waste products in different forms by the respondent tannery. Judge Leach considered the meaning of ‘significant’ in the context of subsection 28(1) and stressed 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.’ Through this statement, he corroborated and sustained the view that ‘significant pollution’ must be considered in the light of the constitutional right to an environment conducive to health and well-being.<sup>57</sup>

Obviously, the *Hichange* case has much in common with the *Woodcarb*<sup>58</sup> case. The court held that the generation of smoke in the circumstances defined before the court was an infringement of the respondent’s neighbours’ right to an environment which is not detrimental to their health or well-being.<sup>59</sup>

\* Administrative suspension or cancellation of authorization:

This is a powerful sanction. It contains a discretionary suspension or cancellation of authorization that may be available to an administrative body, is where the holder’s non-compliance with such authorization or the public interest demands<sup>60</sup> such a suspension or cancellation. In South Africa, the administrative suspension or cancellation of authorization is provided for in the Nuclear Energy Act 46 of 1999 for example.

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<sup>56</sup> 2004 (2) SA 393 (ECD).

<sup>57</sup> Glazewski J *op. cit.* (n 5) 150.

<sup>58</sup> *Minister of Health and Welfare v Woodcarb (Pty) Ltd* (1996) (3) SA 155 (N).

<sup>59</sup> Mohomed Farzana Environmental rights afforded to residents affected by mining activities: A case study in Hondeklip Bay (November 2006) University of South Africa Unisa [Unpublished LLM dissertation] Pretoria 19.

<sup>60</sup> Section 93 of the National Environmental Management: Biodiversity Act 10 of 2004, now also enforced by environmental management inspectors as discussed above.

\* Detention as security and investigation and seizure:

In terms of some procedural provisions of 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 that pose a danger to the environment, pending the payment of costs for which the owners are liable. Under certain circumstances, administrative bodies are also authorized to enter premises, conduct investigations, search vehicles and conduct examinations to ascertain whether environmental prescriptions have been observed. In this case, they are empowered to seize anything that furnishes proof of any contravention of these provisions.<sup>61</sup>

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<sup>61</sup> Section 7 of the Act pertaining to the inspection of a ship or tanker or of records, and the taking of samples of oil. Section 8 puts an emphasis on the right of entry. It says:

(1) Any person or member referred to in section 7 and any other person authorized thereto by the Minister may enter upon any land with such workmen, machinery, vehicles, equipment, appliances, instruments and other articles, and may perform all such acts thereon, as may be necessary for the purpose of complying with any provision of this Act, or for the purpose of making any enquiries or undertaking any investigations with a view to determining whether any pollution of the sea by oil has occurred and whether the removal of such pollution is feasible, or for the purpose of erecting camps or other temporary works which may be considered necessary in connection with the removal of such pollution of the sea by oil, or for the purpose of ascertaining whether or not any provision of this Act or condition imposed thereunder is being complied with, and may, for the purpose of gaining access to such land, enter upon and cross any other land with the said workmen, machinery, vehicles, equipment, appliances, instruments and other articles: provided that –

- a) no such entry shall be made into any building, or upon any enclosed space attached to a dwelling, except with the consent of the occupiers thereof;
- b) as little damage, loss or inconvenience as possible shall be caused in the exercise of the powers conferred by this subsection, and such compensation as may be agreed upon or, failing agreement, determined by a component court, shall be paid from the State Revenue fund for any damage, loss or inconvenience so caused.

[Para. (b) substituted by s. 2 of Act No. 9 of 1990.]

(2) Any person who prevents any entry authorized or the exercise of any powers conferred by subsection (1) or who wilfully obstructs or hinders any person so entering in the performance of his functions under this Act shall be guilty of an offence. See also Bray W *Environmental Law: Study guide for LCP 407-P* (2003-2004) University of South Africa Pretoria at 88.

## b. Internal administrative control of environmental matters

In general, internal administrative control or the so-called extra-judicial control encapsulates various administrative methods used by administrative bodies to ensure compliance with administrative (environmental) prescriptions. Thus, the validity and merit of administrative decisions are subject to internal appeal to a higher administrative body or official within the same hierarchy (e.g. the director general or minister)<sup>62</sup> or an appeal to an administrative tribunal outside the particular hierarchy.<sup>63</sup> A number of environmental statutes provide for appeals against administrative decisions that are heard and decided either by more senior officials or by administrative bodies established for the hearing of appeals or, further, control by environmental tribunals, if they are provided for.<sup>64</sup> An appeal to the minister is also provided for by section 43 of National Environmental Management Act:

- (1) any affected person may appeal to the Minister against a decision taken by any person acting under a power delegated by the minister under this Act.
- (2) an appeal under subsection (1) must be noted and must be dealt with in the manner prescribed.

## c. Administrative and environmental tribunals

One is of the view that administrative tribunals offer an affordable, speedy and accessible system of justice to those aggrieved by an administrative action. They

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<sup>62</sup> Sections 3, 4 and 5 of the Promotion Administrative Justice Act 2000; Burns Y and Beukes M *op. cit.* (n 43) 269; Bray E *Administrative justice* in Paterson A and Kotzé JL (eds.) *op. cit.* (n 10) 188.

<sup>63</sup> Kidd M *op. cit.* (n 28) 209. Chapus R *Droit administratif général* (2000) T.1 14<sup>ème</sup> éd. Montchrestien Paris 989; Burns Y *Administrative Law: Under the 1996 Constitution* (2003) 2<sup>nd</sup> ed. Butterworths Durban 279; Burns Y and Beukes M *op. cit.* (n 43) 271-272

<sup>64</sup> Section 146 of Chapter 15 of the National Water Act 36 of 1998 establishes a Water Tribunal. See also Burns Y and Kidd M “Administrative law and implementation of environmental law” in Strydom HA and King ND (eds.) *op. cit.* (n 1) 242, 268.

are created by statute and their powers and functions are laid down in an empowering statute.<sup>65</sup>

For just administrative action, the Constitution requires national legislation to be enacted to give effect to the rights provided in subsection (1) and (2) of section 33 of the Constitution and to:

- provide for the review of administrative action by a court or, where appropriate, an independent and impartial tribunal;
- impose a duty on the state to give effect to the rights in subsections (1) and (2); and
- promote efficient administration.

In this respect, Bray has observed that up to now, the establishment of administrative tribunals in South Africa has been done on an *ad hoc* basis. No coherent system exists,<sup>66</sup> and only a limited number of environmental tribunals have been established and for specific fields.<sup>67</sup> The Development Facilitation Act 67 of 1995 established development tribunals to grant interim relief, make final decisions or refer to conciliation a wide range of matters relating to land

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<sup>65</sup> Burns Y and Beukes M *op. cit.* (n 43) 270.

<sup>66</sup> Bray W *op. cit.* (n 61) at 90. Burns Y and Kidd M “Administrative law and implementation of environmental law” in Strydom HA and King ND (eds.) *op. cit.* (n 1) 268. Burns Y and Beukes M *op. cit.* (n 43) 270.

<sup>67</sup> A further development has been the establishment of the Environmental Courts, first in Hermanus in February 2003 and a second court later in Port Elizabeth. During the first 18 months, the Hermanus court was in session for 229 days and finalised 166 cases with 125 guilty verdicts and a conviction rate of almost 75%. This is certainly a great effort done in the right direction but there still is a long way to go because of the lack of understanding of environmental issues within the judiciary and capacity building in this regard. Despite a very successful three-year track record, the court was closed in 2006 due to the unwillingness of the Department of Justice and Constitutional Development to resource a specialized court that was mandated by specific legislation. There is however, still a district court in Port Elizabeth dedicated to the prosecution of environmental offences. Müller K “Environmental governance in South Africa” in Strydom HA and King ND (eds.) *op. cit.* (n 1) 95; Bray E “Administrative justice” in Paterson A and Kotzé JL (eds.) *op. cit.* (n 10) 195; Du Plessis Anél *Understanding the legal context* in Paterson A and Kotzé JL (eds.) *op. cit.* (n 10) 37; Craigie F, Snijman P and Fourie M “Environmental compliance and enforcement institutions” in Paterson A and Kotzé J (eds.) *op. cit.* (n 10) 98.

development.<sup>68</sup> General principles in Chapter 2 (sections 2-4) of the Act proclaim that laws, procedures and administrative practice pertaining to land development should give further content to the fundamental rights set out in the Constitution (including environmental and developmental rights). Although the Act encourages environmentally sustainable land development practices and processes, inevitably, land development of any kind is expected to have an impact on the environment. Thus, it would seem that the very process of expedition inherent in the Development Facilitation Act might have negative environmental consequences.<sup>69</sup>

### 5.1.3 Judicial control over administrative actions and remedies

It has been emphasized that, in reality, judicial control over administrative actions remains additional to internal control and is a form of control that is foreign to the internal structure and operation of the administration.<sup>70</sup> Through judicial control, one would like to ensure that the state does not use its superior position to infringe the rights, freedoms and liberties of the individual.<sup>71</sup> The court plays a significant role in the adjudication of human rights matters in order to establish whether there has been a violation and make a declaration. In addition, it has to determine remedies that could be granted once such violation had been found<sup>72</sup> because a right without a remedy does not exist.<sup>73</sup> In terms of

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<sup>68</sup> Sections 15 – 26; 30(1); 33; 34; 40; 42; 48(1); 51; 57; and 61 of the Development Facilitation Act.

<sup>69</sup> Sally-Ann Rigby and Roseanne Diab “Environmental sustainability and the Development Facilitation Act in South Africa” (2003) Vol. 15 No. 1 *Journal of Environmental Law* at 28.

<sup>70</sup> Wiechers M *Administrative law* (1985) Butterworths Durban 270.

<sup>71</sup> Burns Y and Beukes M *op. cit.* (n 43) 273.

<sup>72</sup> Sibonile Khoza “Extrapolating from South Africa’s jurisprudence on the right of access to adequate housing, health care and social assistance” in Borghi Marco, Letizia Postiglione Blommestein (eds.) *The right to adequate food and access to justice* (2006) Bruylant Bruxelles Schulthess Geneva 174.

<sup>73</sup> Kiss A and Shelton D *Manual of European environmental law* (1997) 2<sup>nd</sup> ed. Cambridge University Press UK 81.

the Constitution, wide-ranging powers have been conferred on the court to grant ‘appropriate relief’,<sup>74</sup> make ‘declaratory orders’,<sup>75</sup> and grant orders which are ‘just and equitable’.<sup>76</sup> The court should choose from various specific remedies: declaratory, mandatory orders, and suspension, reading-in, supervisory jurisdiction or structural interdict.<sup>77</sup> A brief overview of judicial control and the remedies provided in South Africa, and of the organisation and the structure of the judicial system of the country, follows.

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

The organization and structure of the South African judicial system is based on the Constitution which is the supreme law of the country and the rule of the law.<sup>78</sup> In terms of section 165 of the Constitution, the judicial authority is vested in the courts. The courts are independent and subject only to the Constitution and the law, which they are obliged to apply impartially and without fear, favour or prejudice. All organs of state are required to assist and to protect the courts to ensure their independence, impartiality, dignity, accessibility and effectiveness. The judicial system embodies a number of courts. These courts are provided for by 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 other courts established or recognized in terms of an Act of Parliament, including any court of a status similar to either the High Courts or Magistrates’ Courts. The Constitutional Court is the highest

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<sup>74</sup> Section 38.

<sup>75</sup> Section 172 (1) (a).

<sup>76</sup> Section 172 (1) (b).

<sup>77</sup> Sibonile Khoza “Extrapolating from South Africa’s jurisprudence on the right of access to adequate housing, health care and social assistance” in Borghi Marco, Leitzia Postiglione Blommestein (eds.) *op. cit.* (n 72) 174.

<sup>78</sup> Section 1 (c) of the Constitution.

court in all constitutional matters; it may only decide upon constitutional matters, and issues connected with decisions on constitutional matters; and it makes the final decision as to whether or not a matter is a constitutional matter or whether or not an issue is connected with a decision on a constitutional matter.<sup>79</sup> 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>80</sup> The High Court applies legal rules and principles to determine whether administrative decisions were taken in a fair and reasonable manner. The High Court has the power either to confirm the administrative decision taken by the official, to amend or repeal it, to refer it back to the official (or body) for reconsideration, or to make a decision itself.<sup>81</sup> The courts are the ‘watchdogs’ of the democratic principles and values enshrined in the Constitution, and so it is essential that courts and the officers presiding over them remain independent and free from undue influence. The Constitution has already created the jurisprudential framework and philosophy for judicial independence and legitimacy as well as the potential for judicial activism. To give muscle to this approach, and, further, to prevent the manipulation of salaries and thereby to furnish members of the bench with security of tenure, which is essential to render them independent of executive interference, the salaries, allowances and benefits of judges may not be reduced in South Africa.<sup>82</sup> The Constitution makes clear provisions for the impeachment of members of the bench. A judge may only be removed from office if:

- the Judicial Service Commission finds that the judge suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct; and

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<sup>79</sup> Section 167 (3) of the Constitution.

<sup>80</sup> Section 168 (3) of the Constitution.

<sup>81</sup> Read also the provisions of the Promotion of Administrative Justice Act 2000 (PAJA) which now regulate judicial review of administrative action and the procedure for judicial review (points 6 and 7)

<sup>82</sup> Section 176 (3) of the Constitution.



- the National Assembly calls for the judge to be removed, by a resolution adopted with a supporting vote of at least two-thirds of its members.

The President must then remove a judge upon adoption of a resolution calling for that judge to be removed.<sup>83</sup> One may safely assert that in the light of the constitutional provisions in South Africa, judges have security of tenure<sup>84</sup> and judicial independence has been confirmed<sup>85</sup> by the Constitutional Court decisions underlining the principle of the separation of powers between the three branches of government. In the case of *South African Association of Personal Injury Lawyers v Health and Others*,<sup>86</sup> the Court upheld that

separation of the judiciary from the other branches of government is an important aspect of the separation of powers required by the Constitution, and is essential to the role of the court under the Constitution ... a failure to maintain the separation required by the Constitution between the legislative and executive on the one hand, and the courts on the other hand, will undermine the role of the court as an independent arbiter of issues involving the division of powers between the various spheres of government.

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

Legal standing, or *locus standi*, is a basic rule of many legal systems and means that a party may take a matter to court only if he or she has an identifiable and clear interest in the outcome of the case. According to Glazewski,<sup>87</sup> traditionally,

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<sup>83</sup> Section 177 of the Constitution.

<sup>84</sup> Devenish GE *The South African Constitution* (2005) Butterworths Durban 339.

<sup>85</sup> The judicial system in South Africa is independent although sometimes slow, and plays its own role in protecting human rights. See Reif Linda C “Building democratic institutions: The role of national human rights institutions in good governance and human rights protection” (2000) Vol. 13 *Harvard Human Rights Journal* at 67.

<sup>86</sup> 2000 (10) BCLR 113 (T); 2001 (1) BCLR 77-101 (CC).

<sup>87</sup> Glazewski J *op. cit.* (n 5) 101.

the requirement that individuals must show personal interest in the administrative action being challenged has been an impediment to those wishing to litigate in environmental matters in South Africa. Nowadays, the new constitutional dispensation has broadened the scope of the *locus standi* of individuals and groups to seek relief in matters involving fundamental rights such as environmental rights. The enforcement of rights guaranteed in section 38 of the Constitutional 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, and the court may grant appropriate relief, including a declaration of rights.<sup>88</sup> Further, in terms of section 38 of the Bill of Rights, 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 an alleged infringement of those rights. This may arise in either private law or public law situations where the individual has been aggrieved by an action or decision by a public authority. This broad approach to standing is necessary to ensure the effective enforcement of the Bill of Rights.<sup>89</sup>

In a similar vein to the Constitution, the scope of *locus standi* has been further extended through the National Environmental Management Act. 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

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<sup>88</sup> Section 38 of the Constitution provides that:

“Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are:

- (a) anyone acting in their own interest;
- (b) anyone acting on behalf of another person who cannot act in their own name;
- (c) anyone acting as a member of, or in the interest of, a group or class of persons;
- (d) anyone acting in the public interest; and
- (e) an association acting in the interest of its members”.

<sup>89</sup> Feris Loretta “Environmental rights and locus standi” in Paterson A and Kotzé JL (eds.) *op. cit.* (n 10) 148.

law concerned with the protection of the environment or the utilization of natural resources.<sup>90</sup> Section 32 (2) of the National Environmental Management Act (NEMA)<sup>91</sup> goes even further as it has been demonstrated by the Court in *Silvermine Valley Coalition v Sybrand van der Spuy Boerderye and Others*.<sup>92</sup> The Court applied section 32 of the National Environmental Management Act in favour of the losing applicant, finding that it had met the requirements in the section. 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 the light of the provisions of the National Environmental Management Act seek appropriate relief in the interest of protecting the environment itself.

The Promotion of Administrative Justice Act (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.’

According to Glazewski,<sup>93</sup> 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 interest provided for by the National Environmental Management Act, considerably increases the opportunity for public interest litigation in the environmental sphere. In a number of cases the

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<sup>90</sup> Sections 32 and 33 of the National Environmental Management Act. See also Kidd M *op. cit.* (n 28) 226.

<sup>91</sup> Section 32(2) of the National Environmental Management Act (NEMA) provides that: “A court may decide not to award costs against a person who, or group of persons which, fails to secure the relief sought in respect of any breach or threatened breach of any provision including a principle of this Act or of any other statutory provision concerned with the protection of the environment or the use of natural resources, if the court is of the opinion that the person or group of persons acted reasonably out of a concern for the public interest or in the interest of protecting the environment and had made due efforts to use other means reasonably available for obtaining the relief sought”.

<sup>92</sup> 2002 (1) SA 478 (C). Burns Y and Kidd M “Administrative law and implementation of environmental law” in Strydom HA and King ND (eds.) *op. cit.* (n 1) 266.

<sup>93</sup> Glazewski J *op. cit.* (n 5) 123.

liberalization of the *locus standi* has had a significant effect. For instance, in *Wildlife Society of Southern Africa and Others v Minister of Environmental Affairs and Tourism*,<sup>94</sup> Judge Pickering recognised the *locus standi* of the Society under the Interim Constitution. He held 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>95</sup> In *Minister of Health and Welfare v Woodcarb (Pty) Ltd*,<sup>96</sup> Judge Hurt likewise considered the question of *locus standi* and asserted that the applicant could rely on the public interest clause in the Interim Constitution<sup>97</sup> for *locus standi* to apply to the court for an interdict.

In addition to the analysis of the *locus standi* rule, there are various procedural requirements that must be met before the legal remedies aimed at controlling administrative action may be sought via the courts. The review motion must be brought before the court within a reasonable time and it is only the final decisions of administrative organs which may be taken on review. In general, internal remedies should be exhausted before the court is approached for assistance,<sup>98</sup> because judicial control is an external form of control meant to ensure adherence to the requirement of legality, but not meant to usurp the administration and its operation. It has been acknowledged that the administration itself is in the best position to remedy its mistakes.<sup>99</sup> However, South African history and experience have shown that the general public often displayed a lack of confidence in, and mistrust of, the administration. The public

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<sup>94</sup> (1996) (3) SA 1095 (Tk).

<sup>95</sup> At 1104 (I-J), At 1105 (A-B). See also Glazewski J *op.cit.* (n 5) 122.

<sup>96</sup> *Idem.*; See also Burns Y and Beukes M *op. cit.* (n 43) 489.

<sup>97</sup> Section 7 (4) of the Interim Constitution at 164 G.

<sup>98</sup> Bray E “Administrative justice” in Paterson A and Kotzé JL (eds.) *op. cit.* (n 10) 190.

<sup>99</sup> Wiechers M *op. cit.* (n 70) 271.

has generally chosen to approach the civil courts rather than exhaust internal or domestic remedies.<sup>100</sup> This matter is now regulated by the Promotion of Administrative Justice Act (PAJA) in terms of its section 7 (2):

- (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.

Obviously, there are various reasons to justify the requirement to exhaust internal remedies. The following may be mentioned:

- 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 expensive and time-consuming, and judicial officers often have less ‘hands-on’ experience of technical environmental problems than officers working in this field.<sup>101</sup>

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<sup>100</sup> Burns Y *op. cit.* (n 63) 290.

<sup>101</sup> Bray E “Administrative justice” in Paterson A and Kotzé JL (eds.) *op. cit.* (n 10) 193; Kidd M “Greening the judiciary” (2006) Vol. 9 No 3 *Potchefstroom Electronic Law Journal* at 8/15 – 13/15.

Against this broad and open understanding of *locus standi*, one shares the point of view that all constitutional, statutory (e.g. the National Environmental Management Act), and common law provisions pertaining to *locus standi* are not restricted to individuals who have shown injury, prejudice, or damage of a right particular to themselves but is afforded to any person/entity who may want to enforce their environmental rights irrespective of whether that person/entity is adversely affected by the alleged infringement of their rights.<sup>102</sup> This is an important development in the South African legal system in support of the protection of human rights and of environmental rights in particular. The South African understanding and promotion of *locus standi* is close to what has taken place in a number of legal systems elsewhere in the world that have also extended the right to file suit to groups and organizations of concerned citizens. An excellent illustration of open access is article 15 (2) of the 1993 Slovenia Environmental Protection Act which provides:

To exercise their right to a healthy and clean environment, individual citizens, their associations, unions, and organizations may file a suit with the court, demanding termination of an activity, if such an activity presents or will present an immediate threat to the environment, a critical environmental strain or damage, or a direct danger to the life and health of the people, or demanding that the commencement of such an activity be prohibited if the likelihood of the above mentioned effects can be demonstrated with reasonable certainty.

### 5.1.3.3 *The interdict and mandamus*

One notes 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. As a common law

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<sup>102</sup> Mohomed Farzana *op. cit.* (n 59) 41.

remedy, an interdict can be instituted against the administration or the individual. In a number of cases, the South African courts have applied the interdict, for instance, to prevent unlawful action or to halt threatening pollution as in the *Woodcarb*<sup>103</sup> case; or to prevent unlawful administrative action or threatening unlawful action as in *Van Huyssteen v Minister of Environmental Affairs and Tourism*.<sup>104</sup> These cases were of greatest importance and interest because, in the *Woodcarb* case, for example, the Minister's responsibility to take proactive steps to control air pollution<sup>105</sup> being emitted from scheduled processes was confirmed in preference to an after the event reliance on the cumbersome, reactive procedure of criminal prosecution. In a similar vein, was the grant of an interdict in *Die Vereniging van Advokate v Moskeplein (Edms) Bpk*,<sup>106</sup> where building operations caused such noise and disturbance at the advocates' chambers that the group of advocates applied for an interdict to prohibit building operations during normal working hours.<sup>107</sup>

However, a mandamus, as another mechanism or remedy by which administrative actions can be controlled, remains a legal process whereby an administrative organ can be compelled to perform some or other statutory duty. The most common employment of mandamus is as a weapon in the hands of the ordinary citizen when a public authority fails to do its duty. Thus, mandamus deals with wrongful inaction.<sup>108</sup> It is in this respect that in *Transnet Beperk h/a Coach Express v Voorsitter Nasionale Vervoerkommissie*,<sup>109</sup> the court found that

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<sup>103</sup> (1996) (3) SA 155 (N).

<sup>104</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 Constitution).

<sup>105</sup> The defendant's unlicensed atmospheric emissions illegally interfered with the neighbours' constitutional right to a healthy environment contained into section 29 of the Interim Constitution 1993 (section 24 of the Constitution).

<sup>106</sup> (1982) (3) SA 159 (T).

<sup>107</sup> *Burns Y op. cit.* (n 43) 301.

<sup>108</sup> *Wade HWR and Forsyth CF op. cit.* (n 49) 604.

<sup>109</sup> (1995) (3) SA 844 (T).

a mandatory interdict can be granted both where the permit was refused as a result of a disregard for the rules of natural justice, and where the permit was granted as the result of a disregard of those rules.<sup>110</sup> In *Wildlife Society of Southern Africa*,<sup>111</sup> the Wildlife Society applied for a mandamus to compel the Transkei Department to protect the Wild Coast against the degradation caused by rampant and 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.<sup>112</sup>

#### 5.1.4 Judicial review and statutory appeal

Judicial review and statutory appeal are two different systems.<sup>113</sup> With this in mind, Burns and Beukes emphasise that the High Court has never had inherent appeal jurisdiction. The right to appeal exists only where express statutory provision is made for it. In addition, a subordinate legislature may not create a right of appeal in the absence of express statutory authority contained in the enabling Act.<sup>114</sup> Rights of appeal are always statutory.<sup>115</sup>

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<sup>110</sup> Burns Y *op. cit.* (n 63) 302.

<sup>111</sup> (1996) (3) SA 1095 (Tk).

<sup>112</sup> *Idem.*

<sup>113</sup> “It is known that when hearing an appeal the court is concerned with the merits of a decision under appeal: is it correct? When subjecting some administrative act or order to judicial review, the court is concerned with its legality: is it within the limits of the powers granted? On an appeal the question is: “right or wrong?” On review the question is ‘lawful or unlawful?’ ” See Wade HWR and Forsyth CF. *op. cit.* (n 49) 33; Burns Y and Beukes M *op. cit.* (n 43) 278.

<sup>114</sup> Burns Y and Beukes *idem.*; *Johannesburg City Council v Chesterfield House (Pty) Ltd* (1952) (3) SA 809 (A).

<sup>115</sup> Wade HWR and Forsyth CF *op. cit.* (n 49) 33.



Judicial review of administrative action appears to be a potent instrument regarding decisions pertaining to the environment.<sup>116</sup> In this respect, Feris indicates that it falls on the judiciary to use its powers of judicial review to assess the conduct of the legislature and executive for consistency with the Constitution.<sup>117</sup> In the *Fuel Retailers Association of Southern Africa v Director General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province*,<sup>118</sup> the above function of the Court was underscored when the Judge Ngcobo stated: ‘the role of the courts is especially important in the context of the protection of the environment and giving effect to the principle of sustainable development’.<sup>119</sup> All administrative environmental decisions (actions) taken by the relevant officials or bodies are subject to judicial review by the High Court.<sup>120</sup> In terms of section 33 of the Constitution and the Promotion of Administrative Justice Act, 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>121</sup>

### 5.1.5 Statutory criminal sanctions

Statutory criminal sanctions are provided for in legislation and are also referred to as criminal penalties or sanctions. These sanctions are very important and are extensively applied when legal and administrative environmental provisions are contravened. Clearly, criminal sanctions can be used as a primary or direct

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<sup>116</sup> Glazewski J *op. cit.* (n 5) 123.

<sup>117</sup> Feris Loretta “Environmental rights and locus standi” in Paterson A and Kotzé JL (eds.) *op. cit.* (n 10) 134.

<sup>118</sup> 2007 (6) SA 4 (CC).

<sup>119</sup> *Id.* Paragraph 102.

<sup>120</sup> 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.

<sup>121</sup> Section 6 and 7 of the Promotion of Administrative Justice Act.

sanction, or as a subsidiary or indirect sanction, in the enforcement of environmental laws.<sup>122</sup> According to Glazewski, 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. Indeed, reliance on the criminal sanction as a subsidiary sanction is highly desirable as it anticipates environmental harm before it occurs.<sup>123</sup>

Criminal sanctions act as a deterrent, but to be an effective deterrent, proper enforcement of the legislation is essential and the sanction must be stringent enough to overcome the motive of economic gain. This is so important because big factories and industries with large profit margins, for instance, will not be deterred by a fine of R500 or R2000,<sup>124</sup> but will simply regard such fines as ‘the cost of doing business.’ It would be more effective for such fines to be significant enough to be an incentive to them to decrease their pollution levels or improve their anti-pollution measures. There has been an important improvement through the Marine Pollution Act 2 of 1986. Any person convicted of an offence under this Act is liable to a fine of up to R500 000 or to imprisonment of up to five years.<sup>125</sup> In the same vein, the National Forests Act 84 of 1998 provides that a person sentenced to community service under the Act ‘must impose a form of community service which benefits the environment.’<sup>126</sup> This means that in addition to imposing a criminal sanction, a court may award compensatory damages to a person who has suffered loss as a result of the

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<sup>122</sup> Burns Y and Kidd M “Administrative law and implementation of environmental law” in Strydom HA and King ND (eds.) *op. cit.* (n 1) 244.

<sup>123</sup> The aim of this procedure is to promote the application of the preventive principle. This is the case when various restricted activities cannot lawfully be carried out without a permit (section 57 of the Biodiversity Act 10 of 2004). An offence involving the lack of a permit or authorisation would also be easier to prove in most cases than in the case of a primary sanction. Kidd M *op. cit.* (n 28) 210; Glazewski J *op. cit.* (n 5) 118.

<sup>124</sup> South African Currency. The sign “R” means “Rand.”

<sup>125</sup> Section 3A (4) of the Marine Pollution Act 2 of 1986.

<sup>126</sup> Section 58 (8) (a).

criminal act.<sup>127</sup> Section 34 of the National Environmental Management Act on criminal proceedings has also attempted to redress this issue. A court of law that has convicted a person of an offence under any provision 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 is the way forward because it allows for the imposition of an increased penalty or fine on the guilty party.

Despite all efforts done to protect the environment through criminal law in South Africa, Kidd points out that, generally, there have not been many successful prosecutions in the environmental sphere. There are a number of shortcomings in the use of criminal sanctions<sup>128</sup> because of the reactive nature of criminal law, for instance. This is designed to react to offences that have already been committed, which might often be too late to prevent damage to the environment.<sup>129</sup> One believes that public awareness of threats to the environment remains a vital point. People who are aware that conduct is wrong and prohibited by law may refrain themselves from undertaking activities that are harmful to the environment and so assist officials by bringing offences to their notice. In this order, the environmental impact assessment process is a practical phase that paves the way to a strong partnership between officials and the public in the management of the environment.

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<sup>127</sup> Section 59 of the Forests Act and Sections 152 and 153 of the National Water Act 36 of 1998. See also Glazewski J *op. cit.* (n 5) 119.

<sup>128</sup> Kidd M *op. cit.* (n 28) 210, 211; Burns Y and Kidd M “Administrative law and implementation of environmental law” in Strydom HA and King ND (eds.) *op. cit.* (n 1) 244.

<sup>129</sup> Burns Y and Kidd M “Administrative law and implementation of environmental law” in Strydom HA and King ND (eds.) *op. cit.* (n 1) 245.

### 5.1.6 The Environmental Impact Assessment process and the promotion of environmental rights in South Africa

Environmental Impact Assessment (EIA) is considered as being anticipatory in nature, and it is a planning and management tool for achieving sustainable development, aimed at providing decision-makers with information on the likely consequences of their actions. One asserts that the practice of environmental impact assessment commenced much later in developing countries. In a number of developing countries development projects have frequently taken place without any Environmental Impact Assessment. It has been observed that, for instance, in most African countries, Environmental Impact Assessment was conducted mainly by donor and multilateral agencies.<sup>130</sup> This has been the case in the situation of the DRC. In South Africa, Environmental Impact Assessments have been practised on a voluntary basis as part of an Integrated Environmental Management (IEM) system since the mid-1970s.<sup>131</sup> In the 2002/2003 South African Human Rights Commission report on economic and social rights,<sup>132</sup> it was affirmed that development projects will always impact on the environment one way or another and Environmental Impact Assessment is an accepted way to lessen the negative impact of development projects on the environment. The Environmental Impact Assessment process is supposed to provide equilibrium between the interests of development and the environment. According to the South African Human Rights Commission, the Environmental Impact Assessment process has tended to be unduly tied to either one of its real

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<sup>130</sup> Sandham Luke A Siphugu Victor M and Thivhulawi Tshivhandekano R “Aspects of environmental impact assessment practice in the Limpopo province – South Africa” (March 2005) Vol. 10 *AJEAM – RAGEE* at 50.

<sup>131</sup> Kidd M and Retief F “Environmental assessment” in Strydom HA and King ND (eds.) *op. cit.* (n 1) 973; Wood C “Pastiche or pastiche? Environmental impact assessment in South Africa” (1999) 81 (1) *South African Geographical Journal* 52-59; See also Burger B Voluntary application of the integrated environmental management guidelines by Eskom in Kwa-Zulu-Natal 1989 – 1997 (2004) University of Natal Masters dissertation Durban quoted in Sandham Luke A, Siphugu Victor M and Thivhulawi Tshivhandekano R *op. cit.* (n 120) at 50.

<sup>132</sup> South African Human Rights Commission, *The right to a healthy environment: 5<sup>th</sup> economic and social rights report 2002/2003 financial year* (2004) at 46.

objectives. Shortcomings of the Environmental Impact Assessment process were discovered in so far as it can be time-consuming and so seemed to slow down economic development.<sup>133</sup> Therefore, it was necessary for the Department of Environmental Affairs and Tourism (DEAT) to remove the limiting aspects of the Environmental Impact Assessment process in order to ensure that environmental protection and management do not undermine economic development, but that the three work together for the common good.<sup>134</sup>

In terms of sections 21, 22 and 26 of the Environmental Conservation Act 73 of 1989,<sup>135</sup> Environmental Impact Assessment had become a mandatory legal requirement for a wide range of projects. The National Environmental Management Act makes provision for Environmental Impact Assessment,<sup>136</sup> and new regulations in the light of the relevant sections of the National Environmental Management Act were published for comment in June 2004 for anticipated promulgation in 2005. It was only in 2006 that the Environmental Impact Assessment regulations under the National Environmental Management Act were promulgated and the repeal of the relevant sections and regulations of the Environmental Conservation Act took effect.<sup>137</sup> A close look at the South African regulations on Environmental Impact Assessment reveals that these regulations are powerful instruments which take into account the procedural

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<sup>133</sup> In this order, President Mbeki had attacked “green laws”, saying they were causing development delays that had contributed to a “quite considerable slowing down of economic activity”. Kidd M *op. cit.* (n 28) 206; Kidd M and Retief F “Environmental assessment” in Strydom HA and King ND (eds.) *op. cit.* (n 1) 1034.

<sup>134</sup> South African Human Rights Commission, *The right to a healthy environment: 5<sup>th</sup> economic and social rights report 2002/2003 op. cit.* (n 132) at 46.

<sup>135</sup> Sections 21, 22 and 26 of the Environmental Conservation Act No. 73 of 1989 have been repealed by section 50(2) of the National Environmental Management Act (NEMA) 107 of 1998.

<sup>136</sup> Preamble, section 28, 50 of the National Environmental Management Act.

<sup>137</sup> Regulation in terms of Chapter 5 of the National Environmental Management Act of 1998, Environmental Impact Assessment Regulations, 2006. GN R615 in *GG* 28938 of 23 June 2006 repeals Government Notices (GNs) R 1182 and 1184 and Government Notice (GN) R616 repeals Government Notice (GN) R1183. Kidd M *op. cit.* (n 28) 198; Kidd M and Retief F “Environmental assessment” in Strydom HA and King ND (eds.) *op. cit.* (n 1) 995.

definition of the human right to a healthy environment. The procedure contained in the Environmental Impact Assessment regulations has muscle and provides a vehicle for enhancing access to public information, public participation in the decision-making<sup>138</sup> process and environmental justice. Lack of information is one of the major obstacles in environmental impact management. There Environmental Impact Assessment regulations of 2006 were published in three government notices:<sup>139</sup> the regulations relating to the process to be followed;<sup>140</sup> the list of activities and competent authorities in respect of which a ‘basic assessment’<sup>141</sup> will be required<sup>142</sup> and those activities and competent authorities relating to activities requiring scoping and Environmental Impact Assessment.<sup>143</sup> To safeguard the rights of people undergoing the Environmental Impact Assessment process, the interested and affected parties have the opportunity to challenge the decision of the authority through an appeal as provided for by chapter 7 of the Environmental Impact Assessment Regulations.<sup>144</sup>

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<sup>138</sup> The movement in favour of public participation has been interpreted as a triumph of participatory democracy over the techno-centric roots of environmental assessment. See Holder Jane and Lee Maria *Environmental protection, law and policy* (2007) 2<sup>nd</sup> ed. Cambridge University Press UK 548.

<sup>139</sup> *Government Gazette* 28753 of 21 April 2006.

<sup>140</sup> Government Notice (GN) R385 commenced on 3 July 2006 according to Government Notice (GN) R612 in *Government Gazette* 28938 of 23 June 2006.

<sup>141</sup> Means a process contemplated in regulation 22.

<sup>142</sup> Government Notice (GN) R386 amended by Government Notice (GN) R613, *Government Gazette* 28938 of 23 June 2006, to provide that the list comes into effect on the date on which the regulations in Government Notice (GN) R385 come into effect (e.g. 3 July 2006), except for items 8 and 9, which will come into effect at a date to be published in a separate notice. Items 8 and 9 are reconnaissance, prospecting, mining or retention operations (8) and the undertaking of any prospecting or mining related activity or operation (9). See also Kidd M *Environmental law op. cit.* (n 28) 201.

<sup>143</sup> Government Notice (GN) R387 that commences on the 23 June 2006 except for items 7 and 8: reconnaissance, exploration, production and mining (7) and the undertaking of any reconnaissance, exploration, production or mining-related activity or operation (8).

<sup>144</sup> Burns Y and Kidd M “Administrative law and implementation of environmental law” in Strydom HA and King ND (eds.) *op. cit.* (n 1) 268.

## RIGHT TO DEVELOPMENT

### 5.2 Implementation and enforcement of the right to development in South Africa

Against the background of South Africa's previously poor human rights track record, a National Action Plan (NAP)<sup>145</sup> has been established to address the legacy of the past by implementing practical and attainable plans for the protection and promotion of human rights. Through the National Action Plan, government is called upon to give concrete meaning to the universal, indivisible, interdependent and interrelated character of all human rights. Efforts to respect, protect, promote, and fulfil all human rights should be reinforced. A rational definition of national priorities for the people should be focused on the basic needs of the most disadvantaged and vulnerable members of society. In this respect, the National Action Plan gives effect to the composite nature of the right to development<sup>146</sup> and aims to make sure that people's daily well-being improves, that people take part in development in a meaningful way, and that

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<sup>145</sup> The National Action Plan is an integrated and systematic national strategy to help realize the advancement of human rights in South Africa. In addition, it is:

- an audit of the human rights situation in the country that identifies areas in need of protection and improvement;
- a commitment to concrete measures that can be adopted to build and entrench a culture of human rights for the enjoyment of all;
- a framework for sustained and coordinated ways for the country as a whole to protect and promote human rights in the next three years, and
- a serious effort on the part of the government to address the legacy of apartheid.

See National Plans of Action for the Promotion and Protection of Human Rights: South Africa, at 2. Available at: [http://www2.ohchr.org/english/issues/plan\\_actions/safrica.htm](http://www2.ohchr.org/english/issues/plan_actions/safrica.htm) (visited 11/03/2008).

<sup>146</sup> Concerned at the existence of serious obstacles to development, as well as to the complete fulfilment of human beings and of peoples, constituted, *inter alia*, by the denial of civil, political, economic, social and cultural rights, and considering that all human rights and fundamental freedoms are indivisible and interdependent and that, in order to promote development, equal attention and urgent consideration should be given to the implementation, promotion and protection of civil, political, economic, social and cultural rights and that, accordingly, the promotion of, respect for and enjoyment of certain human rights and fundamental freedoms. See Preamble of the United Nations Declaration on the Right to Development of 1986.

the benefits of any economic, social, cultural or political development are fairly shared by everybody.<sup>147</sup> One should strive for the establishment of favourable conditions to make the right to development real; abolish the immense, shameless violations of human rights of the past; overcome the results of unequal treatment; destroy the obstacles to development that have come from failing to observe economic, social and cultural rights, as well as civil and political rights.<sup>148</sup> Thus, the right to development is a significant tool to fight against poverty as it puts the human being at the centre of all governmental concerns. An array of laws and policies pertaining to the right to development, which defines the roles of administrative bodies, citizens and other actors involved in the development process, exists within the country. Putting an emphasis on the importance of taking forward the development agenda as a whole and to pave the way for a more comprehensive approach to socio-economic development in the country, a National Planning Commission has been put in place by the new government lead by the new South African democratically elected President Jacob Zuma. This Commission is responsible for strategic planning for the country to ensure one national plan to which all spheres of government adhere.<sup>149</sup>

### 5.2.1 Regulatory framework pertaining to the right to development in South Africa

Various laws exist that embody or implicitly mention the right to development within the country in the light of the Bill of Rights. One may rely, for instance, on the National Water Act 36 of 1998, the Water Services Act 108 of 1997, the National Forest Act 84 of 1998, the Restitution of Land Rights Act 22 of 1984,

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<sup>147</sup> Equity and justice are primary characteristics of the right to development. See Sengupta Arjun "Implementing the right to development" in Nico Schrijver and Friedl Weiss *International law and sustainable development: Principles and practice* (2004) Martinus Nijhoff Publishers Leiden / Boston 348.

<sup>148</sup> See National Plans of Action for the Promotion and Protection of Human Rights: South Africa, *op. cit.* (n 145).

<sup>149</sup> See South Africa's new-look cabinet, *op. cit.* (n 13).



the Housing Act 107 of 1997, the Social Assistance Act 59 of 1992, the Labour Relations Act 66 of 1995, and the Development Facilitation Act 67 of 1995.<sup>150</sup> Addressing the issues of the implementation of the right to development, government's policies are guided by principles drawn from the Reconstruction and Development Programme (RDP),<sup>151</sup> which is the policy framework for the realization of the National Action Plan (NAP), and the Growth, Economic and Redistribution Strategy (GEAR): an integrated and sustainable programme, a people-driven process, peace and security for all, nation building, reconstruction and development, and the democratization of South Africa.<sup>152</sup>

### 5.2.2 Understanding the right to development as a right to a process of development in South Africa

Bearing in mind the consequences of the imbalances of the past, the political transformation of the 1990s, sustained by the coming into force of the Interim and the Final Constitutions, these changes became an opportunity to heal the divisions of the past and establish a society based on democratic values, social

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<sup>150</sup> The Development Facilitation Act 67 of 1995 (DFA) has been praised as an excellent example of legislation that promotes integrated development. Its primary implementation mechanisms are the provincial Development Tribunals, established to take responsibility for approvals of land development. Their objectives, which comprise land development and public service experts, is to allow faster development decision-making, conflict resolution between the stakeholders, and also to provide a forum for greater community involvement and public participation within land development. See Sally Ann Rigby and Roseanne Diab *op. cit.* (n 69) at 28.

<sup>151</sup> Before coming to power, the African National Congress (ANC) had adopted the Reconstruction and Development Programme as a map for economic change. The aim of the programme was to improve the lives of the poor, and it involved both the public and private sectors in building new homes, redistributing land, creating jobs, expanding health care and education, and increasing the number of people with running water, electricity, and modern sanitation facilities. See Berger Iris *South Africa in world history* (2009) Oxford University Press New York 154.

<sup>152</sup> The key programmes of the Reconstruction and Development Programme (RDP) and Growth, Economic and Redistribution Strategy (GEAR) are: meeting basic needs, developing human resources, getting rid of poverty, building a democratic state and society and governing well. See National Plans of Action for the Promotion and Protection of Human Rights: South Africa, *op. cit.* (n 145).

justice and fundamental human rights, that would free the potential of everyone and which would lead to an improved quality of life for all citizens.<sup>153</sup> This understanding forms the backdrop of the process of development launched through the National Action Plan. The National Action Plan is designed to implement a recommendation that states consider drafting such plans to identify the steps by which the state will improve the protection and promotion of human rights (including the right to development), which was made in the Vienna Declaration and Programme of Action adopted at the 1993 United Nations World Conference on Human Rights.<sup>154</sup> Through it, anyone was given the opportunity to dream about the betterment of life in its fullest dimensions in an open and democratic South Africa. As a young multiracial democracy, South Africa is attempting to consolidate its development process through the respect, protection, promotion and fulfilment of all human rights; and further, to address the major issues of poverty and socio-economic disparities in the country. When the right to development is taken as a process, all rights are taken in their totality as an integrated whole. Recognition is given to the implications of their interrelations. In this respect, non-particular rights should not be violated in fulfilling any other right, appropriate measures for the realization of selected rights (considered as priorities) need to be put in place.<sup>155</sup> This means that some rights could be realized earlier than others without violating or retrogressing the fulfilment of any other.<sup>156</sup> In this perspective, the Constitution has opted for the language of gradualism, or 'progressive realization'. In terms of its section 27, the Constitution requires that 'the state must take reasonable legislative and

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<sup>153</sup> The Preamble to the Constitution.

<sup>154</sup> Reif Linda *C op. cit.* (n 85) at 67.

<sup>155</sup> The realization of economic, social and cultural rights together with civil and political rights form an essential basis for the right to development. See Sengupta Arjun "On the theory and practice of the right to development" (November 2002) Vol. 24 No. 4 *Human Rights Quarterly* 866.

<sup>156</sup> Sengupta Arjun *id.* at 867.

other measures,<sup>157</sup> within its available resources, to achieve the progressive realization of each of these rights'.<sup>158</sup> Clearly, this language echoes the phrasing of the International Covenant on Economic, Social and Cultural Rights, which requires each state to take steps 'to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognized in the Covenant.'<sup>159</sup> The Court in the seminal *Government of the Republic of South Africa and Others v Grootboom and Others*<sup>160</sup> case upheld that the phrase 'progressive realization' indicates that a right is not to be realised immediately, but that its accessibility should be progressively facilitated through examining and lowering over time the legal, administrative, operational and financial hurdles. According to Sibonile Khoza,<sup>161</sup> it seems as though the requirement that the state should adopt comprehensive, coherent and coordinated plans is seen as an implicit element of progressive realization. Such plans should be geared towards facilitating the smooth conception and implementation of the right. Indeed, if all rights have equal importance and equal value, the nature of the resource constraints may help to determine the priorities. Thus, the rights requiring the least expenditure of resources will tend to be realized more

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<sup>157</sup> Legislation of economic and social rights serves a number of purposes: it defines the scope and content of such rights; allocates the budget and creates the institutional framework for the delivery of the rights; outlines the responsibilities and functions of the national, provincial and local spheres of government that will give effect to the rights; avert and prohibit violations of the rights by public officials or private interests; outline the process for redress when the rights are violated; supplies the detail to the "big picture" painted by constitutional norms; assists the courts by providing concrete legislated rights that may be more easily enforced than constitutional or international law norms. See Sandra Liebenberg "The protection of economic and social rights in domestic legal systems" in Eide Asbjorn, Krause Catarina and Rosas Allan *Economic, social and cultural rights: A textbook* (2001) 2<sup>nd</sup> rev. ed. Martinus Nijhoff Publishers Dordrecht / Boston / London 79 -80.

<sup>158</sup> These are the rights to health care, food, water, and social security, which are important basic needs of the people.

<sup>159</sup> Article 2(1) of the International Covenant on Economic, Social and Cultural Rights G.A Res. 2200 A, U.N GAOR 21<sup>st</sup> Sess., Supp. No. 16 at 49, U.N Doc. A/6316 (1966).

<sup>160</sup> (2000) (1) SA 46 (CC) para. 45.

<sup>161</sup> Sibonile Khoza "Extrapolating from South Africa's jurisprudence on the right of access to adequate housing, health care and social assistance" in Borghi Marco, Letizia Postiglione Blommestein eds.) *op. cit.* (n 72) 170.

quickly. In other words, if one admits that all human rights in the development process enjoy a similar importance and protection, resource constraints or the scarcity of resources may lead to prioritization amongst the different rights by underscoring the most pressing basic needs of the vulnerable. The consequence is that this may fail to bring about the social change that is the ultimate goal or objective of following the rights approach to development. Sengupta<sup>162</sup> notes, for instance, that if providing primary education to any poor child is equally important, whether the child lives in a remote village or in an urban area, in a country with limited road connectivity or transport facilities, the children in the remote village could so easily be ignored. Taking also the example of the implementation of food security programmes, the same author emphasizes that: if providing food to poor families in all parts of the country is given equal value in a financially expensive programme of food security, the female children in villages may continue to be deprived if social reforms are not pursued effectively. Certainly, this is not an easy task but one may not run away from it. It has been emphasized through the South African National Action Plan that:

... in making its own 'choices' about setting national priorities, government faces great difficulties and challenges. But it is nevertheless clear that we must prioritize if we are actually going to reverse the legacy we have inherited. This is bound to upset and disappoint some people, but it must be done. So, what valid criteria for prioritisation can we use? We will prioritize the greatest needs of the most disadvantaged and vulnerable people. This means emphasizing the realization of socio-economic rights. And we believe that we can justify this on the basis of our country's history of systematic discrimination and racial inequality.<sup>163</sup>

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<sup>162</sup> Sengupta Arjun "On the theory and practice of the right to development" *op. cit.* (n 155) at 866.

<sup>163</sup> See National Plans of Action for the Promotion and Protection of Human Rights: South Africa, *op. cit.* (n 145).

In this regard, economic, social and cultural rights have been given consideration in the context of the South African development process.<sup>164</sup> We will therefore focus on the rights to health care, food, water and social security, the right to have access to adequate housing, and the right to education.

#### 5.2.2.1 *The rights to health care, food, water and social security*

The right to health care, food, water and social security are fundamental human rights which fall under the category of the so-called economic, social and cultural rights embodied in the Bill of Rights of the South African Constitution.

Health care as a right is indispensable for the enjoyment of many other human rights, particularly the right to food, education, work and more,<sup>165</sup> because of the indivisible nature of all human rights. Disease affects the quality of life of individuals and may lead to violations of the right to life if treatment exists but

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<sup>164</sup> One notes that by 2007 efforts to improve life for the most impoverished communities had apparently met with some success. The government has built since 1994 more than two million homes. About 85 percent of households had access to fresh water, more than 71 percent of homes have toilets connected to the sanitation system and more than four million homes now have electric power – though at a quadrupled price that many cannot afford. Yet the income gap remains among the greatest in the world. More than 40 percent of South Africans lived on less than \$1,15 a day. See Berger Iris *op. cit.* (n 151) 154.

<sup>165</sup> The rights to food, health, education and work are closely related. Naturally, food is essential to human development, health and survival. Poor health can interfere with a person's ability to metabolise the food available to them, and insufficient food, lack of nourishing food and the wrong food can lead to malnutrition. Good health is a foundation stone of the realization of the right to food; malnutrition reduces a person's physical fitness for work and the income necessary to purchase food. Education about nutrition and the hygienic storage and handling of food is likewise a factor. Thus, healthy and educated people are the best way to realize development. It becomes clear that development is best measured by access to such basic services as health, education and the ability to meet such basic needs as food. See Margret Vidar "The interrelationships between the right to food and other human rights" in Wenche Barth Eide and Uwe Kracht (eds.) *Food and human rights in development: Legal and institutional dimensions and selected topics* (2005) Vol. I Intersentia Oxford UK 145; Malewezi Justin "Regional integration: The path to prosperity" in Christopher Clapham, Greg Mills, Anna Mome and Elizabeth Sidiropoulos (eds.) *Regional integration in Southern Africa: Comparative international perspectives* (2001) South African Institute of International Affairs Pretoria 24.

is unavailable to that individual. Giving effect to the international instruments providing the right to health such as the International Covenant on Economic, Social and Cultural Right,<sup>166</sup> the Bill of Rights formulates this right as follows: ‘Everyone has the right to have access to ... health care services, including reproductive health care’.<sup>167</sup> Particular attention is offered to children: ‘Every child has the right to basic health care services ...’<sup>168</sup>

One is of the view that inaccessibility to adequate food may severely impact other human rights which then *ipso facto* lose their relevance. Following international guidelines<sup>169</sup> to draft the right to food into the South African Constitution, the following provisions are related to this right: Section 27 (1) (b) ‘Everyone has the right to have access to sufficient food ...’; section 28 (1) (c) ‘Every child has the right to basic nutrition, ...’; and section 35 (2) (e) ‘Everyone who is arrested for allegedly committing an offence has the right ... to conditions of detention that are consistent with human dignity, including ... nutrition, ...’.

Despite the state’s constitutional obligations related to the implementation of this right, according to Sibonile, a large proportion of the South African

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<sup>166</sup> Article 12 of the International Covenant on Economic, Social and Cultural Rights, adopted on 16 December 1966 and entered into force on 3 January 1976, reads:

1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

2. The steps to be taken by the States Parties to the Present Covenant to achieve the full realization of this right shall include those necessary for:

a) the provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child;

b) the improvement of all aspects of environmental and industrial hygiene;

c) the prevention, treatment and control of epidemic, endemic, occupational and other diseases;

d) the creation of conditions which would assure to all medical service and medical attention in the event of sickness. See *United Nations, Human Rights: A compilation of international instruments* (1988) New York 12.

<sup>167</sup> Article 27 (1) (a).

<sup>168</sup> Section 28 (1) (c).

<sup>169</sup> Article 11 of the International Covenant on Economic, Social and Cultural Rights adopted on 16 December 1966 and entered into force on 3 January 1976.

population does not enjoy the right to food. Many people live in abject poverty, and experience widespread hunger, food insecurity and malnutrition. The figures demonstrate that more than 36% (more than 14 million) of the population is vulnerable to food insecurity. The most vulnerable segments of the society are found amongst children, women and the elderly.<sup>170</sup> In fact, in spite of the existence of policy and strategic measures, the government response to this problem is not nearly adequate. Before the adoption of the Integrated Food Security Strategy (IFSS) in 2002, these measures were fragmented, poorly coordinated and implemented. There seemed to be poor communication between the relevant government departments responsible for the right to food.

The current food insecurity in the country, which is certainly a consequence of the apartheid regime (laws and policies forcefully dispossessed Africans of their productive land and they were relocated to places where they are economically and socially excluded), needs to be tackled urgently by the government. Access to adequate food is fundamental to leading a life worthy of that name. It is clear that malnourished and undernourished people are not able to engage effectively in the social and political activities of their society,<sup>171</sup> and inadequate access to food is life-threatening.

Turning to the right to water, most international instruments do not expressly mention the right to water as a human right. The Convention for the Elimination of All Forms of Discrimination Against Women<sup>172</sup> and the Convention on the

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<sup>170</sup> Sibonile Khoza “The role of framework legislation in realizing the right to food: Using South Africa as a case study of this new breed of law” in Wenche Barth Eide and Uwe Kracht (eds.) *op. cit.* (n 165) 188.

<sup>171</sup> Sibonile Khoza “The role of framework legislation in realizing the right to food: Using South Africa as a case study of this new breed of law” in Wenche Barth Eide and Uwe Kracht (eds.) *op. cit.* (n 165) 191.

<sup>172</sup> Article 12 (2).

Rights of the Child (CRC),<sup>173</sup> are excellent and encouraging exceptions. Fresh water is life sustaining and plays a central role in the fields of sanitation, agriculture, industry, urban development and many other human activities. Access to water in the Plan of Implementation of the Johannesburg Summit is dealt with in Chapter II on poverty eradication and, in Chapter IV, on the protection and management of the natural resources base for economic and social development, affirming the relationship between water availability and development. Chapter 18 of Agenda 21 states the extent to which the contribution of water resources development to economic productivity and social well-being is not usually appreciated, even though all social and economic activities rely heavily on the supply and quality of freshwater.<sup>174</sup> Access to water not only constitutes a condition to the fulfilment of the right to development, the right to development in turn can be said to enable the realization of all human rights.<sup>175</sup> Against this reality, the right to have access to sufficient and clean water has been classified and considered implicitly in a number of other human rights, namely the right to life, the right to adequate standards of living, the right to health, the right to housing and the right to food. The Special *Rapporteur* on the right to food has indicated that ‘it is obvious that the right to food must include the substantial right to drinking water.’<sup>176</sup> One notes with concern the fact that many regions of the world suffer today from serious water shortages and South Africa is no exception. With the aim of dealing properly with this issue under social and environmental justice politics, the drafter of the

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<sup>173</sup> Articles 24 (2) (c) and 27.

<sup>174</sup> United Nations Conference on Environment and Development (1992), Agenda 21, Chapter 18, Protection of the Quality and Supply of Freshwater Resources: Application of integrated approaches to the development, management and use of water resources. See also Hilderling Antoinette “The right of access to freshwater resources” in Nico Schrijver and Friedl Weiss (eds.) *op. cit.* (n 147) 416.

<sup>175</sup> Hilderling Antoinette “The right of access to freshwater resources” in Nico Schrijver and Friedl Weiss (eds.) *op. cit.* (n 147) 416.

<sup>176</sup> Commission (2001) Para. 32; See also Margret Vidar “The interrelationships between the right to food and other human rights” in Wenche Barth Eide and Uwe Kracht (eds.) *op. cit.* (n 165) 150.



Constitution has explicitly entrenched the right to water: ‘Everyone has the right to have access to ... water; ...’<sup>177</sup> The constitutional entrenchment of this right in the Bill of Rights was a significant step in the right direction, but the need for clean drinking water and its shortage is still endured by the majority of vulnerable South Africans.

The importance of social security has received growing recognition and has acquired the status of a human right. It entitles individuals to the provisions of benefits in case of a contingency that prevents a person from earning a living for reasons outside their control, such as old age and frailty, unemployment, injury and maternity. Social assistance, at the end, helps to ensure disadvantaged and vulnerable persons the chance to live free from want and in a manner consistent with human dignity.<sup>178</sup> In this order, in South Africa, everyone has the right to have access to social security, and if they are unable to support themselves and their dependants, the right to appropriate social assistance.<sup>179</sup> South Africa, as one of very few middle-income developing countries, has a social security system that includes regular payments to the elderly, the disabled, and a child support grant.<sup>180</sup>

Considering the importance of the above-mentioned rights for human existence and development *in* the development process, the South Africa government has been requested to take reasonable legislative and other measures, within its

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<sup>177</sup> Section 27 (1) (b).

<sup>178</sup> Margret Vidar “The interrelationships between the right to food and other human rights” in Wenche Barth Eide and Uwe Kracht (eds.) *op. cit.* (n 165) 149.

<sup>179</sup> Article 27 (1) (c) of the Constitution.

<sup>180</sup> Margit Tveiten “Justiciability of socio-economic rights: Reflections on Norwegian and South African debate and experience” in Wenche Barth Eide and Uwe Kracht (eds.) *op. cit.* (n 165) 169.

available resources, to achieve the progressive realization of each of these rights.<sup>181</sup>

### 5.2.2.2 *The right to have access to adequate housing*

In line with international human rights instruments<sup>182</sup> and taking its lesson from the abuses of the apartheid past, the South African Bill of Rights explicitly guarantees the right to housing in the following terms:

- (1) Everyone has the right to have access to adequate housing.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right.
- (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.<sup>183</sup>

Like all other human rights, the right to have access to adequate housing imposes three levels of obligation on the state, namely: the obligation to respect, protect and fulfil the right.<sup>184</sup> This has also been emphasized by the Bill of Rights through section 7 (2) that reads: ‘The state must respect, protect, promote and fulfil the rights in the Bill of Rights.’<sup>185</sup> Under the obligation to respect human rights, the right to housing requires the state to refrain from interfering

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<sup>181</sup> Section 27 (2) of the Constitution.

<sup>182</sup> For instance, Article 11 of the International Covenant on Economic, Social and Cultural Rights, adopted in 1966 and which entered into force in 1976.

<sup>183</sup> Section 26 of the Constitution.

<sup>184</sup> The right to the highest attainable standard of health, United Nations Committee on Economic, Social and Cultural Rights, General comment 14, UN Doc. E/C. 12/2000/4 Para. 33; See also Geoff Budlender “Justiciability of socio-economic rights: Some South African experiences” in Yash Ghai and Jill Cottrell (eds.) *Economic, social and cultural rights in practice: The role of judges in implementing economic, social and cultural rights* (2004) International Centre for the Legal Protection of Human Rights [Interights] UK. 33.

<sup>185</sup> South African Human Rights Commission 6<sup>th</sup> *Economic and Social Rights Report* (August 2006) xvii.

directly or indirectly with its enjoyment. The Constitutional Court upheld in the *Grootboom*<sup>186</sup> case that ‘although the subsection does not explicitly say so, there is, at the very least, a negative obligation placed upon the State and all other entities and persons to desist from preventing or impairing the right of access to housing.’ The obligation to protect the right to housing requires the state to take measures that prevent third parties from interfering with this right. Dealing with the South African experience on this matter, the state has given effect to this duty through the enactment of statutes that protect people whose tenure of their home is insecure, and who are vulnerable to eviction. The statutes contain fair procedures and criteria for eviction.<sup>187</sup> The obligation to promote or advance the right to housing means, in other words, the duty to create an enabling environment that will further or advance the realization of the right to housing as it has been discussed by the Constitutional Court in its landmark *Grootboom*<sup>188</sup> case:

... it is not only the state who is responsible for the provision of houses, but ... other agents within our society, including individuals themselves, must be enabled by legislative and other measures to provide housing. The state must create the conditions for access to adequate housing for people at all economic levels of our society.

The obligation to fulfil the right to housing, in the light of the South African experience, is the most contentious of the socio-economic rights because it requires the state to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures towards the full realization of the right. Some academics have concluded that socio-economic rights are not rights at all,

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<sup>186</sup> *Government of the Republic of South Africa v Grootboom* (2000) 4 SA 46 (CC) at 34.

<sup>187</sup> Amongst the statutes, the most important are: the Extension of Security of Tenure Act 62 of 1997 and the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 19 of 1998. See Geoff Budlender “Justiciability of socio-economic rights: Some South African experiences” in Yash Ghai and Jill Cottrell (eds.) *op. cit.* (n 184) 35.

<sup>188</sup> *Grootboom op. cit.* (n 185) at 35.

but simply aspirations.<sup>189</sup> The Constitutional Court did not share this point of view when it held that ‘... these rights are, at least to some extent, justiciable ... many of the civil and political rights ... will give rise to similar budgetary implications without compromising their justiciability.’<sup>190</sup>

Drawing lessons from the *Grootboom* case, Budlender points out that ‘the positive obligation to fulfil the right to housing is justifiable even in resource constraint situations. A judgment may not always result in an order for provision of specific benefits to specific individuals, but even where this does not happen, it can have results of a far-reaching and fundamentally important nature in the achievement of the right to housing.’<sup>191</sup> It is distressing to note that despite the constitutional guarantee of the right of everyone to have access to adequate housing, up to now, approximately 2,2 million households in South Africa do not have access to adequate housing.<sup>192</sup>

### 5.2.2.3 *The right to education*

Due to its pertinence, a number of international instruments spell out the right to education. The provisions of the International Covenant on Economic, Social

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<sup>189</sup> Geoff Budlender “Justiciability of socio-economic rights: Some South African experiences” in Yash Ghai and Jill Cottrell (eds.) *op. cit.* (n 184) 38.

<sup>190</sup> *Ex Parte Chairman of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa* (1996) 4 SA 744 (CC) paragraphs 76 - 78. In *August and another v Electoral Commission and Others* (1999) (4) BCLR 363 (CC), an election was pending. The applicants were prisoners who asserted that they were being denied a classic civil and political right – the right to vote. To set up the necessary administrative infrastructures to enable them to vote would have significant financial implications. The Court had no hesitation in finding that the state was obliged to take these steps to enable prisoners to vote. The Independent Electoral Commission was obliged by the Court to make all reasonable arrangements necessary to enable prisoners to exercise this right. See Sandra Liebenberg “The protection of economic and social rights in domestic legal systems” in Eide Asbjorn, Krause Catarina and Rosas Allan *op. cit.* (n 157) 58.

<sup>191</sup> Geoff Budlender “Justiciability of socio-economic rights: Some South African experiences” in Yash Ghai and Jill Cottrell (eds.) *op. cit.* (n 184) 41.

<sup>192</sup> South African Human Rights Commission *6<sup>th</sup> economic and social rights report op. cit.* (n 185) at 21.

and Cultural Rights, which are most comprehensive and wide-ranging,<sup>193</sup> have influenced other instruments pertaining to this right at regional as well as at national level. The South African Bill of Rights guarantees explicitly this right in section 29 in the following terms:

1. Everyone has the right –
  - a. to basic education, including adult basic education; and
  - b. to further education, which the state, through reasonable measures, must make progressively available and accessible.

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<sup>193</sup> Article 13 of the International Covenant on Economic, Social and Cultural Rights provides that :

1. The States Parties to the Present Covenant recognize the right of everyone to education. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. They further agree that education shall enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups, and further the activities of the United Nations for the maintenance of peace.

2. The States Parties to the present Covenant recognize that, with a view to achieve the full realization of this right:

- a) Primary education shall be compulsory and available free to all;
- b) Secondary education in its different forms, including technical and vocational secondary education, shall be made generally available and accessible to all by every appropriate means, and in particular by the progressive introduction of free education;
- c) Higher education shall be made equally accessible to all, on this basis of capacity, by every appropriate means, and in particular by the progressive introduction of free education,
- d) Fundamental education shall be encouraged or intensified as far as possible for those persons who have not received or completed the whole period of their primary education.
- e) The development of a system of schools at all levels shall be actively pursued, an adequate fellowship system shall be established, and the material conditions of teaching staff shall be continuously improved.

3. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to choose for their children schools, other than those established by the public authorities, which conform to such minimum educational standards as may be laid down or approved by the State and to ensure the religious and moral education of their children in conformity with their own convictions.

4. No part of this article shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph 1 of this article and to the requirement that the education given in such institutions shall conform to such minimum standards as may be laid down by the State.

2. Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium, institutions, taking into account –
  - a) equity;
  - b) practicability; and
  - c) the need to redress the results of past racially discriminatory laws and practices.
3. Everyone has the right to establish and maintain, at their own expense, independent educational institutions that –
  - a) do not discriminate on the basis of race;
  - b) are registered with the state; and
  - c) maintain standards that are not inferior to standards at comparable public educational institutions.
4. Subsection (3) does not preclude state subsidies for independent educational institutions.

Without neglecting all other human rights, the progressive realization of the social, economic and cultural rights in the development process of South Africa's democracy remains a significant and critical point of concern if one is to adequately redress the aftermath of the socio-economic and political human rights abuses of the past. The distribution of income and wealth within the country is among the most unequal in the world, and many households still have unsatisfactory access to health care, education, energy and clean water.<sup>194</sup> These are justiciable and enforceable rights in various ways in the light of the court's interpretation as highlighted in *Grootboom*.<sup>195</sup> The question, therefore, is not

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<sup>194</sup> Mubangizi JC "Know your rights: Exploring the connections between human rights and poverty reduction with specific reference to South Africa" (2005) 21 *South African Journal on Human Rights* at 39.

<sup>195</sup> *Grootboom op. cit.* (n 186) at 20.

whether socio-economic rights are justiciable under the South African 1996 Constitution, but how to enforce them in a given case. Such enforcement will certainly be more meaningful and successful if the general public and poor people in particular are sufficiently informed and aware of the existence of the rights and the appropriate mechanisms through which to enforce them.<sup>196</sup> Recognizing the fact that the right to development appears relevant for the protection of economic, social and cultural rights,<sup>197</sup> one may affirm that the enforcement of human rights, especially of economic, social and cultural rights, is the way forward to the implementation of the right to development. Through this process, one may talk about the practicability of the right to development at the grass roots level.

### 5.2.3 Justiciability and enforcement of the right to development in the Republic of South Africa

If one may extrapolate from South African jurisprudence on socio-economic and other rights, the Bill of Rights does not only provide for the same protection to all human rights contained in it (including the right to development),<sup>198</sup> it also makes them equally capable of judicial enforcement.<sup>199</sup> Appearing as an

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<sup>196</sup> Mubangizi JC “Know your rights: Exploring the connections between human rights and poverty reduction with specific reference to South Africa” *op. cit.* (n 194) at 40.

<sup>197</sup> Once an acceptable level of development is reached and is sustainable, it becomes possible to guarantee and grant these rights in material terms. Until then, positive services and minimum economic standards will not be possible. See Abi-Saab “The legal formulation of a right to development” in Hague Academy of International Law “The right to development at the international level” (1980) 163 in Steiner Henry J and Alston Philip *International human rights in context: Law, politics, morals* (2000) 2<sup>nd</sup> ed. Oxford University Press New York 1321; Rosas Allan “The right to development” in the Eide Asbjorn, Krause Catarina and Rosas Allan (eds.) *op. cit.* (n 157) 121.

<sup>198</sup> Section 7 (2) of the Constitution.

<sup>199</sup> The controversies of whether the socio-economic rights entrenched in the Bill of Rights are justiciable or not has been put to rest in South Africa. While certifying the Constitution, the Court held that socio-economic rights are indeed subject to judicial enforcement, and are, at least to some extent, justiciable. See *Ex Parte Chairperson of the Constituent Assembly* 1996 (4) SA 744, Paragraphs 77 – 78. See also Sibonile Khoza “Extrapolating from South

aggregate right which draws its substance from the other instruments that set forth human rights and fundamental freedoms,<sup>200</sup> the enforcement of the right to development has been visible or noticeable in South Africa through the enforcement of socio-economic rights. However, it must also be noted that the right to development may also be enforced independently of other human rights despite its composite nature. Although there is not yet an explicit test case related to the right to development in South Africa, Ankrumah<sup>201</sup> has pointed out that the chances of making a successful right to development claim can be strengthened if the group concerned can show that it is a minority or an oppressed group which is experiencing discrimination solely because of the group to which its members belong. The author has mentioned, for instance, a situation pertaining to the rights of women: ‘family law legislation provides that a female cannot own land without the consent of her spouse.’ Reasonable minds would tend to agree that the legislation can be challenged on the basis of *inter alia* the right to development, because such a law deprives women of the ability to be treated as equal partners in their homes and communities. Such subordinate and inferior status could deprive women of their self worth and their ability to improve upon and give expression to their talent.<sup>202</sup>

Coming back to its aggregate appearance,<sup>203</sup> the right to development has been strengthened in South Africa through certain Constitutional Court cases

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Africa’s Jurisprudence on the right of access to adequate housing, health care and social assistance” in Borghi Marco, Letizia Postiglione Blommestein (eds.) *op. cit.* (n 72) 152.

<sup>200</sup> The aggregate nature is drawn from the UN Declaration on the Right to Development. See Tomuschat Christian *Human rights: Between idealism and realism* (2003) Academy of European Law European University Institute Oxford New York 48. See also Baxi *The development of the right to development* in Janusz Symonides (ed.) *Human rights: New dimensions and challenges* (1998) Ashgate and UNESCO 99.

<sup>201</sup> Ankrumah Evelyn A *The African Commission on Human and Peoples’ Rights: Practice and procedures* (1996) Vol. 16 Martinus Nijhoff Publishers The Hague London Boston 167.

<sup>202</sup> *Idem.*

<sup>203</sup> The concept of development in the light of the right to development defined by the UN Declaration on Human Rights includes the acceptance and spread to the whole population of,



pertaining to socio-economic rights. Despite the fact that the South African Constitution does not explicitly include the right to development, the drafter realized that without the achievement of social justice, the Constitution will remain meaningless to the majority of the South Africans who suffered many years of racial domination, oppression, and deprivation.<sup>204</sup> In this respect, the Constitutional Court has been closely concerned, since the coming into force of the constitutional dispensation, with cases that involve socio-economic rights.<sup>205</sup> Following is an overview of some of the most important decisions the Court has handed down.

In the *Soobramoney*<sup>206</sup> case, despite the compelling and tragic facts, the Constitutional Court reasoned that ‘if treatment has to be provided to the appellant, it would also have to be provided to all other persons similarly placed ... if this principle was to be applied to all patients claiming access to expensive medical treatment or expensive drugs, the health budget would have to be

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at the very least, minimal standards of housing, education, and health. This means that all people are reasonably clothed and fed. In hard times, such as unemployment, minimum assistance is available for those in need. This assistance is referred to in some countries as social security. Anne Orford “Globalization and the right to development” in Alston Philip (ed.) *Peoples’ rights* (2001) Academy of European Law European University Institute Oxford University Press New York 144; Udombana NJ “The Third World and the right to development: Agenda for the next millennium” (August 2000) Vol. 22 No. 3 *Human Rights Quarterly* at 756.

<sup>204</sup> Tlakula Pansy “Human rights and development” in Tiyambe Zeleza and McConaughay Philip J (eds.) *Human rights, the rule of law, and development in Africa* (2004) University of Pennsylvania Press USA 118.

<sup>205</sup> In this order, two types of cases may come before the courts: firstly, a person may allege that a socio-economic right currently enjoyed is being infringed. In this respect, a violation of the state’s duty to “respect” the right in question may be asserted. Such a violation arises when the state, through legislative or administrative conduct, deprives people of the access they enjoy to a particular socio-economic right. A second type of case may arise in which a person alleges that they are being denied the opportunity to benefit from a particular socio-economic right in the first place. Here, the allegation against the state would be that it had failed to “promote” and “fulfil” the right in question, in that it had not taken the required positive measures to assist those who currently lack access to the rights to gain access thereto. See Glazewski Jan and Witbooi Emma “Sustainable development, poverty alleviation and the right to sufficient water in the new Democratic South Africa” (2006) 13 *South African Journal of Environmental Law and Policy* at 207

<sup>206</sup> *Soobramoney v Minister of Health, KwaZulu-Natal* (1997) 1 SA 765 (CC).

dramatically increased to the prejudice of other needs that the state has to meet.<sup>207</sup> Considering that this was problematic, the Court made another crucial statement: ‘these choices involve difficult decisions to be taken at the political level in fixing the health budget, and at the functional level in deciding upon the priorities to be met. A court will be slow to interfere with rational decisions taken in good faith by the political organs and medical authorities whose responsibility it is to deal with such matters.’<sup>208</sup> The remarks the court made in this case create the impression that the court will not lightly interfere with the failure of the state to protect, promote and fulfil economic and social rights if the state pleads that it does not have the resources to do so.<sup>209</sup> Indeed, this case has cautioned many academics against leaving the enforcement of these rights to the courts of laws only, which will seldom intervene in matters of budgetary allocation. The enforcement of socio-economic rights should therefore be a cooperative enterprise among the judiciary, the legislature, the executive, and institutions such as the Human Rights Commissions.<sup>210</sup> This trend in the courts may have been influenced by many factors. Firstly, *Soobramoney* was litigated scarcely a year after the Constitution had come into effect, leaving little time for the government to work out the relationship between constitutionalized priorities

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<sup>207</sup> Paragraph 28.

<sup>208</sup> *Id.* paragraph 29. This approach has been seen and considered as the “utilitarian calculus” by a scholar and argued further that in a rights context, a utilitarian approach is deeply problematic as it is premised on a presumption of fixed and limited resources. See Woods Jeanne M “Justiciable social rights as a critique of the liberal paradigm” (2003) 38 *Texas International Law Journal* 763; Arun Thiruvengadam “The global dialogue among courts: Social rights jurisprudence of the Supreme Court of India from a comparative perspective” in Raj Kumar C and Chockalingam K (eds.) *Human Rights, justice, and constitutional empowerment* (2007) Oxford University Press New Delhi 293; Sandra Liebenberg “The protection of economic and social rights in domestic legal systems” in Eide Asbjorn, Krause Catarina and Rosas Allan *op. cit.* (n 157) 65.

<sup>209</sup> In its conclusion the Court said that “The State has to manage its limited resources in order to address all claims. There will be times when this requires it to adopt a holistic approach to the larger needs of society rather than to focus on the specific needs of particular individuals within society.” Paragraphs 11, 31.

<sup>210</sup> Tlakula Pansy “Human rights and development” in Tiyambe Zeleza and McConaughay Philip J (eds.) *op. cit.* (n 204) 118.

and policy making in relevant fields.<sup>211</sup> Secondly, the medical profession had made a categorical decision supporting the stance adopted by the government on the issue, and the court would have found it appropriate to defer to that opinion.<sup>212</sup>

Three years later, a landmark case involving socio-economic rights came before the Constitutional Court, the *Grootboom* case. While discussing the constitutional scheme, the court observed that in the South African context, the question to ask is not whether socio-economic rights are justiciable, but how they are to be enforced.<sup>213</sup> Elaborating on the housing rights of adults and children with ‘no access to land, no roof over their heads, and who were living in intolerable conditions or crisis situations’, the Court made a thoroughly outstanding analysis as it interpreted the terms of ‘progressive realization’, ‘reasonable measures’, ‘within available resources’<sup>214</sup> that appear in several constitutional provisions pertaining to socio-economic rights. The state should ‘devise, fund, implement and supervise measures to provide relief to those in desperate need’ within its available resources. In the light of section 26, the Court sets out that there is at the very least, a negative obligation to desist from preventing or impairing the right of access to adequate housing. As to the positive obligations that this section imposed on the state, the Court pointed out that these were textually limited to the availability of resources. In addition, the

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<sup>211</sup> However, as the years have passed, and the new, democratic government of South Africa has had more time and opportunities to tackle these issues prioritized by the Constitution, the Constitutional Court appears to have changed its attitude and is taking a more proactive role in seeking to enforce social rights. See Arun Thiruvengadam “The Global dialogue among courts: Social rights jurisprudence of the Supreme Court of India from a comparative perspective” in Raj Kumar C and Chockalingam K (eds.) *op. cit.* (n 208) 305.

<sup>212</sup> *Id.* at 294.

<sup>213</sup> *Grootboom op. cit.* (n 186) paragraph 20. Obviously, this Constitutional Court approach is similar to the constitutional theory of “judicial minimalism” advocated by Cass Sunstein. Cass Sunstein *One case at a time: judicial minimalism in the Supreme Court* (1999) Harvard University Press Cambridge.

<sup>214</sup> South African Human Rights Commission 6<sup>th</sup> *Economic and Social Rights Report op. cit.* (n 185) at 34.

Court, notably, mentioned that ‘state policy dealing with housing must ... take account of different economic levels in South African society.’<sup>215</sup> Elaborating on what would amount to ‘reasonable measures’, the Court upheld that a reasonable programme must ‘clearly allocate responsibilities and tasks to different spheres of government and ensure that the appropriate financial and human resources are available’ and ‘must establish a coherent public housing programme directed towards the progressive realization of the right of access to adequate housing within the state’s available means.’<sup>216</sup> Assessing, furthermore, the reasonableness of the measures adopted by the state, a court will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. Rather, the question would be whether the measures that have been adopted are reasonable. A wide range of possible measures could be adopted by the state to meet its obligations, many of which would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met.<sup>217</sup> The use of the expression ‘progressive realization’ underlined in section 26, according to the Court, showed that it was contemplated that the right could be realized immediately. However, it was the duty of the state to progressively facilitate the accessibility of the right; as time progresses, housing must be made more accessible not only to a larger number, but to a wider range of people.

Ultimately, the critical point raised was the endorsement by the court of the idea that ‘any housing plan that does not provide for the short-term needs of the most

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<sup>215</sup> *Grootboom op. cit.* (n 186), Paragraph 35. At this point, the Court made a significantly different decision to the *Soobramoney* case. The Court emphasized that the state has different obligations towards those who could afford to pay for housing and those who cannot. As for the poor, the court held that the state had a special obligation towards providing them with access to housing.

<sup>216</sup> *Grootboom op. cit.* (n 186) Paragraph 39.

<sup>217</sup> *Grootboom op. cit.* (n 186) Paragraph 41. Arun Thiruvengadam “The global dialogue among courts: Social rights jurisprudence of the Supreme Court of India from a comparative perspective” in Raj Kumar C and Chockalingam K (eds.) *op. cit.* (n 208) 297.

vulnerable is not reasonable'. In the light of this judgment, the Court has demonstrated clearly that socio-economic rights are justiciable and enforceable, and noted their progressive realization within the available resources. This is a real improvement for the protection, promotion and fulfilment of socio-economic rights compared to the thinking in *Soobramoney*. The standard of review applied by the Constitutional Court appears to be more substantive and less deferential to the state than the 'rationality' standard adopted in the *Soobramoney* case.<sup>218</sup> Sunstein hailed the decision as adopting a novel and highly promising approach to the judicial protection of social rights in a way that is respectful of democratic prerogatives and the reality of limited budgets.<sup>219</sup>

Elaborating on the right of everyone to have access to health care services, including reproductive health care, the Constitutional Court in the *Minister of Health and Others v Treatment Action Campaign*<sup>220</sup> upheld that the specific textual mandate of the South African Constitution vested responsibility in the courts for supervising whether governmental policies were in accordance with the rights guaranteed in the Bill of Rights. After laying out the scope of its jurisdiction, the Court concluded that the government's policy of not providing Nevirapine in public hospitals fell short of the requirements of section 27 (1) and (2) of the Constitution. It ordered the government to immediately remove the restrictions on the administering of Nevirapine to needy patients, and also issued a number of incidental directions to facilitate this process.<sup>221</sup> This is a

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<sup>218</sup> Sandra Liebenberg "The protection of economic and social rights in domestic legal systems" in Eide Asbjorn, Krause Catarina and Rosas Allan *op. cit.* (n 157) 67.

<sup>219</sup> Sunstein Cass 'Social and economic rights? Lessons from South Africa' quoted by Arun Thiruvengadam "The global dialogue among courts: Social rights jurisprudence of the Supreme Court of India from a comparative perspective" in Raj Kumar C and Chockalingam K (eds.) *op. cit.* (n 208) 299.

<sup>220</sup> (1) (2002) 5 SA 721 (CC).

<sup>221</sup> One may find those directions at paragraph 135 of the judgment. For more comments, see Arun Thiruvengadam "The global dialogue among courts: Social rights jurisprudence of the Supreme Court of India from a comparative perspective" in Raj Kumar C and Chockalingam K (eds.) *op. cit.* (n 208) 304.

similar interpretation to the Constitutional Court judgment relating to social rights in the case of *Khosa v Minister of Social Development*.<sup>222</sup> The Court overrode the objection of the South African Government to hold that non-citizens in South Africa (who had obtained permanent residence status) would be entitled to receive social security benefits in terms of section 27 of the Constitution. It held further that the South African Government would have to bear the extra financial costs to arrange for such disbursement.<sup>223</sup>

A review of the above-mentioned cases reveals that the South African Constitutional Court has made an important step by grappling with very serious issues pertaining to socio-economic rights since the coming into force of the new constitutional dispensation. It sought to resolve them by adopting a pragmatic and cautious approach. However, the effective enforcement of socio-economic rights will require the Court to intrude into the legislative and executive domain in a way that it had not done before. By doing this, it will ensure that the executive accounts to the people for its spending of the country's resources, and whether the resources are spent on the development and social progress of the people.<sup>224</sup> According to Liebenberg,<sup>225</sup> the courts may also be prepared to intervene in situations where the relevant allocation of resources is manifestly unreasonable or in bad faith. This may occur, for instance, where resources are prioritised in favour of privileged groups at the expense of meeting the social needs of disadvantaged groups. The author has indicated further that the courts may even be prepared to make positive orders directing the

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<sup>222</sup> *Khosa and Mahlaule v Minister of Social Department and Others* (2004) (6) SA 505 (CC) 13/03. See also Arun Thiruvengadam "The global dialogue among courts: Social rights jurisprudence of the Supreme Court of India from a comparative perspective" in Raj Kumar *op. cit.* (n 208) 305.

<sup>223</sup> *Id.* at 305.

<sup>224</sup> Tlakula Pansy "Human rights and development" in Tiyambe Zeleza and McConaughay Philip J. (eds.) *op. cit.* (n 204) 118.

<sup>225</sup> Sandra Liebenberg "The protection of economic and social rights in domestic legal systems" in Eide Asbjorn, Krause Catarina and Rosas Allan *op. cit.* (n 157) 67.

expenditure of funds that have already been allocated for certain socio-economic programmes, but have not been spent owing to bureaucratic inefficiency or corruption.

Despite the fact that the South African Constitutional Court experience<sup>226</sup> in dealing with socio-economic rights is underscored to serve as a model of predilection to the DRC Constitutional Court, there is still a long way to go within the country. The development process is seriously hampered by challenges related to human development and security. According to Arun, South Africa remains amongst the poorer countries of the world. Its populace is marked by extreme differences of wealth, education, and income, and is still recovering from the combined long-term effects of colonialism and apartheid. The author notes, further, that in future years, the challenge for the Constitutional Court will be to continue to enforce the mandate set out for it by the Bill of Rights in respect of socio-economic rights. This should be done while maintaining its credibility with, and gaining the trust of, the people at large as well as the other organs of government.<sup>227</sup>

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<sup>226</sup> The Constitutional Court has been influenced by the social rights jurisprudence evolved by the Supreme Court of India. The Constitutional Court has expressly referred to the reasoning adopted in relevant Indian cases to justify its own results in the *Soobramoney* and *Treatment Action Campaign* cases. See Arun Thiruvengadam “The global dialogue among courts: Social rights jurisprudence of the Supreme Court of India from a comparative perspective” in Raj Kumar C and Chockalingam K (eds.) *op. cit.* (n 208) 308.

<sup>227</sup> Arun Thiruvengadam “The global dialogue among courts: Social rights jurisprudence of the Supreme Court of India from a comparative perspective” in Raj Kumar C and Chockalingam K (eds.) *id.* 306. From a global perspective Mubangizi JC notes that “South Africa is a relatively poor country. Despite the fact that in per capita terms South Africa is seen as an upper-middle-income country, the experience of most South African households is of outright poverty or of continuing vulnerability to being poor. There is a consensus amongst most economic and political analysts that approximately 40 per cent of South Africans are living in poverty with the poorest 15 per cent in a desperate struggle to survive. A study using the Minimum Living Level (MLL) refers to South Africa as a “45/55” society. This means that “about 45 per cent of the population lives in poverty and 55 per cent do not”. See Mubangizi JC “Know your rights: Exploring the connections between human rights and poverty reduction with specific reference to South Africa” *op. cit.* (n 194) at 39.

#### 5.2.4 Other mechanisms for the protection and promotion of environmental and developmental rights in the Republic of South Africa

In addition to the mechanisms of protection and promotion of human rights (including environmental and developmental rights) in South Africa explored earlier, one also notes parliamentary control of administrative action,<sup>228</sup> and control exercised by public bodies (Public Protector,<sup>229</sup> 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>230</sup> In the light of section 184 of the Constitution, the Human Rights Commission (HRC) exercises a ‘watchdog’ function with regard to the observance of fundamental rights (including environmental and developmental rights) by the administration. The main mandate of the Commission is to promote human rights via education and to raise 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>231</sup> The Commission will try to resolve the human rights complaints through negotiation, mediation, a public hearing, or litigation and has the power to bring court actions in its own name or on behalf of persons, groups, or classes of persons whose rights have been infringed.<sup>232</sup> The Commission has jurisdiction over human rights matters in both the public and private sectors. Each year, the Human Rights Commission must require relevant organs of state to provide it with information on the measures that they have taken towards the realization of

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<sup>228</sup> Section 92 of the Constitution.

<sup>229</sup> The Public Protector plays the role of the Ombudsman. Under the apartheid regime, the government established a national ombudsman and puppet ombudsman office in the homelands, which were abolished when the apartheid regime collapsed. See Reif Linda C *op. cit.* (n 85) at 64.

<sup>230</sup> Section 181 of the Constitution.

<sup>231</sup> Section 184 of the Constitution; See also Burns Y *op. cit.* (n 64) 275.

<sup>232</sup> South Africa Human Rights Commission, Complaints Procedure; Human Rights Commission Act 54 of 1994 in Reif Linda C. *op. cit.* (n 85) at 66.



the rights in the Bill of Rights concerning housing, health care, food, water, social security, education and the environment.<sup>233</sup> Carrying out its mandate, the Commission finalised a National Action Plan for the Protection and Promotion of Human Rights<sup>234</sup> and has handed down different reports pertaining to the realization of human rights. In its 2002/2003 Report, the Commission noted 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. There is a gap between the policies, programmes and legislation that were developed and the actual realization 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 the protection of the environment. One highlights the obligation on the state to put in place a national framework for realizing the right to environment that enables the obligations imposed to be met.<sup>235</sup> Furthermore, the Commission asserted that the progression in the realization of the right to environment has not been very well monitored and observed by the Commission because annual progress reports in terms of section 11 of the National Environmental Management Act (NEMA)<sup>236</sup> were inaccessible at the time of writing. In response to these disappointing facts, the 2006 Report<sup>237</sup> mentions some points of improvement through the assessment of the progress made by the State in fulfilling its environmental constitutional

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<sup>233</sup> Section 184 (3) of the Constitution. This is an additional role given to the Commission to monitor state action taken to implement economic, social and environmental constitutional rights, because of the fact that many South Africans suffer from socio-economic disadvantages caused by the racial discrimination of the past. See Linda Reif *C op. cit.* (n 85) at 67.

<sup>234</sup> National Action Plans for the Protection and Promotion of Human Rights, South Africa. Available at: <http://www.sahrc.org.za> (visited 25/03/2008).

<sup>235</sup> South African Human Rights Commission *The right to a healthy environment: 5th Economic and Social Rights Report op. cit.* (n 132) at 50.

<sup>236</sup> Section of the National Environmental Management Act on environmental implementation plans and management plans.

<sup>237</sup> South African Human Rights Commission *6<sup>th</sup> economic and social rights report op. cit.* (n 185) at 121 – 134.

obligations defined by section 24, and further, the progress made in relation to cooperative governance since the right to environment involves different governmental departments. There has been a progressive realisation on policies, legislation and frameworks in the Department of Minerals and Energy (DME), the Department of Environmental Affairs and Tourism (DEAT),<sup>238</sup> and, the Department of Water Affairs and Forestry (DWAFF).<sup>239</sup> Through its three branches (Mineral Development, Energy Management and Hydrocarbon and Energy Planning), the Department of Minerals and Energy has improved its operation. Amongst the policies, strategies and legislation that were finalized during the 2003/2004 financial year under the Mineral Development branch, one notes the Mineral and Petroleum Resource Development Act, 2002 (MPRDA). It has been recognized through this Act that minerals and petroleum are non-renewable resources under the State's custody. The State must protect the environment for the benefit of present and future generations. The Act corroborates the National Environmental Management Act's provisions pertaining to the right of everyone to have the right to a protected environment, for the benefit of present and future generations, through reasonable legislative and other measures that prevent pollution and ecological degradation.<sup>240</sup> The Commission points out the importance of this legislative measure Mineral and Petroleum Resource Development Act (MPRDA), given the number of mines in South Africa and their serious impact on the environment.<sup>241</sup> The establishment

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<sup>238</sup> The creation of an Enforcement Directorate in 2003 by the Department of Environmental Affairs and Tourism (DEAT) and the appointment of Environmental Management Inspectors with important powers has also been a significant way forward in the improvement of environmental compliance and enforcement in South Africa. See Craigie F, Snijman P and Fourie M "Environmental compliance and enforcement institutions" in Paterson A and Kotzé JL *op cit.* (n 10) 89, 95.

<sup>239</sup> South Africa's new-look cabinet *op. cit.* (n 13).

<sup>240</sup> Preamble of the National Environmental Management Act.

<sup>241</sup> The main aim of all the mining companies in the country is to extract natural resources and to create wealth. Magadi Mabiletsa and Willemien du Plessis "The impact of mining on the environment and the people" (unpublished article) quoted by the South African Human Rights Commission 6<sup>th</sup> *Economic and Social Rights Report op. cit.* (n 185) at 121, 122.

by the Department of Minerals and Energy (DME) of a Sustainable Development through Mining (SDM) programme in 2005 and the Broad Based Socio-Economic Charter for the Mining Industry in 2004 are significant steps made in the fulfilment of the constitutional obligations of the State in terms of section 24 which must be read in conjunction with section 7 (2) of the Bill of Rights: ‘The State must respect, protect, promote and fulfil the rights in the Bill of Rights.’ The current programmes place in the forefront the environmental and development rights of everyone to be respected, promoted and fulfilled by the state. Not only should derelict and ownerless mines be identified and prioritized for rehabilitation in accordance with the Sustainable Development through Mining (SDM) programme, but also, in respect of the mining community and rural development, companies are expected to participate in the formulation of Integrated Development Planning in compliance with the Broad Based Socio-Economic Charter for the Mining Industry. Companies are further expected to cooperate with the government in the implementation of those plans for communities where mining takes place, and for the major labour-sending areas. The report notes, further, that for housing and living conditions, companies are expected, together with stakeholders, to provide housing. They are also obliged to establish measures for improving the standards of housing.<sup>242</sup>

Focusing on the assessment of outcomes with regard to the government’s constitutional obligations in terms of section 7 (2), the Commission<sup>243</sup> points out that under the requirement of promotion, the Department of Water Affairs and Forestry (DWAF) must ensure that there is extensive and comprehensive consultation with related stakeholders before implementation. It also ensures that programmes of awareness, education and capacity building and information dissemination accompany all consultative processes. For these purposes,

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<sup>242</sup> South African Human Rights Commission *6th Economic and Social Rights Report id.* at 122.

<sup>243</sup> *Id.* at 125, 126.

guidelines have been provided by the Department of Environmental Affairs and Tourism (DEAT): the Community-based Natural Resource Management Guidelines and Initiatives and Guidelines on Campaigns, Waste Management and Competitions. Under the requirement of protection, the Department of Water Affairs and Forestry must ensure that the nation's water resources, and the management thereof, are protected, used, conserved, managed and controlled in ways that meet basic human needs. In response to the requirement of respect, the State has developed a number of frameworks to ensure that there is proper management of the sustainable use of natural resources to promote the socio-economic status of present and future generations. With regard to the obligation to fulfil, the State offers support, where possible, to all programmes to enable groups and individuals, especially the vulnerable groups, to realize the right within the resources available to the department.

Strong policies, legislation and strategies falling under Energy Management within the country have also been put in place during the 2003/2004 financial year (Free Basic Electricity Policy (FBEP); Electricity Distribution Industry Restructuring; and the Electricity Regulation Legislation National Programme.)<sup>244</sup>

Under the Department of Environmental Affairs and Tourism (DEAT), an Environmental Planning and Coordination Programme was established to provide information to support effective environmental management and public participation in environmental governance. This is to reemphasize the provisions of the National Environmental Management Act that mention the importance of law which establishes procedures and institutions to facilitate and promote

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<sup>244</sup> South African Human Rights Commission, *The right to a healthy environment: 5th Economic and Social Rights Report 2002/2003 Financial Year op. cit.* (n 132) 27.

public participation in environmental governance.<sup>245</sup> Environmental management must place people and their needs at the forefront of its concern, and serves their physical, psychological, developmental, cultural and social interests equitably. Development must be socially, environmentally and economically sustainable.<sup>246</sup> In fact, this understanding is not far from the provisions of the UN Declaration on the Right to Development,<sup>247</sup> the Stockholm Declaration on the Human Environment of 1972,<sup>248</sup> and the Rio Declaration on Environment and Development of 1992.<sup>249</sup>

Indeed, the involvement of the Department of Minerals and Energy (DME), the Department of Environmental Affairs and Tourism (DEAT) and the Department of Water Affairs and Forestry (DWAF) in the development of environmental management and the implementation plans in South Africa clearly shows to what extent the principle of cooperative governance is given substance. In this respect, it has been underlined by the Department of Water Affairs and Forestry that the ongoing implementation of the national Water Policy is essential to enable social and economic upliftment and development on a sustainable basis. The Department has introduced the National Water Resource Management (NWRM) to ensure that all water users have adequate resources. It has emphasized that 'water resources can be properly managed through a water resource management charge that was recently introduced with the aim of contributing towards the water abstraction control to ensure that all users get their fair share of water; monitoring and pollution control to keep our rivers healthy; and to clear away invasive alien plants that consume water that should

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<sup>245</sup> Preamble of the National Environmental Management Act.

<sup>246</sup> Section 2 (2) and (3) of National Environmental Management Act.

<sup>247</sup> Article 2.

<sup>248</sup> Principle 2.

<sup>249</sup> Principle 3.

be available for our use.’<sup>250</sup> It has also been indicated in the 2002/2003 Report,<sup>251</sup> that another important aspect is the progress 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>252</sup>

Against the observations and recommendations made by the Commission through its 2002/2003 Report, one should applaud the great improvement made by the State in relation to its constitutional obligations on human rights (including environmental and developmental rights). However, much remains to be done with regard to the implementation and enforcement of policies, legislation, and programmes which exist under the Department of Minerals and Energy, the Department of Environmental Affairs and Tourism, and the Department of Water Affairs and Forestry in conjunction with the requirements of environmental justice within the country. It has not been an easy task to prioritise and serve the interests of the voiceless who are the ‘most vulnerable and disadvantaged’ people living in the villages under very poor environmental conditions. There has been an intentional or unintentional legitimisation of polluter’s actions through the principle of ‘polluter pays’.<sup>253</sup> It has been indicated that South Africa has a high level of waste and pollution which impact on air, land and water. Waste disposal practice is unsatisfactory in most parts of the country, with a high number of strikes and protests against municipalities for

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<sup>250</sup> South African Human Rights Commission *6th Economic and Social Rights Report op. cit.* (n 185) at 124, 125.

<sup>251</sup> South African Human Rights Commission *The right to a healthy environment: 5<sup>th</sup> Economic and Social Rights Report op. cit.* (n 132) at XXI.

<sup>252</sup> South African Human Rights Commission *6th Economic and Social Rights Report op. cit.* (n 185) at 126.

<sup>253</sup> In the light of this principle, a polluter must bear the costs of remedying a situation created by its industrial activity and pay compensation to the victims of pollution. See *Indian Council for Enviro-legal Action v UOI AIR 1996 SC 1446, 1446r* cited in Charu Sharma “Human rights and environmental wrongs: Integrating the right to environment and developmental justice in the Indian Constitution” in Raj Kumar C and Chockalingam K (eds.) *op. cit.* (n 208) 313.

not collecting domestic waste. Although the Department of Environmental Affairs and Tourism has reported that it is developing a set of strategic guidelines for municipalities, this has not yet been finalized and implemented. The ineffective waste management and poor regulatory controls allow waste producers to dispose of their waste in ways that contaminate the external environment and endanger nearby communities.<sup>254</sup> In this regard, legislation should put more emphasis on the implementation of the principle of prevention at the stage of environmental impact assessment of development projects than to be focused on the ‘polluter pays’ principle.<sup>255</sup> Thus, a fair and balanced appreciation may be made between the needs of environmental protection (right to environment) and the importance of development (right to development) for the benefit of present and future generations. In this way, sustainable development,<sup>256</sup> which requires the integration of social, economic and environmental factors in the planning, implementation and evaluation of

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<sup>254</sup> South African Human Rights Commission *6th Economic and Social Rights Report op. cit.* (n 185) at 132. It has been reported, for instance, by ESKOM that pollution levels in the Soweto area are 2,5 times higher than anywhere else in South Africa. Medical studies show that Soweto’s children suffer from more asthma and chest colds, and take longer to recover from respiratory diseases, than do youngsters elsewhere in the country. In the Durban South area, one finds what has been referred to as ‘a sad case of unplanned urban development allowing polluting industrial development and high density residential development to occur side by side’, where the residential area finds itself on the doorstep of industry on every side. Kidd M *op. cit.* (n 28) 238.

<sup>255</sup> The precautionary principle requires the state authorities to prevent, solve, and anticipate factors that would lead to environmental pollution and the developer must prove that its action was environmentally useful. The “polluter pays principle” underlies the entire environmental management regime of South Africa. Therefore, it is likely that the problem with applying the principle will pervade all other areas of environmental management such as air pollution and land as well as the entire waste management system. The adoption of a national standard of the systems or instruments for applying the principle across the different areas remains a necessity. See *Vellore Citizens’ Welfare Forum v UOI AIR 1996 SC 2715, 2721* cited in Charu Shama “Human rights and environmental wrongs: Integrating the right to environment and developmental justice in the Indian Constitution” in Raj Kumar C and Chockalingam K (eds.) *op. cit.* (n 208) 313; South African Human Rights Commission *The right to a healthy environment: 5<sup>th</sup> Economic and Social Rights Report op. cit.* (n 132) at 45.

<sup>256</sup> Preamble of the National Environmental Management Act, Woolman S *et al. Environmental law of South Africa* (2006) 2<sup>nd</sup> ed. Juta Kenwyn 50-21; Feris Loretta “Environmental rights and locus standi” in Paterson A and Kotzé JL (eds.) *op. cit.* (n 10) 142.

decisions will be able to ensure that development serves present and future generations by becoming a reality and not an empty slogan.

### 5.2.5 Conclusion

In summary, an array of environmental legislation that gives effect to the environmental rights guaranteed by the Constitution exists in South Africa. There has been important progress in policies, legislation and frameworks at the Department of Minerals and Energy, the Department of Environmental Affairs and Tourism and the Department of Water Affairs and Forestry.<sup>257</sup> Steps have been made to push forward their implementation through, for instance, the information on monitoring environmental issues that is currently available on the Government Communication and Information System (GCIS) website.<sup>258</sup> 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. A wide approach to *locus standi* has been endorsed in terms of the National Environmental Management Act, the Promotion of Administrative Justice Act, and, further, the common law. 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 for the benefit of present and future generations. Any person may now institute proceedings in a court or tribunal for the judicial review of an administrative environmental action. Easier access to courts has been guaranteed by the Constitution through section 34. Everyone has the right to have any dispute

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<sup>257</sup> South Africa's new-look cabinet *op. cit.* (n 13).

<sup>258</sup> The GCIS website is expected to report on the monthly progress made by all government departments in terms of their constitutional mandates. See South African Human Rights Commission 6<sup>th</sup> *Economic and Social Rights Report op. cit.* (n 185) at 95.



(including disputes in environmental, developmental and socio-economic 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. On this basis, human rights (including environmental and development rights) are protected and promoted under the ‘umbrella’ of the Constitution which imposes the obligations on the State: to respect, protect, promote and fulfil human rights.<sup>259</sup> The interpretation of the Bill of Rights should not be confined to the rights enumerated in the Constitution, but have a larger understanding of these by taking into consideration international law, foreign law and common law. The Bill of Rights does not deny the existence of any other rights or freedoms that are recognized or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill of Rights.<sup>260</sup> In the light of these incentives, the author is of the opinion that the right to development is protected in South Africa and it may be invoked before the courts or in its composite appearance (including the justiciable socio-economic rights among others). However, it would be prudent if this right is mentioned explicitly in the country’s legislation. By incorporating socio-economic rights in its Constitution, South Africa has embarked on a pioneering but challenging path towards giving real effect to sustainable development.<sup>261</sup>

In spite of the fact that the implementation and enforcement of the environmental legislation has been lauded in the RSA, it embodies some weaknesses which constitute important challenges. Bearing this in mind, one shares the observation of Glazewski,<sup>262</sup> who asks himself why environmental degradation continues apace in South Africa? Thinking about Glazewski’s concern, open-minded people should consider engaging themselves in a

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<sup>259</sup> Section 7 (2) of the Constitution.

<sup>260</sup> Section 39 of the Constitution.

<sup>261</sup> Glazewski J and Witbooi Emma *op. cit.* (n 205) at 210.

<sup>262</sup> Glazewski J *op. cit.* (n 5) 117.

brainstorming study to define the challenges and put some practical suggestions on the table.

In the light of this general background, the following chapter (final) presents the challenges facing the SADC, and particularly the DRC and RSA, on the protection and promotion of environmental and developmental rights. Some recommendations are also provided.

## CHAPTER 6:

### **CHALLENGES AND RECOMMENDATIONS**

From the preceding chapters we learn of the various challenges that are being faced in regard to respect for environmental and developmental rights, and their protection, promotion and fulfilment within the SADC region, especially in the DRC and in the RSA. The identification and definition of some of the challenges, or obstacles, together with recommendations, should present a step in the right direction for the achievement of the objectives contained in the SADC Treaty of 1992, the goals embodied in the governmental programmes of the DRC and RSA, and commitment of both countries to the attainment of the UN Millennium Development Goals.<sup>1</sup>

#### **6.1 Challenges and recommendations for the Southern African Development Community**

The SADC region contains a range of natural environments that are rich with development opportunities. These opportunities must be exploited to enhance the quality of life of the people and to alleviate poverty within the region. The betterment of people's lives remains at the core of all actions undertaken by the Organization which upholds the view that people must be at the heart of the development process. Political leaders within the region should bear in mind the fact that the SADC has been put in place not to satisfy their whims or desires at

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<sup>1</sup> The former United Nations Secretary General Kofi Annan pointed out that "we will have time to reach the MDGs worldwide and in most, or even all, individual countries – but only if we break with business as usual. We cannot win overnight. Success will require sustained action across the entire decade between now and the deadline. It takes time to train teachers, nurses and engineers; to build the roads, schools and hospitals; to grow the small and large businesses able to create the jobs and income needed. So we must start now. And we must more than double global development assistance over the next few years. Nothing less will help to achieve the Goals." See Kirchmeier Felix *The right to development – where do we stand? state of the debate on the right to development* (July 2006) No 23 Occasional papers, Dialogue on globalization, Friedrich – Ebert – Stiftung, Geneva 16.

the expense of people's lives, but to ensure the progress and well-being of the people.<sup>2</sup> Political power must not supersede human rights.

In fact, development opportunities may also be interpreted as challenges. It has been highlighted that improper land husbandry, deforestation, overstocking, and the neglect of soil conservation all impact negatively on the environment,<sup>3</sup> *ipso facto*, development and the human rights agenda.

### 6.1.1 Lack of human rights legislation and institutions

A close look at the principles and objectives defined by the SADC Treaty reveals that human rights concerns are considered in their fullest sense and with respect for their status. SADC state members have been called to act accordingly at the regional and national levels through their respective legislation.<sup>4</sup> In this regard, the Strategic Indicative Plan for the Organ (SIPO) has described the consolidation of democracy and good governance as political challenges. States aspiring to join the SADC have been invited to comply with the observance of the principles of democracy, human rights, good governance and the rule of law and the African Charter of Human and Peoples' Rights.<sup>5</sup> It is unfortunate to note that despite the foregoing efforts, the human rights agenda that is the cornerstone of the SADC state members' commitment, has a 'hollow ring' and has yet to meet the peoples' expectations. A clear normative framework established by the Treaty or embedded in the SADC's programmatic activities is lacking. No institution has been established with a specific mandate to deal with human rights issues, neither are there any protocols or sectors especially

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<sup>2</sup> Preamble of the SADC Treaty of 1992.

<sup>3</sup> The Institute for Global Dialogue (IGD) *Guide to the Southern African Development Community* (2001) Institute for Global Dialogue Johannesburg 152.

<sup>4</sup> Articles 4, 5 and 6 of the SADC Treaty.

<sup>5</sup> Oosthuizen Gabriël H *The Southern African Development Community: The organisation, its policies and prospects* (2006) Institute for Global Dialogue Midrand South Africa 303.

entrusted with inculcating respect for, or the protection, promotion and fulfilment of human rights.<sup>6</sup> Elling Tjonneland<sup>7</sup> has indicated, for instance, that the organization is institutionally weak. Member states are reluctant to transfer some aspects of their national sovereignty for a future common good nor do they necessarily share the same political outlook on what major challenges are facing the region. Human rights, democracy, good governance, and the rule of law principles have been proclaimed without a programme or policies to support their enhancement. The reason may be that these ‘values’ are not yet common to all SADC state members. This makes agreeing simply on a common understanding of such concepts a problematic issue.<sup>8</sup> Likewise, Clapham asserts that the effectiveness of the SADC will be judged according to its track record in addressing what he considers as key issues, namely, the eradication of extreme poverty, job creation, the promotion of democracy, the rule of law and respect for human rights.<sup>9</sup> The future of human rights is very dark within the region if swift action is not taken to save people’s lives. The ‘*raison d’être*’ of the SADC will be meaningless if political leaders do not take care of people’s concerns in good time and further the protection of the environment which gives life today and in the future.<sup>10</sup> The sustainable development approach is not well rooted at the political or at the grass roots levels because of the lack of political will. Clear

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<sup>6</sup> Thoko Kaime “SADC and human security: Fitting human rights into the trade matrix” (2004) 13 (1) *African Security Review* 111. See also Thoko Kaime “Commentary: SADC and human security: Fitting human rights into the trade matrix”. Available at: [www.issafrica.org/pubs/ASR/13No1/kaime.pdf](http://www.issafrica.org/pubs/ASR/13No1/kaime.pdf) (visited 06/12/2007).

<sup>7</sup> Tjonneland EN, Isaksen J, and Le Pere G *SADC’s restructuring and emerging policies: Options for Norwegian support*, Report commissioned by the Norwegian Embassy Harare CHR Michelsen Institute 2005 pp v-vi; Hendricks Cheryl “Introduction: From State security to human security in Southern Africa” in Hendricks Cheryl (ed.) *From State security to human security in Southern Africa: Policy research and capacity building challenges* (April 2006) No 122 Institute for Security Studies ISS Monograph Series 6.

<sup>8</sup> Oosthuizen Gabriël H *op. cit.* (n 5) 325.

<sup>9</sup> Prega Ramsamy “SADC: The way forward” in Clapham C *et al.* (eds.) *Regional integration in Southern Africa: Comparative international perspectives* (2001) South African Institute of International Affairs Pretoria 39.

<sup>10</sup> Mukwindidza Enock The implementation of environmental legislation in the Mutasa District of Zimbabwe (2008) University of South Africa Unisa [Unpublished Masters dissertation] Pretoria 120.

empirical legislative measures (sustained by strong methods for their implementation and enforcement) and institutions dealing with human rights must be established and empowered. It is only in this respect that human rights legislation (including environmental and developmental rights) will not become 'empty tablet boxes'. Political office bearers who conduct activities that lead to environmental degradation will not go unpunished. This process will give teeth to the actions of the Organization on the ground. Therefore, the SADC will be meaningful to the people of the region and will serve as a model for other regional organizations all over the world if one believes in the potential and ingenuity that Africans have to share with the rest of the world.

#### 6.1.2 Citizen awareness and education

Citizen awareness and education are pivotal concerns which allow and empower the people to participate actively and meaningfully in the management of the environment and to foster the human rights agenda. People must be able to shape and determine development decisions, as well as to significantly contribute to the realization and monitoring of the environment management and development programme.<sup>11</sup> Thus, people should be put at the centre of the development process as actors and beneficiaries as outlined in the Preamble of the SADC Treaty: 'mindful of the need to involve the people of the Region centrally in the process of development and integration, particularly through the guarantee of democratic rights, observation of human rights and the rule of law.' Proper and ongoing environmental awareness and education programmes help to identify activities likely to cause environmental degradation and serve as daily reminders of the value and challenges of sustainable living. The SADC Regional Environmental Education Programme that has been established will only have

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<sup>11</sup> Wilson Emilie Filmer "The human rights-based approach to development: The right to water" (June 2005) Vol. 23 No. 2 *Netherlands Quarterly of Human Rights* at 219.

impact at the grass roots level within the SADC state members if people are directly involved in the process, and understand and share in its objectives.<sup>12</sup>

Considering the significant pace of environmental degradation within the region, one is compelled to regard the SADC Regional Environmental and Education Programme with some concern. For example, findings of a study conducted in Zimbabwe demonstrate the weaknesses of the SADC Regional Environmental Education Programme. It was found that awareness and environmental education programmes are inconsistent and rarely carried out in Zimbabwe's Mutasa District, and those who are expected to ensure that environmental awareness education programmes are carried out are failing to reach out to local communities.<sup>13</sup> Local communities need to be considered as partners involved in environmental management programmes and traditional leaders need to be given more authority to ensure that the natural resources within their communities are utilised in a sustainable manner. One shares the opinion that it is advisable that the SADC Regional Environmental Education Programme should put in place a partnership with governmental bodies, civil society and Non Governmental Organizations, which would allow easier contact with local communities as opposed to organising meetings and workshops in capital cities where the recommendations and resolutions remain on paper without any practical follow-up or impact at the grass roots level.

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<sup>12</sup> The SADC Regional Environmental Education Programme's specific objectives are:

- to create an enabling environment for regional and national environmental education policy and to support the development and implementation of local level environmental education policy within the SADC region;
- to support environmental education processes through enabling decentralized networking of environmental education practitioners within the SADC region.

See Worldlife and Environment Society of South Africa people caring for the earth *Supporting Environmental Education in the SADC Region*. Available at: [www.wildlifesociety.org.za](http://www.wildlifesociety.org.za). (visited 23/07/2008).

<sup>13</sup> Mukwindidza Enock *op. cit.* (n 10) 120.

### 6.1.3 Poverty and human development

The link between poverty and the abuse or neglect of human rights on one side, and the role that respect for human rights plays in the reduction of poverty on the other is clearly a shortcut to boosting human development. According to Mubangizi, of all the social phenomena that have most cruelly impacted on human rights, poverty probably ranks the highest. Poverty is, in itself, a denial of human rights.<sup>14</sup> Kofi Annan affirmed that whenever we lift one soul from a life of poverty, we are defending human rights. Whenever we fail in this mission, we are failing human rights.<sup>15</sup> To ensure that poverty eradication is addressed in all SADC activities and programmes, the Organization aims to achieve, amongst other objectives, development and economic growth, the alleviation of poverty, the enhancement of the standard and quality of life of the people and support for the socially disadvantaged.<sup>16</sup> One notes with regret the disjuncture between the region's goals and aspirations and their corresponding lack of implementation and outcome.

Various obstacles hamper the fulfilment of the SADC's objectives, for example, the inequality between states and within states is widening, the rising incidence of HIV/AIDS, poverty and food shortages, degradation of the environment and human rights abuses. These issues, among others, have a severely negative impact on human development in the region. Phalula has observed, for example, that

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<sup>14</sup> Mubangizi JC "Know your rights: Exploring the connections between human rights and poverty reduction with specific reference to South Africa" (2005) 21 *South African Journal on Human Rights* 32.

<sup>15</sup> Kofi Annan, Former United Nations General Secretary quoted by Mubangizi JC "Know your rights: Exploring the connections between human rights and poverty reduction with specific reference to South Africa" *idem*.

<sup>16</sup> Articles 5 and 6 of the SADC Treaty.



in the Malawi Districts of Nsanje, Phalombe, Chikwawa, Blantyre and Mulanje, in the Southern Region of the country, women are digging up water-lily tubers, and after boiling them, serve these as food to their families. In Nsanje, women have to risk crocodile attacks to cross the Shire River in search of those water-lily tubers, locally known as Nyika. The other alternatives, apart from collecting wild plants to feed their families, is to gather unripe green mangoes which they then cook before serving them. Similarly, green paw-paws are cooked, while hard bamboo seeds are ground until they resemble rice and then are cooked; termites are also caught and then fried, and salt is added to give them more flavour. As resourceful as these measures are, they fail to sustain the families concerned, and women have, in despair, joined the commercial sex trade to get a little money to buy maize. They rationalize that it is better for them to die 5 or 10 years later from AIDS than to see themselves and their families die now from hunger. In the rural areas, desperate women, and girls as young as 15, participate in commercial sex in order to survive even though they are at maximum risk for HIV infection. According to Youthnet and Counselling, a Non Governmental Organization working to rehabilitate reformed commercial sex workers, there are indications that the number of women engaging in sex has increased sharply because of the food crisis.<sup>17</sup>

The above situation is not far from the food crisis and poverty challenging many SADC state members such as Zimbabwe, South Africa and the DRC.

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<sup>17</sup> Phalula Irene is the Public Relations Officer of Illovo Sugar (Malawi) Limited. She writes in her personal capacity. This article is part of the gender links Opinion and Commentary Service that provides fresh views on everyday news. [http://www.chrr.org.mw/democracy\\_forum/woman\\_twin\\_crisis.php](http://www.chrr.org.mw/democracy_forum/woman_twin_crisis.php) accessed on 22/11/2006. See also Kihangi Bindu Kennedy *Human security in the SADC region with specific reference to the Republic of Malawi* (2007) Africa Institute of South Africa/Young Graduate and Scholars [Unpublished paper presented at the Parliamentary Research Session on Youth Perspectives on the Effects of Globalization in SADC] at 7, 8. Available at: [www.credda.populus.ch](http://www.credda.populus.ch) (visited on 01/05/2009).

Poverty impacts on human development and has different ramifications in various sectors of the SADC region. Strategies to address poverty reduction need to take into account the human rights dimensions of poverty and its remedies. Human rights are central to the promotion of development that focuses on people, because rights empower people to satisfy their needs and realize their full potential as human beings.<sup>18</sup> Indeed, the current human rights understanding corresponds with the objective of human security which is to create political, economic, social, cultural and environmental conditions in which people can live knowing that their vital rights and freedoms are secured.<sup>19</sup> People should be protected from the chronic threats of hunger, disease and oppression, and be empowered to act responsibly or to take care of themselves in adverse circumstances. However, this will only happen when people are made aware not only of the existence of their rights and the mechanisms for enforcing them, but also of their human rights obligations:<sup>20</sup> there is no right without a corresponding obligation.

In conclusion, many critical issues related to respect for, and the protection, promotion and fulfilment of human rights with specific reference to environmental and development rights are at stake in the SADC region. Despite the commitment made by its state members to realize the human rights agenda throughout the region and within the member countries, the principles and objectives defined by the SADC Treaty have not yet been given real power. The Organization seems reduced to satisfying the interests of governmental political leaders at the expense of their people's basic needs. Indeed, according to

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<sup>18</sup> Khungwa Blessings W.B, Training officer (Malawi Local Government Association (MALGA) 31<sup>st</sup> January 2005.

<sup>19</sup> Kihangi Bindu *op. cit.* (n 17). 11,12.

<sup>20</sup> Mubangizi JC "Know your rights: Exploring the connections between human rights and poverty reduction with specific reference to South Africa" *op. cit.* (n 14) 33.

Oosthuizen,<sup>21</sup> the Organization is not functioning optimally and it is the region's people who pay the price, sometimes with their lives. In reality, according to the author, the SADC has very limited powers and means to compel its members to act in unison, urgently, and in compliance with the very strategies, policies, treaties, and programmes they themselves have designed and approved. Finally, it is important that the Organization develop a bottom-up approach to ensure true participatory development and to boost the human rights agenda. This will be taken as a guideline at the regional level and at the state level in countries such as the DRC and the RSA which face particular problems in this domain. Without any doubt, governors need to be reminded that people are both the aim and the means of development.<sup>22</sup>

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

Obviously, the entrenchment of the right to environment and the right to development in the 2006 DRC Constitution opened the door for serious environmental and development challenges facing the country and which need to be dealt with. Some of these challenges along with recommendations will be highlighted and examined.

### **6.2.1 The incomplete nature and weakness of environmental and developmental legislation**

First of all, it is important to highlight the fact that the proper management of the environment is a real development opportunity that will enhance people's lives in a country where political leaders and people are aware of their respective responsibilities towards present and future generations. In this order, a bottom-

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<sup>21</sup> Oosthuizen Gabriël H *op. cit.* (n 5) 315, 316.

<sup>22</sup> Malewezi Justin "Regional integration: The path to prosperity" in Christopher Clapham *et al.* (eds.) *op. cit.* (n 9) 24.

up approach is sustained by strong legislation that gives effect to the expectation of a better life for all. When the environment is destroyed, plundered, or mismanaged, it undermines the quality of life in the present and for future generations.<sup>23</sup> In compliance with the above understanding, the rights to environment and to development recognized explicitly by the DRC Constitution need to be sustained by strong and powerful legislation. Parliament must be pressurized to fulfil its constitutional obligation in this respect. It is disturbing to note that, since the coming into force of the 2006 Constitution, appropriate legislation pertaining to environmental and developmental rights has not yet been put in place by Parliament. Therefore, implementation and enforcement raise many concerns and challenges. For instance, the Draft Environmental Act of 18 September 2007 *Loi Cadre sur l'environnement* prepared by the Ministry of the Environment, Conservation of Nature and Tourism, to date, is still under consideration by Parliament. Furthermore, there is a real need to review the current Congolese environmental regulatory framework. General principles on the management of the environment need to be defined by this Act which must play an 'umbrella' role to cover all environmental sectors. It will be advisable to address the following aspects:

- The concept of 'environment' must be defined, taking into account some components from both the narrow and wide approaches;
- The content and scope of the right to environment and the mechanisms of its implementation and enforcement must be highlighted in the legislative text to cover the areas which have not been tackled by the constitutional provisions;

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<sup>23</sup> Wangari Maathai (2005) quoted by the Department of Environmental Affairs and Tourism *South Africa environmental outlook: A report on the state of the environment* (2006) Pretoria Republic of South Africa 4.

- The principle of sustainable development that refers to meeting the basic needs of all, and extending to all the opportunities to satisfy their aspirations for a better life, must be broken down into its basic components. Sustainable development includes important principles, namely: ecologically sustainable use of natural resources in a fair and sustainable manner for the benefit of present and future generations; the precautionary principle, which means, for example, 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; the principle of intergenerational equity must be taken into account to protect the environment for future generations as well. The principle of biological diversity and ecological integrity, and the polluter pays principle must also be considered.<sup>24</sup>

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>25</sup>

Nowadays, the three pillars of sustainable development, namely, environmental protection, economic growth and social justice,<sup>26</sup> need to be extended to include

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<sup>24</sup> Thornton J and Beckwith S *Environmental law* (2004) 2<sup>nd</sup> ed. Thomson Sweet and Maxwell London 2-020 – 2-02447; Glazewski J *Environmental law in South Africa* (2005) 2<sup>nd</sup> ed. Butterworths Durban 12-19, 480.

<sup>25</sup> Metha MC “Growth of environmental jurisprudence in India” (1999) *Acta Juridica* 71-79 at 79.

<sup>26</sup> Tladi Dire “Strong sustainability, weak sustainability, intergenerational equity and international law” (2003) 28 *South African Yearbook of International Law* 200. See also Glazewski J *op. cit.* (24) 13; See also Tladi Dire *Sustainable development in international*

the notion of governance and participation in decision-making.<sup>27</sup> Sustainable development needs to prioritise the issues of governance, participation, the economy, social issues and the environment in developing countries and focus on how these factors interact. It will be much better to preserve what we have and develop global partnerships, networks, forums or observatories to prioritize the questions of participation and governance. The partnership will be fulfilled in the light of principle 7 of the Rio Declaration.<sup>28</sup>

- A clear definition must be given 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 they have to fulfil their role in the courts which are established as custodians of environmental integrity.

Parliament and political leaders are urged to give priority to the improvement of the environmental regulatory framework currently in force in order to save lives. Like any other right, appropriate policies pertaining to development or statutory

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*law: An analysis of key enviro-economic instruments* (2007) Pretoria University Law Press PULP Pretoria 90.

<sup>27</sup> Conference paper presented by Garnier Paul, *Institutional arrangements for sustainable development: A Geneva perspective* (18/10/2007) University of Geneva, Faculty of Law, Geneva.

<sup>28</sup> "In view of their different contributions to global environmental degradation, states have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they have in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command." See also Thornton J and Beckwith S *op. cit.* (n 24) 2-023, 2-024.

laws<sup>29</sup> as provided by the Constitution must be put in place by Parliament to give effect to the right to development. This seems to be a new right despite the fact that it has been incorporated in different international instruments binding on the DRC and in constitutional drafts within the country since its independence. Nothing has been done by the legislative or judicial arms to give it life. A comprehensive human rights ‘arsenal’ is needed within the country as it is only through the process of implementation and enforcement that constitutional provisions pertaining to human rights will be meaningful for the betterment of life within the country.

The reconstruction of the DRC will not be possible if political leaders undermine or are unwilling to deal properly with the management of the environment in its fullest sense and the human rights agenda as a whole.<sup>30</sup> This remains a necessity and must motivate the Parliament to consider the urgent nature of this issue and its impact on people’s lives.

#### 6.2.2 Information and education

Due to their importance as powerful instruments of change in society, information and education have been elevated to the status of fundamental human rights by the drafters of the 2006 DRC Constitution.<sup>31</sup> However, despite their constitutional guarantee and the function performed by the Ministry of Human Rights, the dissemination of information to the public through the *Official Journal* and the education programmes on human rights, with specific

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<sup>29</sup> Article 122 (a) of the 2006 Constitution proclaims that statutory law establishes the rules concerning the rights of citizens and fundamental guarantees given to the Citizens for the exercise of public liberties.

<sup>30</sup> In fact, this establishes that all human rights are equally important for respecting the dignity and worth of every person. One cannot deal with one specific right in isolation without taking into account the whole range of related rights. See Wilson Emilie Filmer *op. cit.* (n 11) at 220.

<sup>31</sup> Articles 24 and 43.

reference to environmental and developmental rights, remain very poor.<sup>32</sup> People do not have easy access to this publication and a significant number of Congolese are illiterate. Human rights legislation pertaining to the environment, in particular, and, to development in general, should be summarized and made available in plain and accessible language, and translated into the national languages (Chiluba, Kikongo, Kiswahili, and Lingala) so that it will reach more people. There is a need for adult literacy programmes to support a human rights culture. Interim measures such as the SADC's educational programme could do so much good in this regard. The gap between the right proclaimed by the Constitution and the reality is surprising. Winstanley has indicated 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>33</sup> and, further, the governmental development programmes. The state remains the main protector of the people in the domain of respect for, and the protection, promotion and fulfilment of human rights (including environmental and developmental rights).

For the realization 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, for example, not to litter, not to waste or soil water, and to encourage responsible use of resources. Facing this challenge, the

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<sup>32</sup> This is a disappointing result. In terms of article 45 of the Constitution public authorities have the duty to promote and to ensure, through teaching, education and dissemination of information, the respect of human rights, fundamental liberties and duties of the citizens enumerated in the Constitution. In the same vein, public authorities are also requested to ensure the dissemination and the teaching of the Constitution, the Universal Declaration of Human Rights, the African Charter on Human and Peoples' Rights, as well as all the duly ratified regional and international conventions relating to human rights.

<sup>33</sup> Winstanley T "Entrenching environmental protection in the new Constitution" (1995) 1 *South African Journal of Environmental Law and Policy* at 91.



Indian Supreme Court in the case of *MC Metha v Union of India*,<sup>34</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>35</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 harmony between the earth and human beings for the benefit of present and future generations. Competent governmental leadership, coherent national policies and strong popular commitment<sup>36</sup> are real concerns ongoing the process of implementation and enforcement of human rights as a whole.

### 6.2.3 Governance and leadership

Despite all the effort that went into organizing successful presidential and legislative general elections in 2006, the DRC is still experiencing governmental, political, economic and religious leadership crises. The governmental programme lacks sufficient detail for its implementation (there is a real confusion between the governmental programme and any developmental plan for the country). Policies in different sectors such as those related to

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<sup>34</sup> (1988) AIR 1037 (SC).

<sup>35</sup> Winstanley T *op. cit.* (n 33) at 91.

<sup>36</sup> Dupuy RJ quoted by 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 319.

environment and development are ‘hanging baskets’ at the legislative level; bad governance persists and is characterized by severe human rights violations; the basic needs of the people are ignored because of political leaders’ whims,<sup>37</sup> corruption, impunity, and a lack of peace.<sup>38</sup> One shares the point of view that, empirically speaking, the DRC has virtually ceased to exist as a State.<sup>39</sup> Its ‘rebirth’ with the coming into force of the new constitutional order of 2006, based on the rule of law, will only become a reality if the appropriate and needed mechanisms to build up a culture of democracy and good governance<sup>40</sup>

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<sup>37</sup> For instance, despite the constitutional provisions which state that primary teaching is obligatory and free of charge, parents are still paying tuition fees for their children (article 43 of the Constitution); article 42 of the Constitution proclaims the State obligation to protect youth against bad health care, provide for their education and integral development. While all of this is still “future music”, one urges the government to take its responsibility seriously or resign for the sake of well-being of the people who will then mandate new people with new ideas on improving the situation. After all, governmental power’s *raison d’être* is about serving and satisfying the basic needs of the people.

<sup>38</sup> It has been indicated that peace means development; peace is a fundamental dimension of development. One may not enjoy development without security or one may not enjoy security without development. Moreover, one may not enjoy either without respect for human rights. These concepts are significantly linked. Unless all these causes are advanced, none will succeed. Development cannot proceed easily in societies where military concerns are at or near the centre of life. Societies whose economic efforts are given in substantial part to military production inevitably diminish the prospects of their people for development. The absence of peace often leads societies to devote a higher percentage of their budget to the military than to development needs in health, education and housing. While in some nations military service is the most reliable path to an education and to the acquisition of job skills for civilian life, there are also cases in which military production may disseminate advanced technologies of eventual use for civilian purposes. However, national budgets that focus directly on development serve better the cause of peace and human security. Having a look at the poor economic level of the country, the DRC Government has been put in the hot seat. In addition, the country is still experiencing armed conflicts in its Eastern Part (North Kivu Province) that close the door to any programme related to human development. It seems meaningless to talk development *Cinq Chantiers de la République* in this context. See Kumar Anuradha (ed.) *Human development and natural resources* (2006) Sarup and Sons New Delhi 8; Heynes and Stefiszn (eds.) *Human rights, peace and justice in Africa: A reader* (2006) Pretoria University Law Press PULP Pretoria 156 – 157.

<sup>39</sup> Reyntjens Filip Democratic Republic of Congo: Political transition and beyond (April 2007) Vol. 106 No. 423 *African Affairs: The Journal of the Royal African Society* at 315.

<sup>40</sup> Good governance embodies the following characteristics:

- to foster a culture of inclusive and competitive political participation;
- political stability;
- anti-corruption measures;

are instituted by the Government. This will certainly create a positive impact in terms of its obligations regarding respect for, and the protection, promotion and fulfilment of human rights. It is certain that a collapsed country cannot be entirely reconstructed overnight. A plan has to be devised to start with the reconstruction effort, tackling what is most important and urgent. The DRC is a potentially rich country that cannot and should not rely on foreign financial aid to develop. Udombana asserts clearly that:

Aid by its very nature is highly political. Some people mistake it for charity; it is not. It is part of a bargain between the donor and recipient. The donor nations, the rich countries of the North, have a surplus of capital and know-how. They are willing to make these available to the South or the Third World – at a price. The price varies. It may be a question of influence. It may be a question of military base facilities. It may result in the protection of trading, investment, or other interests. In international politics, there is no such thing as a free lunch; everything has to be paid for. Governments are, first and foremost, concerned about safeguarding the interests of the people they represent.<sup>41</sup>

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- to build robust national institutions to pursue effective and coherent national development strategies;
  - to improve economic management;
  - development of democracy;
  - to consolidate the rule of law;
  - the effectiveness, accountability and transparency of government;
  - existence of proper administrative procedures;
  - to strengthen oversight institutions; and
  - to provide for civil society including the private sector and credible media.

In fact, the definition of the concept ‘good governance’ depends on the context in which is used. For instance, financial donors such as the International Monetary Fund and the World Bank and development aid organisations use it for practical purposes to secure their funding. Academics use it as an analytical concept. The United Nations and its agencies use it as a normative ideal. See Kotzé JL “Environmental governance” in Paterson A and Kotzé JL (eds.) *Environmental compliance and enforcement in South Africa: Legal perspectives* (2009) Juta Cape Town 119; Müller K *Environmental governance in South Africa* in Strydom HA and King ND (eds.) *Environmental management in South Africa* (2009) 2<sup>nd</sup> ed. Juta Cape Town 72; Mubangizi JC “Poverty production and human rights in the African context” (2007) Vol. 11 (1) *Law, Democracy and Development* at 6.

<sup>41</sup> Udombana NJ “The Third World and the right to development: Agenda for the next millennium” (August 2000) Vol. 22 No. 3 *Human Rights Quarterly* 779-786.

The DRC will only be independent in shaping its own model of development when political leaders build a real partnership with their people and put in place strong guidelines on foreign aid. It is in this respect that one shares the point of view put forward by Mohammed Bedjaoui:

The state seeking its own development is entitled to demand that all the other states, the international community and international economic agents collectively do not take away from it what belongs to it, or do not deprive it of what is or must be its due in international trade ... the claim of such a state goes something like this: Before giving me charity or offering me your aid, give me my due. Perhaps I shall then have no need of your aid. Perhaps charity is no more than the screen behind which you expropriate what is due to me. Such charity does not deserve to be so called; it is my own property you are handing back to me in this way and, what is more, not all of it.<sup>42</sup>

There is a real need of reviewing the state of governmental management in the country for the well-being of all. Political leaders with an ethical understanding of the *res publicae* must be the point of departure on the road to constitutionalism and democracy. Good life is still possible in the DRC.

#### 6.2.4 Creation of an independent institution for human rights protection and promotion

The creation of an independent institution instead of the Ministry of Human Rights to protect the rights of citizens to a healthy environment and to development 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 perpetrated by administrative authorities. This institution, which

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<sup>42</sup> Mohammed Bedjaoui quoted by Orford Anne “Globalization and the right to development” in Alston Philip (ed.) *Peoples’ rights* (2001) Vol. IX / 2 Academy of European Law, European University Institute Oxford University Press New York 183.

could be called an ‘Ombudsman’ or ‘Mediator’, could provide legal assistance, including legal representation, for the people whose fundamental rights (including environmental and developmental rights) have been infringed. One needs to emphasize the fact that the establishment of an institution dealing specifically with human rights amongst the institutions supporting democracy in general provided by the Constitution and by Parliament (Articles 211 and 222 respectively) is also a necessity. Independent institutions on human rights like the South African Human Rights Commission is better placed to protect the human rights that people may claim vertically against the state and horizontally against fellow members of society. This will be a great step forward for the human rights agenda and good governance in the DRC.

Independent specific courts or tribunals dealing with environmental matters must also be established. It has been proved that the ‘uniqueness of jurisdiction’<sup>43</sup> which characterizes the Congolese judicial system does not allow judges to specialise in environmental jurisprudence. Judgments offered by the courts or tribunals run the risk of becoming approximate.<sup>44</sup> In addition, judges seem to be unaware of the provisions of the international instruments ratified by the DRC on human rights<sup>45</sup> and do not give close attention to the human rights

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<sup>43</sup> Up to date the jurisdictions introduced by the 2006 Constitution dispensation within the DRC judicial system have not yet been established (articles 223 and 224).

<sup>44</sup> Ngondankoy Nkoy-ea-Loongya *Droit Congolais des droits de l’Homme* (2004) Bruylant Belgique 868.

<sup>45</sup> See Nobirabo Musafiri Prosper *Droit foncier des peuples autochtones et le droit international: cas des peuples de la forêt “Pygmées” de la RD Congo* (2007) Stämpfli Editions Berne 401-419. See also *Journal Officiel de la République Démocratique du Congo Instruments internationaux relatifs aux droits de l’homme ratifiés par la République Démocratique du Congo* (9 Avril 1999) 40<sup>ème</sup> Année Numéro Spécial Cabinet du Président de la République 12; Mazyamambo Makengo Kisala André *Introduction aux droits de l’homme: théorie générale, instruments, mécanismes de protection* in Programme des Nations Unies pour le Développement (PNUD) *Projet “Appui aux Institutions de la Transition” Mandats, rôles et fonctions des pouvoirs constitués dans le nouveau système politique de la République Démocratique du Congo: journées d’information organisées à l’intention des parlementaires, des députés provinciaux et hauts cadres de l’administration Février – Juin 2007* (2007) modules de formation Kinshasa 243-244 ; Articles 70–73 of the Ordinance no 08/073 of 24

guaranteed by the Constitution. An important campaign to train judges in the DRC needs to be carried out because courts and tribunals are the custodians of human rights (Article 150). The jurisprudence on human rights will be helpful in fleshing out the content of environmental and development rights and will guide parties in taking any human rights claim to court. Parliament is still playing a pioneering role by providing the necessary and requested legislation to support those various human rights in the light of the Constitution.

In conclusion, after four decades, the DRC has emerged from the colonial era into a current situation characterized by hunger, malnutrition, lack of health care services, lack of housing programmes, electricity and water, and other problems like an impoverished education system. The Congolese need to act responsibly and quickly to turn this situation around. A bottom-up approach to human rights is a pivotal point. The involvement of communities in the management of the environment and their environmental resources is a powerful instrument for development. In this order, all political leaders must perform their duties responsibly, having in mind the satisfaction of the general public interest. A particular challenge remains the preparation, development and implementation of the rule of law programme in the DRC. The paramount concern must be to avoid a return to the past. In this regard, the only valid prescription is to pursue the requirements for both justice and peace. In this context, efforts to assist governmental institutions must take into account mechanisms for dealing with past abuses in a manner that does not undermine the current fragile peace

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December 2008 on the Organisation and Fonctionning of the Government, mechanisms of collaboration between the President of the Republic, the Government and between the Members of the Government. Lire aussi *Ministère Public et Partie Civile v. SLt Baseme Ofidi et Autres* Tribunal Militaire de Garnison de Goma RP 356/2009 RMP 0042/KNG/09 (24 Avril 2009) 19 *et seq.* (*République Démocratique du Congo*). Available at <http://www.justice.gov.cd> (visited 04/06/2009).

process.<sup>46</sup> One admits that, at its core, development must be about the improvement of human well-being, the removal of hunger, disease and ignorance, and productive employment for all.<sup>47</sup> Udombana<sup>48</sup> has affirmed that a society develops economically as its members jointly increase their capacity for dealing with the environment. This capacity, the author observes, is dependent on several factors. One is the extent to which the members of a society understand the laws of nature or science. The other is the extent to which such members put that understanding into practice by devising tools, namely, technology. Finally, it is dependent on the manner in which work is organized, which is entrepreneurship. To restore the wealth of the country, the first goal must be to end poverty and satisfy the primary needs of all people in a way that can be productively sustained over future generations. The government must thus end the war that disrupts all and any attempted programmes of development within the country.

### **6.3 Challenges and recommendations for the Republic of South Africa**

Giving close attention to the challenges highlighted in the *Fifth Report of the South African Human Rights Commission*,<sup>49</sup> some environmental issues have been settled. However, much still needs to be done to give real effect to the realization of the right to an environment that is not harmful to the health and well-being of people. The challenges facing the country in terms of the protection of the environment are various in the light of the impressive array of legislation that governs the environment. The existence of the law on paper is

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<sup>46</sup> Mahamane Cisse-Gouro “Human rights challenges during the transition: An OHCHR perspective” in Mark Malan and João Gomes Porto (eds.) *Challenges of peace implementation: The UN Mission in the Democratic Republic of the Congo* (2004) Institute for Security Studies Pretoria South Africa 109.

<sup>47</sup> Kumar Anuradha (ed.) *op. cit.* (n 38) 14.

<sup>48</sup> Udombana NJ *op. cit.* (n 41) 756.

<sup>49</sup> South African Human Rights Commission *The right to a healthy environment: 5<sup>th</sup> Economic and Social Rights Report 2002/2003 Financial Year* (2004) 40.

not enough to address real environmental concerns.<sup>50</sup> Environmental justice remains one of the keys that will certainly allow citizens to enjoy the fundamental human rights provided for by the Bill of Rights and their right to develop.<sup>51</sup> Thus, the need to allocate sufficient resources to progressively realize the right for the benefit of vulnerable or disadvantaged groups, the education and training of communities on human rights, the guarantee of effective cooperative governance,<sup>52</sup> the fleshing out the content of the right to environment<sup>53</sup> and the right to development are waiting in the wings.

### 6.3.1 The allocation of sufficient resources for the progressive realization of human rights for the benefit of vulnerable groups

To comply with the requirements of environmental justice to redress the injustice and divisions that characterized the apartheid regime,<sup>54</sup> one shares the point of view that government must integrate environmental considerations with social, political, economic justice and development in addressing the needs and rights of all communities and individuals.<sup>55</sup> Environmental justice<sup>56</sup> is to be

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<sup>50</sup> Burns Y and Kidd M “Administrative law and implementation of environmental law” in Strydom HA and King ND (eds.) *op. cit.* (n 40) 240; Kidd M *Environmental law* (2008) Juta Cape Town 40-41.

<sup>51</sup> One notes that probably the most significant way for dealing with environmental injustice in South Africa is through the government’s addressing infrastructural deficiencies in areas like access to water, sanitation, electricity and the like – an endeavour in which the law is one of many mechanisms involved. See Kidd M *id.* 241.

<sup>52</sup> South African Human Rights Commission *The right to a healthy environment: 5<sup>th</sup> Economic and Social Rights Report op. cit.* (n 49) XXII. See also Bray E “Administrative justice” in Paterson A and Kotzé JL (eds.) *op. cit.* (n 40) 186.

<sup>53</sup> Feris Loretta “Constitutional environmental rights: An under-utilised resource” (2008) 24 *South African Journal on Human Rights* at 49.

<sup>54</sup> The end of apartheid in 1994 left in its wake a population with great poverty and income inequalities, largely defined by racial groups. See Department of Environmental Affairs and Tourism *op. cit.* (23) 31.

<sup>55</sup> Henderson GP “Some thoughts on distinctive principles of South African environmental law” (2001) 8 *South African Journal on Environmental Law and Policy* 139 - 184 at 164.

<sup>56</sup> Environmental justice is about social transformation directed towards meeting basic human needs and enhancing the quality of life, health care, housing, human rights, environmental protection and democracy. In linking environmental and social justice issues, the



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 to ensure human well-being must be pursued and special measures must be taken to ensure access thereto by categories of persons disadvantaged by unfair discrimination.<sup>57</sup> It has been recognized by the Department of Environmental Affairs and Tourism<sup>58</sup> that in South Africa, high levels of poverty<sup>59</sup> continue to constrain human potential and choices and undermine well-being. Recent reviews of inequality indicate that poverty and inequality have not declined substantially over the last decade and, for some significant portions of the population, poverty has worsened.<sup>60</sup> This situation has fundamental implications for the environment, as well as increasing human vulnerability to adverse environmental conditions. It is against this background that many South Africans are not happy with the level of protection of their socio-economic rights. Government delivery in the areas of housing, health care services, food, water and education remains inadequate.<sup>61</sup> In 2005, some provinces experienced infectious diseases due to a lack of clean or adequate water supply, sanitation and waste removal services. Communities residing near to the energy power stations experienced the worst air pollution in 2004/2005. This caused acute and chronic respiratory infections in those communities

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environmental justice approach seeks to challenge the abuse of power which results in poor people having to suffer the effects of environmental damage caused by the greed of others. See Glazewski Jan *op. cit.* (n 24) 16; Cowen DV “The new South African Constitution and opportunities for environmental justice in a democratic South Africa” (1999) 7 *Acta Juridica* at 135-136.

<sup>57</sup> Section 2 (4) (viii) (d) of the National Environmental Management Act.

<sup>58</sup> Department of Environmental Affairs and Tourism *op. cit.* (n 23) 22, 32.

<sup>59</sup> Poverty is defined not only by levels of unemployment but also characterized by a lack of access to, for example, education, health care, and basic services including water and sanitation. Poverty has strong gender, race, family-type, and spatial dimensions. See the Department of Environmental Affairs and Tourism *op. cit.* (n 23) 23.

<sup>60</sup> *Idem*; Mubangi JC “Know your rights: Exploring the connections between human rights and poverty reduction with specific reference to South Africa” *op. cit.* (n 14) at 39.

<sup>61</sup> Mubangizi JC “Know your rights: Exploring the connections between human rights and poverty reduction with specific reference to South Africa” *id.* at 44; Kotzé JL “Environmental governance” in Paterson A and Kotzé JL (eds.) *op. cit.* (n 40) 125.

according to the report released by the South African Human Rights Commission.<sup>62</sup> The most vulnerable are those poor communities living mainly in the rural areas.<sup>63</sup> Thus, to deal properly with the above-mentioned concerns in order 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 and topical issue that Government is called upon to deal with on a day-to-day basis.

### 6.3.2 Education, awareness, and training of communities

According to Devenish,<sup>64</sup> 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 depends. Education is essential in the fight for, and the exercise of, human rights.<sup>65</sup> Communities need to be educated, made aware of, and receive training on environmental management and developmental concerns. The community's access to information must not be neglected because it facilitates the realization of their rights (including environmental and development rights). An effective right to information is indispensable for meaningful public participation and support for enlightened

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<sup>62</sup> See South African Human Rights Commission: *6<sup>th</sup> Economic and Social Rights Report* (August 2006) 102.

<sup>63</sup> The lack of basic services such as clean water, housing and health often go hand in hand with severe environmental degradation, and it is the poor who are always hardest hit by this dangerous combination of conditions. In South Africa, for example, 45% of the population lives in the rural areas and 72% of the poor live in those same rural areas. See Feris Loretta "Environmental rights and locus standi" in Paterson A and Kotzé JL (eds.) *op. cit.* (n 40) 139; Mubangizi JC "Know rights: Exploring the connections between human rights and poverty reduction with specific reference to South Africa" *op. cit.* (n 14) at 45.

<sup>64</sup> Devenish GE *The South African Constitution* (2005) Butterwoths Durban 153.

<sup>65</sup> Mubangizi JC "Poverty production and the human rights in the African context" *op. cit.* (n 40) at 8.

decision-making in regard to the environment,<sup>66</sup> and to further the development process. It is stressful to note that in South Africa, although the Bill of Rights has been part of the new South African constitutional dispensation for more than a decade, it has been demonstrated that many South Africans have yet to hear about it.<sup>67</sup> Lack of knowledge and public awareness of human rights is mainly prevalent among the poor.<sup>68</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 Organizations and Community-Based Organisations (CBOs) in the management, monitoring and implementation of plans. This will bring about a more effective effort towards realizing the right to a healthy environment and will lighten the burden that the government is currently facing in this regard. According to the South African Human Rights Commission,<sup>69</sup> capacity building and the integration of environmental concerns in all forms of education and awareness building have not received enough attention. This has resulted in, for instance: the exclusion of most people, especially rural communities, from decision-making and information dissemination in terms of environmental issues; confusion about the assignment of functions at different spheres of government; limited community participation due to lack of knowledge; lack of human, financial and organizational resources to enable civil society and community-based organizations to participate in environmental management and policy development. Progress in the

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<sup>66</sup> Devenish G E *op. cit.* (n 64) 123.

<sup>67</sup> Mubangizi JC “Know your rights: Exploring the connections between human rights and poverty reduction with specific reference to South Africa” *op. cit.* (n 14) 44.

<sup>68</sup> Although poverty in the “rainbow South African nation” is not confined to any one race group, it is nevertheless concentrated among blacks. See Mubangizi JC “Know your rights: Exploring the connections between human rights and poverty reduction with specific reference to South Africa” *op. cit.* (n 14) 44, 45.

<sup>69</sup> See South African Human Rights Commission 6<sup>th</sup> *Economic and Social Rights Report op. cit.* (n 62) 102.

implementation and monitoring of the environment plans needs to be a combined effort, which will reflect the inputs of the public and the interests of affected parties<sup>70</sup> in the interest of the nation as a whole. Keeping with the approach of having a good working relationship with stakeholders, the proper implementation of environmental management plans would assist in meeting the World Summit on Sustainable Development goals<sup>71</sup> on sustainable development.<sup>72</sup>

### 6.3.3 The guarantee of effective cooperative governance

It has not been easy to actually attain the envisaged cooperative governance in the management and protection of environmental rights and developmental concerns. One recognizes that cooperative governance is not effective with local authorities and amongst different spheres of government. Provinces, in some cases, lack confidence in local authorities and often overrule their decisions.<sup>73</sup> Since the environment is a complex, cross-sectional area of responsibility, national and provincial governments have concurrent legislative competence, and to some extent the local sphere as well. Without cooperative governance,

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<sup>70</sup> South African Human Rights Commission *The right to a healthy environment: 5<sup>th</sup> Economic and Social Rights Report 2002/2003 Financial Year op. cit.* (n 49) at 66.

<sup>71</sup> In its 5<sup>th</sup> report, the South African Human Rights Commission asserted that the World Summit on Sustainable Development illuminated the central role of the environment as a contributor to sustainable social and economic development. This has been an opportunity to define the responsibilities upon the different spheres of government to turn the aspiration of the World Summit on Sustainable Development into reality. There is a challenge of strengthening the institutional framework for the integrated delivery of sustainable development as part of the national implementation of the outcomes of the World Summit on Sustainable Development (WSSD). It is interesting to note that in response to this challenge, the Department of Environmental Affairs and Tourism has established a directorate to set up and coordinate the monitoring mechanism for implementing the World Summit on Sustainable Development outcomes. See South African Human Rights Commission, *The right to a healthy environment: 5<sup>th</sup> Economic and Social Rights Report 2002/2003 Financial Year op. cit.* (n 49) at 45.

<sup>72</sup> See South African Human Rights Commission *6<sup>th</sup> Economic and Social Rights Report op. cit.* (n 62) 102.

<sup>73</sup> Department of Environmental Affairs and Tourism *op. cit.* (n 23) 75.

roles and responsibilities can overlap and become indistinct. Therefore, the system will become fragmented and uncoordinated, and no adequate and efficient implementation and enforcement will take place.<sup>74</sup> Craigie F, Snijman P and Fourie M underline that

While South Africa possesses a broad array of environmental compliance and enforcement institutions, the fragmentation of function across and between them undermines their performance. In an attempt to address this problem, the government introduced the Environmental Management Inspector as an institution which ... cuts across all spheres ...<sup>75</sup>

The Department of Environmental Affairs and Tourism has also indicated that

while policy and legislation are in place, implementation and enforcement have been inadequate, particularly at provincial and local government levels, where a suite of constraints hinder progress towards suitable development. Local government politicians and officials need training in environmental and sustainable development concepts and issues.<sup>76</sup>

The complex and fragmented nature of environmental management and sustainable development in South Africa, with its concurrent competences, remains a focal debate that also includes the problems associated with multi- and

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<sup>74</sup> The fragmentation and lack of co-ordination among the various executing agencies represent a significant hurdle and a barrier to successful implementation in South Africa. See Department of Environmental Affairs and Tourism *op. cit.* (n 23) *idem*; Müller K “Environmental governance in South Africa” in Strydom HA and King ND (eds.) *op. cit.* (n 40) 68, 92.

<sup>75</sup> It is unfortunate to note that despite a certain degree of coordination achieved by the Environmental Management Inspector, fragmentation continue in South Africa owing the fact that various key environmental laws remains outside the mandate of the Environmental Management Inspectors and many of them have overlapping mandates. See Craigie F, Snijman P and Fourie M “Environmental compliance and enforcement institutions” in Paterson A and Kotzé JL(eds.) *op. cit.* (n 40) 100-101; Kidd M *op. cit.* (n 50) 39-40.

<sup>76</sup> Department of environmental Affairs and Tourism *op. cit.* (n 23) at 82.

cross-sectoral functions. Therefore, there is an ongoing need to harmonize planning and reporting systems amongst all sectors in the environmental sector<sup>77</sup> in order to actualize the human rights agenda based on sustainable development. The gap in cooperative governance remains a problem for the proper implementation and enjoyment of environmental rights. Thus, the development of an effective system of cooperative governance deserves to be put in place, possibly by a focus upon the facilitation work of provincial communities for environmental coordination. Despite all the worthy efforts made since the coming into force of the new constitutional dispensation, the environment is not yet acknowledged as a strong enough issue to ensure support and cooperation for better environmental governance in South Africa.<sup>78</sup>

#### 6.3.4 The need to flesh out the content of the right to environment and the explicit constitutional guarantee of the right to development

For the purpose of a good understanding and the practical application of environmental<sup>79</sup> and developmental rights, the courts must determine their content and scope through the interpretation of the laws.<sup>80</sup> To accomplish this mission, different prerequisites are at stake. The training of judges on

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<sup>77</sup> Department of Environmental Affairs and Tourism *op. cit.* (n 23) 77.

<sup>78</sup> *Id.* at 82; Kidd M *op. cit.* (n 50) 39-40; Müller K “Environmental governance in South Africa” in Strydom H A and King N D (eds.) *op. cit.* (n 40) 68, 70,-73.

<sup>79</sup> It has been indicated that with regard to the right to environment jurisprudence that the judiciary has done very little in promoting the understanding on the nature of the right and how it operates vis-à-vis other rights. Courts have been criticized for misconstruing the very nature of the right. See Feris Loretta *Environmental rights and locus standi* in Paterson A and Kotzé JL (eds.) *op. cit.* (n 40) 134; Burns Y and Kidd M “Administrative law and implementation of environmental law” in Strydom HA and King ND (eds.) *op. cit.* (n 40) 248.

<sup>80</sup> Merrills G. John “Environmental rights” in Bodansky Daniel, Brunnée Jutta and Hey Ellen (eds.) *The Oxford handbook of international environmental law* (2007) Oxford University Press New York 64-65. See also Malgosia Fitzmaurice and Jill Marshall “The human right to a clean environment-phantom or reality? The European Court of Human Rights and English Courts perspective on balancing rights in environmental cases” (2007) Vol. 76 No. 2-3 *Nordic Journal of International Law* 106; Tomuschat Christian *Human rights: Between idealism and realism* (2003) Academy of European Law Oxford University Press New York 50-52.

environmental matters is a real necessity.<sup>81</sup> By so doing, judges will be able to cope with and understand the special nature of environmental rights in achieving a better life.<sup>82</sup> 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>83</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 where expertise can be built up need to be established, although this seems to be a permanent and complex challenge.

Keeping this in mind, one shares the recommendation highlighted by the South African human Rights Commission:<sup>84</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

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<sup>81</sup> It is in this respect that The Johannesburg Principles on the Role of Law and Sustainable Development stated that: “We [judges] are strongly of the view that there is an urgent need to strengthen the capacity of judges, prosecutors, legislators and all persons who play a critical role at national level in the process of implementation, development and enforcement of environmental law, including multilateral environmental agreements (MEAs), especially through the judicial process”. Morne van der Linde and Ernst Basson “Environment” in Woolman S *et al.* (eds.) *Constitutional law of South Africa* (2006) 2<sup>nd</sup> ed. Vol. 2 Juta Kenwyn 50-1; Craigie F, Snijman P and Fourie M “Environmental compliance and enforcement institutions” in Paterson A and Kotzé JL (eds.) *op. cit.* (n 40) 98-99.

<sup>82</sup> Hayward T *Constitutional environmental rights* (2005) Oxford University Press 84-92; Malgosia Fitzmaurice and Jill Marshall *op. cit.* (n 80) at 106. Burns Y and Beukes M *Administrative law: Under the 1996 Constitution* (2006) 3<sup>rd</sup> ed. LexisNexis Durban 278.

<sup>83</sup> (1996) (3) SA 155 (N).

<sup>84</sup> South African Human Rights Commission The right to a healthy environment: 5<sup>th</sup> *Economic and Social Rights Report op. cit.* (n 49) at XXII.

focus on the substantive aspects of the realization of the right for vulnerable groups.

Despite the fact that the RSA is party to the African Charter on Human and Peoples' Rights and recognizes the right to development, it is surprising to note that this right is not explicitly incorporated in the Bill of Rights. It is only after close reading that one comes across some provisions pertaining to the right to development in the Preamble of the Constitution 'to heal the divisions of the past ... and to improve the quality of life of all citizens and free the potential of each person ... ' In line with this understanding, the National Action Plan for the Promotion and Protection of Human Rights of South Africa recognizes that the right to development is particularly relevant to the poor and marginalized groups.<sup>85</sup> Due to its relevance in the South African society, the right to development needs to be entrenched explicitly within the Bill of Rights, and therefore, to benefit from the same protection enjoyed by any other fundamental human rights. People should be informed about it and judges must be made aware of its importance by clearly defining its content.

#### **6.4 Concluding remarks**

Despite the polarized debates among academics,<sup>86</sup> environmental protection and the development process have been elevated to the status of fundamental human rights by different international instruments on human rights, including, the African Charter on Human and Peoples' Rights of 1981. Some particulars relating to their recognition as fundamental human rights exist at the regional as well as at the national levels. Environmental and development matters are dealt

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<sup>85</sup> See National Plans of Action for the Promotion and Protection of Human Rights: South Africa. Available at: [http://www2.ohchr.org/english/issues/plan\\_actions/safrica.htm](http://www2.ohchr.org/english/issues/plan_actions/safrica.htm) (visited 11/03/2008).

<sup>86</sup> Steiner Henry J, Alston P and Goodman R *International human rights in context: Law, politics, morals* (2008) 3<sup>rd</sup> ed. Oxford University Press New York 1433 – 1454.



with through article 5 of the SADC Treaty and they are implicitly recognized as human rights in the Preamble and under article 4 which defines the principles in this regard. Because of the weaknesses observed at the regional level pertaining to respect for, and the promotion, protection and the fulfilment of human rights (including environmental and developmental rights), the SADC state members do not share the same understanding or agenda in this matter.

Giving effect to international and regional instruments that recognize the rights to environment and to development and the inextricable relationship between human rights, the environment and development, these rights are recognized with different emphases in the legal systems of the DRC and of the RSA.

The Constitution of the DRC clearly guarantees and incorporates the rights to environment and to development within articles 53 and 58 respectively. These rights are conceived and formulated respectively as individual and collective rights. The procedural character of the right to environment has served to articulate environmental progress by applying the human rights approach, which gives individuals access to information, just administrative action and legal standing to challenge perceived violations. It should be mentioned that 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 remain poor and need important support from all organs of state (the judiciary playing a pivotal role) and from the citizens. While the priorities on the agenda of the political leaders of the DRC do not reveal a real willingness to deal with this matter, in my humble 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 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. In the same vein, the constitutional right to development must also be sustained by a strong regulatory framework in compliance with the governmental document defining the growth strategy and poverty reduction measures: *Document de la Stratégie de Croissance et de Réduction de la Pauvreté* (DSCR) of 2006. The country must be prepared to handle some problems that may occur in the future relating to human rights rather than only react to them.

Certain guidance may be taken from the South African model in this regard, although the realization 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. However, the right to development has no explicit constitutional protection in the RSA. The constitutionalization of the right to development therefore remains a real need for any poverty reduction programme and to have any meaningful impact. This should be done in line with the human rights-based approach to development that puts human rights at the heart of human development.<sup>87</sup> However, a proper contextualization and diagnosis of the socio-economic and political situation in pre-1993 South Africa is critical to graft a better future for all. One needs to keep in mind the fact that South Africa is still a young and

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<sup>87</sup> This approach sets the achievement of human rights as an objective of development. Central to the human rights-based approach is that it is concerned with both the outcomes of development and the process by which development is achieved. From being passive objects of choices made on their behalf, this approach enables all people to be active citizens with rights, expectations and responsibilities. In this respect, all human rights are taken into consideration and enjoy the same protection. Where priorities between them are to be made, this must be done on practical grounds. For instance, a development organization may choose to prioritize the right to education as this contributes to the enjoyment of other rights, such as the right to information. See Wilson Emilie Filmer *op. cit.* (n 11) at 213, 216, 220; Steiner Henry J, Alston P and Goodman R *id.* 1434.

fragile democracy<sup>88</sup> like the DRC. Much of the success in reducing poverty within the country will largely depend on how the state and its organs interpret, apply and enforce the Bill of Rights.<sup>89</sup>

The time has come for the people of the DRC and the RSA to use the law effectively for the defence of their rights (environmental and developmental indeed). One shares Metha's<sup>90</sup> view 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 grass roots level. The strong message is that the authorities will not protect the environment unless there is a strong peoples' movement to support and challenge environmental and development ethics and issues. The use of law, environmental awareness and grass roots action can, and should, play a pivotal role in the protection of the environment and human rights as a whole.

It is against this analysis that the people in RSA and the DRC need to be made aware of their constitutional rights and the institutions and/or mechanisms available to enforce them. Much more needs to be done to educate the public, especially the rural masses, not only about the Bill of Rights and the processes and mechanisms for its enforcement, but also about the existence and functions of the various human rights institutions.<sup>91</sup> People need to be empowered to

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<sup>88</sup> Mubangizi JC "Know your rights: Exploring the connections between human rights and poverty reduction with specific reference to South Africa" *op. cit.* (n 14) at 46.

<sup>89</sup> *Idem.*

<sup>90</sup> Metha MC "Growth of environmental jurisprudence in India" in Glazewski Jan, Bradfield *et al.* (eds.) *Environmental justice and the legal process* (1999) Juta Cape Town 79.

<sup>91</sup> In his own words, Nelson Mandela has asserted that "the experience of South Africans and of all peoples everywhere has taught that in order for the rights and freedoms embodied in constitutions to be realized, they must become a part of the everyday reality of citizens' lives, and the institutions protecting them must be deeply entrenched". See Mubangizi JC *The protection of human rights in South Africa: A legal and practical guide* (2004) Juta Durban 164; Mubangizi JC "Know your rights: Exploring the connections between human rights and poverty reduction with specific reference to South Africa" *op. cit.* (n 14) 46.

demand justice as a right not as an act of charity<sup>92</sup> from those who hold power within society. Government needs to be considered as a facilitator rather than a developer. One may run into problems if the facilitator is transformed into a developer. An empowered society may continue to exist beyond a ‘phantom’ collapsed state. Dependency on the state needs to be minimised as much as possible and a better life is still possible for all. It is critical to note that as far as the role of government is concerned, designing good policies is important but not enough. Governments must describe how they see their national development strategies as contributing to the realization of human rights and how this relates to the right to development.<sup>93</sup> The effective and fair implementation and enforcement of policies are much more crucial and meaningful.

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<sup>92</sup> Wilson Emilie Filmer *op. cit.* (n 11) at 213.

<sup>93</sup> Piron Hélène–Laure *The right to development: A review of the current state of the debate for the Department for International Development* (April 2002).

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