

THE SOUTH AFRICAN ENVIRONMENT AND THE 1996 CONSTITUTION: SOME REFLECTIONS ON A DECADE OF DEMOCRACY AND CONSTITUTIONAL PROTECTION OF THE ENVIRONMENT

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RESUMO: Este estudo discorre sobre a proteção ambiental na República da África do Sul com a edição da Constituição de 1996 conformando um direito humano justiciável. A contribuição começa com uma exposição no desenvolvimento do direito ambiental. São discutidas as providências constitucionais mais pertinentes relacionadas ao ambiente, e são feitas observações relativas a desenvolvimentos futuros.

PALAVRAS-CHAVE: Ambiente, Proteção, Direitos Humanos.

ABSTRACT: This study brings the debate upon environmental protection in the Republic of South Africa since the 1996 Constitution enactment which conformed it as a justifiable human right. The contribution begins with some considerations about (in) the development of the environmental right. The more pertinent constitutional provisions related to the environment are discussed, and there are some remarks about future developments in this field.

KEYWORDS: Environment, Protection, Human Rights.

SUMMARY: 1. Introduction. 2. Domestic development of the environmental right. 3. The Bill of Rights and the environment. 4. Environmental legislation and constitutional protection. 5. A critical survey. 6. Conclusion.

Our 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 process in our country.¹

1. INTRODUCTION

Prior to the enactment of the *Constitution of the Republic of South Africa* 200

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¹ *The Director: Mineral Development, Gauteng Region and Sasol Mining (Pty) Ltd v Save the Vaal Environment and Others* 1999 2 SA 709 (SCA) at 719.

of 1994 (hereafter the Interim Constitution),² and the *Constitution of the Republic of South Africa*, 1996 (hereafter the Constitution), environmental concerns in South Africa were generally perceived to be white elitist concerns that '...were linked to the imposition of the previous government's policies and plans'.³ The previous order furthermore did not provide for a comprehensive constitutionally-based corpus of environmental laws. This, however, changed dramatically with the inception of the current constitutional dispensation. Whilst the existence of an environmental right in South Africa is certainly not unique,⁴ one must acknowledge the fundamental role that the 1996 Constitution played, and continuous to play in developing environmental law in South Africa. The judiciary recently reiterated this point when it stated that:

By elevating the environment to a fundamental justiciable human right, South Africa has irreversibly embarked on a road, which will lead to the goal of attaining a protected environment by an integrated approach, which takes into consideration, *inter alia*, socio-economic concerns and principles.⁵

Constitutional provisions, and more specifically a constitutional environmental right, have been heralded as important mechanisms to protect the environment.⁶ In some instances it has even been described as "...no less important than the right to life itself."⁷ This, at least theoretically, also seems to be the case in South Africa.⁸ This contribution accordingly reflects on the constitutionalisation of environmental protection in South Africa. For this purpose, the contribution commences with an exposition on the development of the environmental right. The most relevant constitutional provisions that relate to the environment are then discussed, and recommendations and observations are made regarding future developments.

² The provisions of the Interim Constitution are not discussed for the purpose of this contribution. See for a discussion on the development of the Interim Constitution, JC Mubangizi *The Protection of Human Rights in South Africa* (Juta 2004) 52-55.

³ J Glazewski 'Environmental Justice and the New South African Democratic Legal Order' in J Glazewski and G Bradfield (eds) *Environmental Justice and the Legal Process* (1999) 2. For a general discussion of the provisions of the Interim Constitution that relate directly or indirectly to the environment, see T Winstanley 'Entrenching Environmental Protection in the New Constitution' 1995 2(1) *South African Journal of Environmental Law and Policy* 85-97. It should be pointed out here that South Africa has had five constitutions to date, dating back to as early as 1910. It is however only the Interim and 1996 Constitutions that can be regarded as democratic constitutions.

⁴ More or less 54 states currently have an entrenched environmental right in their constitutions. See in this regard Winstanley above n 3 at 86-87. This contribution does not afford consideration to the conceptual debate on human rights and the environment, since it only focuses on the environmental right and constitutional protection in South African law. For a succinct discussion on these issues, see LA Feris and D Tladi "Environmental Rights" in D Brand and C Heyns (eds) *Socio-economic Rights in South Africa* (Pretoria University Law Press 2005) 249-255.

⁵ *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation and Land Affairs* 2004 5 SA 124 (W).

⁶ C Bruch, W Coker and C Van Arsdale 'Breathing Life into Fundamental :Principles: Implementing Constitutional Environmental Protections in Africa' 2000(7) *South African Journal of Environmental Law and Policy* 21.

⁷ BT Mekete and JB Ojwang 'The Right to a Healthy Environment: Possible Juridical Bases' 1996(3) *South African Journal of Environmental Law and Policy* 155.

⁸ For a detailed discussion on the constitutional entrenchment of environmental protection in African countries, see Bruch, Coker and Van Arsdale above n 6 at 21-96.

2. DOMESTIC DEVELOPMENT OF THE ENVIRONMENTAL RIGHT

Environmental concerns in the pre-constitutional dispensation in South Africa were addressed in an insufficient manner.⁹ Environmental protection during this period must be considered in the context of the general lack of rule of law and constitutionalism; the supreme reign of the system of apartheid, parliamentary sovereignty and lack of respect for, and protection of human rights.¹⁰ Rather than advocating sustainability and an integrated approach to environmental law and governance; past practices, legislation, and policies were essentially concerned with the facilitation of resource allocation and resource exploitation.¹¹ The development of the environmental right must further be considered in terms of South Africa's colonial past which was characterised by conflicts over land and access to natural resources.¹² Moreover, the apartheid ideology was essentially concerned with social engineering which exacerbated this already untenable situation, since it created additional discrepancies in terms of physical, spatial and economic planning and lack of state response to environmental degradation and human needs.¹³ When considered in this context, it is thus not surprising that the development of the environmental right was principally motivated and driven by those seeking to address the civil and political injustices of apartheid and subsequent environmental injustices caused by this ideology.¹⁴

During the early 1990s an attempt was made to include a right to a clean and healthy environment in what was to become the *Environment Conservation Act 73 of 1989* (hereafter the ECA).¹⁵ This endeavour however never materialised.¹⁶ It was only during the negotiation process that led to the establishment of the Interim

⁹ This correlates to a large extent with the international scenario where increased world-wide environmental degradation gave rise to the development of an environmental right in the international arena. See in this regard V Vukasovic 'Protection of the Environment: One of the Key Issues in the Field of Human Rights' 1990 59(4) *Revista Juridica UPR* 889-896. There is no single and comprehensive international law instrument on human rights and the environment. Some international instruments, however, recognise an environmental right including, *inter alia*: the United Nations Conference on the Human Environment, 1972; the African Charter on Human and People's Rights, 1981; and the World Charter for Nature, 1982. See also M Déjeant-Pons and M Pallemarts *Human Rights and the Environment* (Council of Europe Strasbourg 2002) for a detailed exposition on the development of the environmental right in international context. See also Feris and Tladi above n 4 at 255-256.

¹⁰ See for an insightful discussion on South Africa's transition from a non-democratic to a democratic, constitutional *rechtstaat*, Mubangizi above n 2 at 1-11, 35-42.

¹¹ W Du Plessis and JG Nel 'An Evaluation of NEMA Based on a Generic Framework for Environmental Framework Legislation' 2001 8(1) *South African Journal of Environmental Law and Policy* 1-3.

¹² F Du Bois and J Glazewski *The Environment and the Bill of Rights* (2004) 3.

¹³ *Ibid.*

¹⁴ *Ibid.*

¹⁵ The ECA served as the primary environmental protection act for more than a decade. See MA Rabie 'Environment Conservation Act' in RF Fuggle and MA Rabie (eds) *Environmental Management in South Africa* (1992) 99-119. Most of its provisions have now been repealed by the *National Environmental Management Act 107 of 1998*. The latter act is considered to be progressive and modern environmental law legislation, and currently serves as the primary framework act for environmental governance and management efforts in South Africa. See for a comprehensive discussion, Du Plessis and Nel above n 11 at 1-37, and J Glazewski *Environmental Law in South Africa* 2nd ed (LexisNexis Butterworths 2005) 131-161.

¹⁶ Even if an environmental right was included in the ECA, it is doubtful whether this protection would have been adequate since the ECA is not a constitutional legislative arrangement, but rather a normal environmental act of Parliament operating under the rule of constitutional provisions.

Constitution that possible inclusion of an environmental right was again considered. The negotiation process entailed a significant degree of political trade-offs. Hence, those proponents arguing for the inclusion of an environmental right in the Interim Constitution, had to carefully consider the nature, extent and content of such a right; its relationship with other fundamental rights; and the potential role of a environmental human right in the new South African democratic order.¹⁷ The result of the negotiation process was the inclusion of a narrowly formulated environmental right in section 29 of the Interim Constitution. Section 29 provided that:

Every person shall have the right to an environment which is not detrimental to his or her well-being.

The limited nature of this right may arguably be evidence of the political trade-offs that were made. Firstly, section 29 was formulated in such a way that it conferred an individual, rather than a collective right, thereby excluding the application of the right to injured groups.¹⁸ This presented a significant shortcoming, since it was especially groups that suffered environmental injustices at the hands of the previous apartheid government.¹⁹ Secondly, the right was formulated in the negative, which may imply that no duties (in the form of socio-economic rights) on the part of government existed to protect the environment.²⁰ The right was accordingly relegated to a classic fundamental human right, rather than a socio-economic right which places positive duties on government to fulfil the aims and objectives of the right. It merely acted as a 'shield' against state and private party intervention. Thirdly, it is noted that section 29 may have been too anthropocentric in nature, since it did not specifically provide for protection measures in terms of the natural environment. It also failed to endorse the all important and internationally-recognised concept of sustainable development, and furthermore did not refer to general accepted components of environmental law, namely, resource utilisation and conservation, pollution control, waste management and planning and land use.²¹

The negotiation process which preceded the 1996 Constitution, took into consideration a number of these concerns. The result is that the environmental right, as it is currently formulated and enshrined in the 1996 Constitution, may be considered as the fulcrum around which environmental protection endeavours in South Africa revolve. Further paragraphs shed light on the content of this right and additional rights and constitutional provisions that are meant to assist in the creation of what Glazewski and Du Bois²² term a 'just environmental dispensation' in South Africa.²³

¹⁷ Glazewski above n 15 at 67.

¹⁸ M Kidd *Environmental Law: A South African Guide* (1997) 36 also observes that the individual character of section 29 is contrary to the third-generational character generally afforded to environmental rights, in that they are applicable to groups rather than individuals.

¹⁹ For a discussion on environmental justice and the South African environmental law order, see LA Feris *The Conceptualisation of Environmental Justice within the Context of the South African Constitution* (LLD Thesis University of Stellenbosch 2000).

²⁰ Kidd above n 18 at 36.

²¹ Kidd above n 18 at 36, and Winstanley above n 3 at 85.

²² Du Bois and Glazewski above n 12 at 5.

3. THE BILL OF RIGHTS AND THE ENVIRONMENT

3.1. The Environmental Right

Substantive aspects of the environmental right are provided for by section 24 of the 1996 Constitution. Section 24 states that:

Everyone has the right -

(a) to an environment that is not harmful to their health or well-being; and

(b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that -

(i) prevent pollution and ecological degradation;

(ii) promote conservation; and

(iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

Section 24 forms part of the Bill of Rights of the 1996 Constitution, and may therefore be classified as a fundamental human right.²⁴ This means that the environmental right is attributed the same status afforded to other fundamental rights in the 1996 Constitution.²⁵ Furthermore, the 1996 Constitution is the supreme law of South Africa. The inclusion of the environmental right thus means that individuals may assert this right on a constitutional basis. This significantly enhances the number, nature and scope of legal remedies available to enforce it, especially insofar as one may rely on all constitutional remedies to assert this right.²⁶ As far as the Bill of Rights is concerned, section 7 of the 1996 Constitution reinforces the significance of the constitutionally protected environmental right by stating that:

²³ See for a comprehensive discussion on the role of the Bill of Rights, and specifically section 24, to promote environmental justice and address the environmental legacy of Apartheid in South Africa, J Glazewski 'Environmental Justice and the New South African Democratic Legal Order' 1999 *Acta Juridica* 1-35.

²⁴ See on the classification of the environmental right as a fundamental human right, C Theron 'Environmental Rights: An Overview of Interpretations' 1997 4(1) *South African Journal of Environmental Law and Policy* 29-36, and Mekete and Ojwang above n 7 at 155-176.

²⁵ It is important in this context to briefly reflect on the nature of fundamental rights. Fundamental rights are divided into three different generations. First generation or 'blue' rights are civil or political rights of individuals including, for example, the right to equality and the right to life. The state is specifically required to refrain from infringing these types of rights. Second generation, or 'red' rights are socio-economic rights which places a positive duty on the state to realise their substantive content. These rights may, for example, include the right to access to food and housing. Environmental rights are typically classified as third generation or 'green' rights which are applicable to a certain group. The section 24 environmental right is unique in the sense that it contains aspects of each of these classifications. See Kidd above n 18 at 35 and Mekete and Ojwang above n 7 at 157-158. See also TP Van Reenen 'Constitutional Protection of the Environment: Fundamental (Human) Right or Principle of State Policy?' 1997(4) *South African Journal of Environmental Law and Policy* 270-273, where the author classifies environmental rights primarily as being social fundamental rights-a theory which emphasizes the social preconditions that are required for the realisation of rights.

²⁶ Courts can, for example, declare laws, regulations, and all other measures or actions invalid and unconstitutional. Courts may then further award damages, order interdicts, administrative remedies, or issue a declaration of rights. See further in this regard J De Waal, I Currie and G Erasmus *The Bill of Rights Handbook* (2000) 154 and M Van der Linde and E Basson "Environment" in Woolman S *et al* (eds) *Constitutional Law of South Africa* 2nd ed (2004) 50.

7(1) This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.

(2) The state must respect, protect, promote and fulfil the rights in the Bill of Rights.

(3) The rights in the Bill of Rights are subject to the limitations contained or referred to in section 36, or elsewhere in the Bill.

It may be derived from the wording of section 7 that the environmental right forms part of the democratic system in South Africa. It stands in close relationship with the values of human dignity, equality and freedom, and must be respected, protected, promoted and fulfilled by everyone.

As far as the application of section 24 is concerned, it may firstly be derived from the wording of the right that no one has the right to a clean, unpolluted environment. The right recognises that pollution is inevitable in an industrialised society, especially given the current limits of technological and scientific knowledge. By doing so, the right allows for some measure of development which may involve a certain degree of pollution, as long as this pollution is not harmful to one's health or well-being.²⁷

Secondly, 'everyone' is meant to include only people and not inanimate objects such as plants and animals. This conforms to the orthodox anthropocentric approach followed by South African environmental law, whereby it is generally accepted that humans are the focus of environmental protection and governance efforts.²⁸ This, however, raises an interesting issue. In order to determine the application of the environmental right one also has to define 'environment'. Environment is defined in section 1 of the *National Environmental Management Act* 107 of 1998 (hereafter the NEMA) as:

...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, aesthetic and cultural properties and conditions of the foregoing that influence human health and well-being.

In line with the South African anthropocentric approach, this definition of environment includes humans and the relationships that humans have with and in their environment. It however also includes all environmental media, biological life forms and processes, chemical, aesthetic and cultural components-thus a very comprehensive definition. Given this broad definition, shouldn't the environmental

²⁷ This arguably conforms to the internationally recognised principle of sustainable development in terms of which a balance should be struck between economic, social and environmental considerations.

²⁸ Glazewski above n 15 at 72-75.

right then also be applicable to other components of the environment in addition to humans such as plants and animals? It is argued that the definition of environment clearly consists of two very distinct considerations, namely human existence, and the relationship between humans and the non-human environment which influences human health and well-being. Semantically, the emphasis is thus not necessarily on the non-human components, but rather on the relationship with these components and the contribution these components may make to promote the health and well-being of humans. This argument, coupled with the fact that 'everyone' and not 'everything' has an environmental right, clearly suggests that the South African environmental right only applies to humans.

Thirdly, the wording of the right suggests that it has vertical and horizontal effect. Individuals may thus assert their environmental right against the state, and against other individuals who may negatively affect their right.²⁹ This must be read together with section 8 of the 1996 Constitution which sets out the application of the Bill of Rights. Section 8 states that the Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary, and all organs of state. According to section 8, a provision of the Bill of Rights also binds a natural or a juristic person.³⁰ Whilst a broad platform for enforcement of the environmental right is established, government, all laws, including legislation, judicial precedents, common law, customary law, international law, indigenous law, and private individuals are subject to the Bill of Rights and accordingly also the environmental right. The nature of the right further lends itself to be enforceable between private individuals (horizontal) and between individuals and the state (vertical). The primary aim of the right is not only to ensure effective enforcement by government action, but also to provide remedies to private individuals to assert this right where their health and/or well-being is affected by, for example, the polluting activities of industry.³¹

Fourthly, the environmental right has a two-fold character. On the one hand, section 24(a) may be construed as a classical, or traditional fundamental right that in nature, correlates with the right to human dignity and the right to life.³² Although environmental rights are traditionally classified as third-generation, or collective

²⁹ See further in this regard, J De Waal, I Currie and G Erasmus *The Bill of Rights Handbook* 4th ed (2001) 405, and Glazewski above 15 at 74-75.

³⁰ Juristic persons include companies, closed corporations and associations.

³¹ See also the decision in *Minister of Health and Welfare v Woodcarb (Pty) Ltd and Others* 1996 3 SA 155 (N) where the Court stated that an infringement of environmental legislation, in this instance the *Atmospheric Pollution Prevention Act* 45 of 1965, negatively affects the environmental right of people held under the Interim Constitution. See further Glazewski above n 15 at 74-75, and Feris and Tladi above n 4 at 258-259 in this regard.

³² See sections 10 and 11 of the 1996 Constitution respectively. De Waal, Currie and Erasmus above n 29 at 405, note that section 24(a) is formulated in the negative, which implies that it is an 'orthodox negative right' that provides for a certain minimum standard and not a positive right of indeterminate extent. The reason for this may arguably be attributed to the very notion of sustainable development provided further on in section 24. The core rationale behind sustainable development arguably includes the creation of a harmonious balance between development, economic, and social considerations. If section 24(a) was to be formulated in the positive, the required legal platform for the achievement of this balance may not have been made possible.

rights, section 24(a) is rather an individual, justiciable right, which may be invoked by individuals where this right is violated by state or private individual conduct.³³ This right may specifically be invoked where the health or well-being of individuals is affected in an environmental context. 'Health' should be interpreted to mean the health of individuals or the public at large, specifically where health is affected by polluting activities.³⁴ 'Health' in this context, reaches beyond the section 27 right of access to health care and the provision of health care services.³⁵ It rather relates to the provision of a healthy, pollution-free environment.³⁶ 'Well-being' is an even broader concept than 'health' and relates to those instances where a person's environmental interests are affected. It furthermore entails that the environment and the interests that people may have in the environment, have a specific inherent or intrinsic value to people, which may, for example, include the aesthetic value that some components of the environment may have to people.³⁷ The aesthetic value of a view of the ocean may, for example, be appreciated under the term 'well-being'.³⁸ Hence, it denotes a certain spiritual and psychological meaning which may even include socio-economic dimensions.³⁹

Whilst section 24(a) clearly serves as a shield against state or private intervention, section 24(b) may be construed as a socio-economic right that imposes duties on the state to protect the environment for present and future generations.⁴⁰ The socio-economic character of section 24(b) correlates with other socio-economic rights in the 1996 Constitution, including, amongst others, the right to access to housing; the right to access to health care, food, water and social security; and the socio-economic rights of children.⁴¹ The state must comply with this constitutional duty by way of 'reasonable legislative and other measures' which must, *inter alia*, prevent pollution and ecological

³³ De Waal, Currie and Erasmus above n 29 at 403, and M Kidd 'Environmental Justice: A South African Perspective' in J Glazewski and G Bradfield (eds) *Environmental Justice and the Legal Process* (1999) 155.

³⁴ See for a detailed discussion Van der Linde and Basson above n 26 at 13-50.

³⁵ Section 27 states, *inter alia*, that:

27.(1) Everyone has the right to have access to:

(a) health care services, including reproductive health care...

See for a detailed discussion Glazewski above n 15 at 76-77.

³⁶ Health in this sense may thus also include mental and physical integrity of people. See further Feris and Tladi above n 4 at 260.

³⁷ See further, Glazewski above n 15 at 77, De Waal, Currie and Erasmus above n 29 at 405-406, and Kidd above n 33 at 155. See also GM Ferreira 'Omgewingsbeleid en die Fundamentele Reg op 'n Skoon en Gesonde Omgewing' 1999(1) *Journal of South African Law* 90-91, 106-110 for a further reflection on the duty imposed on the state by section 24(b). The author specifically emphasizes the point that the implementation of socio-economic rights is to a large extent dependent on political and not so much legal considerations. Moreover, it is stated in this regard that one of the fundamental problems with the enforcement of socio-economic rights is the reasonable distribution of limited resources that may be necessary to give effect to these rights.

³⁸ See in this regard *Paola v Jeeva No and Others* 2004 1 SA 396 (SCA), and Van der Linde and Basson above n 26 at 15-16. See also Mubangizi above n 2 at 128-129 for a further discussion on the meaning of these concepts.

³⁹ Feris and Tladi above n 4 at 260.

⁴⁰ See also H Stacy 'Environmental Justice and Transformative Law in South Africa and some Cross-jurisdictional Notes about Australia, the United States and Canada' in J Glazewski and G Bradfield (eds) *Environmental Justice and the Legal Process* (1999) 51, and Mubangizi above n 2 at 119-122 for a discussion on the nature and enforcement of socio-economic rights in South Africa.

⁴¹ See sections 26, 27 and 28 of the 1996 Constitution respectively.

degradation, promote conservation, secure sustainable development and use, and promote justifiable economic and social development.⁴² Whilst the meaning of 'legislative measures' is self-evident,⁴³ 'other measures' may be construed to mean, *inter alia*, administrative measures executed in terms of environmental governance mandates, including, amongst others, protection of natural resources, regulation of pollution, enforcement of environmental laws, and policy development. 'Other measures' may further include measures of an administrative, technical, financial and educational nature.⁴⁴ These provisions furthermore do not only mean that everyone is entitled to the realisation of section 24 by way of reasonable legislative and other measures, but also that all legislative and other measures must conform to the criteria espoused by section 24(b)(i)-24(b)(iii).⁴⁵ Most importantly, these measures must be reasonable. This is an inherent limitation in section 24 since it may curtail or qualify the socio-economic duty of the state to realise section 24. Government may thus arguably rely on, for example, a lack of human and financial resources to justify why it has not taken legislative and other measures to give effect to the environmental right.⁴⁶ The latter may arguably not be conducive to the promotion of environmental protection in a developing country which has to carefully allocate and spend available financial resources to ensure effective governance of all sectors of South African society. This situation is however not peculiar to the environmental right, since most of the other socio-economic rights in the Constitution are qualified in a similar way.⁴⁷

In line with international environmental law developments, section 24(b) also recognises the concept of sustainable development,⁴⁸ and corresponding concepts such as intergenerational equity,⁴⁹ as important concepts in South African environmental law.⁵⁰

⁴² Some commentators argue that the inclusion of a duty to promote justifiable economic development is an unfortunate insertion in any environmental right. The principal aim of environmental protection is not to promote economic development, but rather to secure sustainable development by creating a balance between economic, social and environmental considerations in the development process. It is argued that it would have been more appropriate to have phrased this particular provision to mean that reasonable legislative and other measures should not impede economic development unreasonably. See further Kidd above n 18 at 38.

⁴³ Legislative measures in this context include legislation enacted, adopted and enforced by government.

⁴⁴ Feris and Tladi above n 4 at 263.

⁴⁵ In other words, reasonable legislative and other measures must "...prevent pollution and ecological degradation; promote conservation; and secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development. Glazewski above n 15 at 78-81.

⁴⁶ Feris and Tladi above n 4 at 263.

⁴⁷ See, for example, sections 26, 27 and 28 of the Constitution.

⁴⁸ Glazewski above n 15 at 80-81 observes in this regard that sustainable development forms the fundamental basis for the entire environmental law regime in South Africa. The author also succinctly points out that whilst sustainable development is an imperative in the domestic legal order, environmental protection must always be balanced with "justifiable economic and social development", the latter which must be aimed at, amongst others, alleviating poverty, providing housing to the homeless, and providing equal opportunities for economic development and growth in a developing country such as South Africa.

⁴⁹ For a comprehensive and insightful exposition on the concept of intergenerational equity, see E Brown Weiss *In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity* (1992) 17-46.

⁵⁰ This is reiterated by the section 2 principles of the NEMA that further expand on the nature, ambit and objective of sustainable development and related concepts in South African law. These principles include,

Apart from this environmental-specific aspects provided for by section 24, various other procedural and substantive fundamental human rights exist which may operate alongside, and subsequently support the environmental right. These are discussed hereafter.

3.2. Supplementary Rights⁵¹

3.2.1. The Equality Clause

Equality is a moral idea which entails that '...people who are similarly situated in relevant ways should be treated similarly.'⁵² Section 9 of the 1996 Constitution advocates the social ideal of equality by, *inter alia*, stating that:

9.(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

In environmental context, the right to equality may specifically be invoked to promote environmental justice in society. Environmental justice is:

*...about social transformation directed towards meeting human needs and enhancing the quality of life-[including] economic equality, health care, shelter, human rights, species preservation, and democracy-[by] using resources sustainably. A central principle 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...Environmental problems therefore remain inseparable from other social injustices such as poverty, racism, sexism, unemployment, [and] urban deterioration.'*⁵³

The South African government has had an enormous task to redress the 'environmental legacy of apartheid'.⁵⁴ Environmental justice is therefore of particular concern in South Africa, given its discriminatory past.⁵⁵ Where disproportional negative environmental effects, or consequences are caused, or have been caused by unequal treatment or unfair discrimination, and the corresponding rights and values have been adversely affected, the right to equality may arguably be invoked to address this inequality.

amongst others, the polluter pays principle, the duty of care principle, the precautionary and preventive approach, the life-cycle approach and the principles of democracy, transparency and participation in all environmental governance efforts. See for a comprehensive discussion on sustainable development in South African context, E Bray 'Towards Sustainable Development: Are we on the Right Track?' 1998 5(1) *South African Journal of Environmental Law and Policy* 1-15.

⁵¹ Other provisions which may also have an impact on environmental governance in South Africa include, chapter 3 that deals with co-operative governance; sections 39 and 231-233 which deal with the inception and application of international law, including international environmental law, in South Africa; and chapter 9 which deals with state institutions which support constitutional democracy, such as the Human Rights Commission.

⁵² De Waal, Currie and Erasmus above n 29 at 198.

⁵³ R Hofrichter 'Introduction' in R Hofrichter (ed) *Toxic Struggles: The Theory and Practice of Environmental Justice* (1993) 4, quoted in Glazewski above n 3.

⁵⁴ Glazewski above n 3 at 2.

⁵⁵ For a general discussion on the historical context in which inequality prevailed in South Africa, see De Waal, Currie and Erasmus above n 29 at 199-200. For a detailed discussion of the application of environmental justice in South African context, see Kidd above n 33 at 142-160.

The *Promotion of Equality and Prevention of Unfair Discrimination Act* 4 of 2000 has been promulgated in view of section 9(4) of the 1996 Constitution.⁵⁶ This Act aims to provide a statutory footing for the section 9 constitutional provisions. The preamble of the Act specifically provides that one of its aims is:

...the eradication of social and economic inequalities, especially those that are systematic in nature which were generated in our history by colonialism, apartheid and patriarchy, and which brought pain and suffering to the great majority of our people.

Although the Act does not explicitly mention environmental discrimination or environmental justice issues, it may be argued that this Act may be utilised by those who want to assert their right to equality in the context of environmental justice considerations.

The human dignity clause

Section 10 of the 1996 Constitution states that '[e]veryone has inherent dignity and the right to have their dignity respected and protected.' The right to human dignity lies at the core of the human rights enshrined in the Bill of Rights. This point has been reiterated in the Constitutional Court where it was stated that:

*Recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many of the other rights that are specifically entrenched in [the Constitution].*⁵⁷

Human dignity is accordingly a justiciable and enforceable right, as well as a value,⁵⁸ that provides guidance in the interpretation of other fundamental rights.⁵⁹ There is a close correlation between the right to dignity and environmental justice issues, since 'the imposition of environmental injustices ultimately strikes at human dignity.'⁶⁰ Where, for example, people in an informal settlement do not have access to clean water, and are subject to continuous environmental pollution, it may be argued that their human dignity is negatively affected. Given the significant role of human dignity in the South African Bill of Rights, it may be argued that this right could play a fundamental role to protect human dignity from an environmental point of reference.

The right to life clause

In terms of section 11 of the 1996 Constitution, everyone has the right to life. This right is of primary importance in South Africa. As is the case with the right to human dignity, the right to life has been described as one of the most important of all human rights from which all other human rights emanate.⁶¹ This almost absolute and unqualified right, therefore, also forms the foundation of the environmental right, and

⁵⁶ For a discussion of this act, see De Waal, Currie and Erasmus above n 29 at 225-229.

⁵⁷ *S v Makwanyane* 1995 3 SA 391 (CC) at para 328.

⁵⁸ Section 1 of the 1996 Constitution.

⁵⁹ De Waal, Currie and Erasmus above n 29 at 232.

⁶⁰ Glazewski above n 15 at 100.

⁶¹ *S v Makwanyane* 1995 3 SA 391 (CC) at paras 144, 146.

may play an important role where the environmental right beckons interpretation and application. The anthropocentric nature of South African environmental law further supports this view, since it is specifically humans in their environment, their health, their well-being, and ultimately life and quality of life, that must be protected through sustainable environmental governance efforts executed in terms of section 24.

The property clause

The 1996 Constitution also provides for the right to property. Section 25, *inter alia*, states that:

25.(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.

(4) For the purposes 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.

(6) A person or community whose tenure of land is legally insecure as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to tenure which is legally secure or to comparable redress.

(7) A person or community dispossessed of property after 19 June 1913 as a result of past racially discriminatory laws or practices is entitled, to the extent provided by an Act of Parliament, either to restitution of that property or to equitable redress.

(8) No provision of this section may impede the state from taking legislative and other measures to achieve land, water and related reform, in order to redress the results of past racial discrimination, provided that any departure from the provisions of this section is in accordance with the provisions of section 36(1).

This comprehensive right to property is of particular relevance to environmental concerns in South Africa. It is noteworthy that 'property' is neither limited to land, nor to ownership. 'Property' may include, amongst others, other real rights, as well as natural resources and public goods, including the seas and rivers.⁶² This arguably implies that people have a right that their neighbours exercise their property rights with restraint, and that South Africans have a right to have the

⁶² Glazewski above n 15 at 83-86.

integrity of public goods and natural resources to be maintained.⁶³ This is especially relevant in the context of neighbour law, where the polluting activities of a neighbour may affect the health and well-being of residents in the surrounding area.⁶⁴

Property may furthermore only be expropriated in terms of law of general application, *inter alia*, for a public purpose, or in the public interest.⁶⁵ 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.'⁶⁶ Property may thus be expropriated if expropriation is deemed necessary to address land reform, and access to, for example, water resources, bio-diversity, and cultural heritage objects. There is accordingly a direct correlation between land-use management considerations and legislation dealing with access to natural resources, such as the National Water Act 36 of 1998. This is reiterated by section 25(8) of the 1996 Constitution which provides that the state may take legislative and other measures to achieve land, water and related reforms.⁶⁷

Access to information clause

The right of access to information, which is currently regulated by the Promotion of Access to Information Act 2 of 2000 (hereafter the PAIA), is enumerated in section 32 of the 1996 Constitution.⁶⁸ Section 32 provides states that:

32.(1) *Everyone has the right of access to -*

(a) *any information held by the state; and*

(b) *any information that is held by another person and that is required for the exercise or protection of any rights.*

(2) *National legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.*⁶⁹

Information may include any information held by the state which may have an impact on an aggrieved person invoking this right.⁷⁰ Hence, information in this context

⁶³ *Ibid.*

⁶⁴ This is based on the common law doctrine of *sic utere tuo non laedas*, in terms of which one may only use your property in a way that does not harm another. The result of this is that property rights are not absolute. This doctrine has specific relevance for neighbour law and the law of nuisance.

⁶⁵ Section 25(2)(a).

⁶⁶ Section 25(4)(a).

⁶⁷ Section 27(1)(b) further provides in this regard that everyone shall have the right of access to sufficient food and water.

⁶⁸ The right of access to information not only includes a right of access of information held by the state, but also to access of information held by another person that is required for the exercise or protection of any rights. The rationale behind the right of access to information is arguably to foster a culture of accountable governance, since government can be held accountable and liable on the basis of explanations for any governmental actions. This right also articulates the notion of open democracy that closely correlates with the aforementioned. See in this regard GE Devenish, K Govender and D Hulme *Administrative Law and Justice in South Africa* (2001) 181, 187.

⁶⁹ See further LJ Kotzé 'The Application of Just Administrative Action in the South African Environmental Governance Sphere: An Analysis of Some Contemporary Thoughts and Recent Jurisprudence' (2004) 2 *Potchefstroom Electronic Law Journal* 14-17.

⁷⁰ De Waal, Currie and Erasmus above n 29 at 526.

may specifically relate to information used during, or for the sake of, decision-making, including policies and criteria used by administrative bodies.⁷¹ Inaccessible information held by, for example the Department of Water Affairs and Forestry, which was used during the assessment of an environmental authorisation, may be demanded by an affected developer who feels that her right to administrative justice has been infringed due to unreasonable delay during the decision-making process.⁷²

Access to information held by the state may be particularly relevant in environmental context.⁷³ This is attributed to the notion that administrative decision-making, and consideration of certain technical criteria, policy considerations and so forth, may have a direct or indirect bearing on the environment and developers who are involved with infrastructural developments.⁷⁴ In *Van Huysteen v Minister of Environmental Affairs*,⁷⁵ the court, for example, held that the applicant had access to state-held documents regarding the development of a proposed steel mill and its potential adverse environmental impact.

There is no distinction made in the PAIA between general information and environmental information.⁷⁶ The PAIA does, however, mention 'public safety or environmental risk'⁷⁷ in sections 36(2)(c), 42(5)(c), 46(a)(ii), 68(2) and 70(1), which is in most cases more applicable to commercial information held by private bodies and third parties such as industry, and not necessarily organs of state.⁷⁸ The NEMA however significantly extends the right to access to information provided in the PAIA to environmental matters. Section 2(4)(k) of the NEMA specifically provides that "...[d]ecisions must be taken in an open and transparent manner, and access to information must be provided in accordance with the law."⁷⁹ Section 31(1)(a) of the NEMA provides in addition that:

⁷¹ *Ibid.*

⁷² For a further discussion on the impact of the right to access to information on other rights, see Devenish, Govender and Hulme above n 68 at 194-196.

⁷³ Glazewski above n 15 at 94-99. See for a comparative perspective on the right of access to environmental information, W du Plessis 'Omgewingsinligting in die Europese Gemeenskap' (1998) *South African Law Journal* 222-244; W du Plessis 'Reg op Omgewingsinligting in Duitsland' (1999) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 352-372; W du Plessis 'n Reg op Omgewingsinligting in Nederland' (1999) *Stellenbosch Law Review* 36-55; and W du Plessis 'Enforcement of Environmental Rights by way of a Right to Information' (1999) *Obiter* 92-112.

⁷⁴ See also for a more general discussion W du Plessis 'Right to Environmental Information in the USA' (1998) 5(1) *South African Journal of Environmental Law and Policy* 115-139.

⁷⁵ 1996 1 SA 283 (C).

⁷⁶ Section 9 of the PAIA.

⁷⁷ 'Public safety or environmental risk' is defined in section 1 as:

...harm or risk to the environment or the public (including individuals in their workplace) associated with-

- (a) a product or service which is available to the public;
- (b) a substance released into the environment, including, but not limited to, the workplace;
- (c) a substance intended for human or animal consumption;
- (d) a means of public transport; or
- (e) an installation or manufacturing process or substance which is used in that installation or process.

⁷⁸ Glazewski above n 15 at 94-99.

⁷⁹ It is significant that access to information is provided for in section 2 of the NEMA. This section describes the national environmental management principles, which are applicable throughout South Africa to the actions of all organs of state. The NEMA therefore recognises the importance of access to

...every person is entitled to have access to information held by the State and organs of state which relates to the implementation of this Act and any other law affecting the environment, and to the state of the environment and actual and future threats to the environment, including any emissions to water, air or soil and the production, handling, transportation, treatment, storage and disposal of hazardous waste and substances.

The administrative justice clause

Section 33 of the 1996 Constitution provides, amongst others, that:

33.(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.*⁸⁰

Section 33 embraces the concept of administrative justice. Administrative justice aims to, *inter alia*, ensure good governance and administration, ensure fair dealing in administrative context, enhance the individual's protection against abuse of state power, promote public participation in decision-making, and strengthen the notion that public officials are answerable and accountable to the public they are meant to serve.⁸¹ In sharp contrast with the past regime of parliamentary sovereignty, it is argued that individuals have certain rights, privileges and liberties in the context of an administrative relationship.⁸² Where the public administration consequently acts in an unlawful and unreasonable manner and contrary to public interest when administering its functions, the state may be held liable in terms of section 33 and the provisions of the Promotion of Administrative Justice Act 3 of 2000.⁸³ These provisions may be of particular relevance for dispute settlement in environmental context since most environmental disputes arise because of the exercise of administrative decision-making powers.⁸⁴ For example, in *South African Shore Angling Association and Another v Minister of Environmental Affairs and Tourism*,⁸⁵ the validity and constitutionality of regulations issued in terms of section 44 of the NEMA were challenged on the grounds of reasonableness. The parties contended that the regulations imposing a general ban on recreational use of vehicles in the coastal zone were *ultra vires*, or unconstitutional. The court held that this was not the case, since the regulations did not constitute an absolute ban and allowed for exemptions and permitting.⁸⁶

The provisions on administrative justice should be read together with the provisions of sections 195(1) and 195(2) of the 1996 Constitution that establish basic

information for the successful functioning of, not only environmental management and governance, but also for the achievement of the objectives of the act as a whole.

⁸⁰ See further Kotzé above n 69 at 1-34.

⁸¹ Devenish, Govender and Hulme above n 68 at 14-16.

⁸² Section 33(3)(a) also provides for judicial review in this regard, which replaces the previous practice of sovereignty of parliament.

⁸³ Devenish, Govender and Hulme above n 68 at 85.

⁸⁴ Van der Linde and Basson above n 26 at 36-37.

⁸⁵ 2002 5 SA 511 (SE).

⁸⁶ See further Van der Linde and Basson above n 26 at 36-37.

values and principles according to which the public administration must be executed. It is stated, in this regard, that the public administration must be governed by the general democratic values and principles enshrined in the 1996 Constitution. Moreover, specific principles are provided, which advocate that: a high standard of professional ethics be promoted and maintained; efficient economic and effective use of resources be promoted; public administration be development-oriented; services be provided impartially, fairly, equitably and without bias; people's needs be responded to, and the public be encouraged to participate in policy-making; public administration be accountable; transparency be fostered by providing the public with timely, accessible and accurate information; good human-resource management and career-development practices to maximise human potential, be cultivated; and public administration be broadly representative of the South African people, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.⁸⁷ It is also explicitly stated that these principles apply to all organs of state as well as state administration in every sphere of government.⁸⁸

The access to courts clause

Section 34 of the 1996 Constitution states that:

Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum.

Section 34 reinforces the procedural rights available to aggrieved parties in environmental disputes. For section 34 to become operative and applicable, it is necessary that a dispute should exist. An individual who is of the opinion that his/her right to, for example, administrative justice is being infringed, can approach a court of law or independent tribunal or forum to have the legal dispute arising from the infringement, adjudicated.⁸⁹ The right to have a dispute settled is very wide and as such, it may extend or reinforce the rights of an aggrieved individual. The right includes: a right of access to a court or independent forum; the requirement that courts and forums should be independent and impartial; and the requirement that the dispute be decided in a fair and public hearing.⁹⁰ This right is furthermore significant insofar as it affords everyone whose environmental right have been infringed the opportunity to approach a forum to have the dispute settled and the right enforced. The right of access to courts must be read with the enforcement of rights clause below.

The enforcement of rights clause/locus standi

The enforcement of rights clause provides for the right to a wide legal standing (*locus standi*). Section 38 of the 1996 Constitution states in this regard that:

38. 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

⁸⁷ Section 195(1) of the 1996 Constitution.

⁸⁸ Section 195(2) of the 1996 Constitution.

⁸⁹ De Waal, Currie and Erasmus above n 29 at 555.

⁹⁰ See De Waal, Currie and Erasmus above n 29 at 554-580, for an in-depth discussion.

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.*

This right aims to, *inter alia*, promote enforcement all constitutional rights, including the section 24 environmental right. The wide *locus standi* offered by section 38 also correlates with the widely-applicable environmental right which states that 'everyone' has a right to an environment which is not detrimental to their health and well-being.⁹¹ In an environmental context, it is furthermore noteworthy that the section 38 constitutional provisions on *locus standi* have been significantly extended by section 32 of the NEMA. Section 32(1) states that:

Any person or group of persons may seek appropriate relief in respect of any breach or threatened breach of any provision of this Act, including a principle contained in Chapter 1, or any other statutory provision concerned with the protection of the environment or the use of natural resources-

- (a) in that person's or group of person's own interest;*
- (b) in the interest of, or on behalf of, a person who is, for practical reasons, unable to institute such proceedings;*
- (c) in the interest of or on behalf of a group or class of persons whose interests are affected;*
- (d) in the public interest; and*
- (e) in the interest of protecting the environment.*

Section 32(1) firstly considerably extends the application of the section 38 constitutional clause to include not only the rights contained in the Bill of Rights, but also "...any breach or threatened breach of any provisions of this act [the NEMA]...or any other statutory provision concerned with the protection of the environment or the use of natural resources".⁹² Secondly, it may even be argued that apart from liberating public interest litigation, section 32(1)(e) extends the *locus standi* provisions, by providing that individuals or a group may currently act not only in their own interests, but also in the interest of the environment.⁹³ As far as 'having an interest in the relief sought' is concerned, it is significant that the environment is equated in terms of legal standing with individuals and groups. This may ultimately broaden the scope of remedies available to people acting in their own interest and the interests of the environment.

⁹¹ Glazewski above n 15 at 75. See also the discussion in paragraph 3.1 above.

⁹² Section 32(1) of the NEMA.

⁹³ See in this regard Glazewski above n 15 at 101, 120-123.

The access to housing clause

Section 26 provides for the right of access to housing clause. It is specifically stated that:

- 26.(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 realisation 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.*

This right may be relevant in environmental context where, for example, people rendered homeless by a natural disaster are provided interim housing facilities. Should they be relocated to reside in an environmentally sensitive area, it may arguably have a negative impact on the environment. It will thus be required of the judiciary and the relevant organ of state to balance the interests of the environment and those of the affected community.⁹⁴ The right of access to adequate housing may however also be relied on to strengthen the case of people who are relocated because of, for example, golf estate developments in environmental sensitive areas. Such developments may have an impact on social and environmental justice and may accordingly be halted where it can be proved that relocation and the development activities would not be beneficial to either the environment or the reallocated individuals.

The limitation clause

Section 36 of the 1996 Constitution contains the general limitation clause that provides for those instances where fundamental rights may be limited. Section 36 states that:

- 36.(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.*

It follows from the wording of section 36 that all fundamental rights, also those that relate directly or indirectly to the environment, may be limited in certain instances.

⁹⁴ See, for example, *Minister of Public Works and Others v Kyalami Ridge Environmental Association* 2001 3 SA 1151 (CC), LJ Kotzé *Local Economic Development and the Possible Conflict of Fundamental Rights: Konrad Adenauer Stiftung Seminar Report-Constitution and Law IV-Colloquium on Local Government Law* (2002) 103-107, and Feris and Tladi above n 4 at 262.

An interpretation of the application of section 36 to the environmental right, however still beckons consideration by the judiciary.⁹⁵

4. ENVIRONMENTAL LEGISLATION AND CONSTITUTIONAL PROTECTION

Constitutional provisions relating to the environment, however comprehensive they may be, are worthless if they are not afforded enforceable status. The section 24 environmental right makes specific provision that the right be enforced by way of 'reasonable legislative and other measures'.⁹⁶ Apart from the array of constitutional provisions that directly or indirectly relate to environmental protection, there accordingly exists a comprehensive corpus of environmental legislation which aims to 'operationalise' the environmental right. Although a detailed description of this regime falls outside the scope of this contribution, some of the most important acts are indicated.

The *National Environmental Management Act* 107 of 1998 (hereafter the NEMA) acts as South Africa's primary environmental framework act and as such, aims to give effect to the environmental right in a generic sense.⁹⁷ The act contains comprehensive provisions on, *inter alia*: sustainability principles, institutions and procedures for co-operative governance, procedures for fair decision-making and conflict management, comprehensive provisions on environmental impact assessment, procedures for the application of international environmental law in South Africa, and compliance and enforcement measures, institutions and procedures.⁹⁸

In addition to the NEMA, South African environmental legislation also provides for an array of environmental-media specific, or sectoral acts which regulates, amongst others, renewable and non-renewable resources, environmental pollution, agriculture, land use management, planning and cultural heritage. By way of summary, these acts include, *inter alia*: the *Conservation of Agricultural Resources Act* 43 of 1983; the *Development Facilitation Act* 67 of 1995, the *Environment Conservation Act* 73 of 1989; the *National Forests Act* 84 of 1998, the *Genetically Modified Organisms Act* 15 of 1997; the *Hazardous Substances Act* 15 of 1973; the *Marine Living Resources Act* 18 of 1998; the *Mineral and Petroleum Resources Development Act* 28 of 2002; the *National Environmental Management: Air Quality Act* 39 of 2004; the *National Environmental Management: Biodiversity Act* 10 of 2004; the *National Environmental Management: Protected Areas Act* 57 of 2003; the *National Heritage Resources Act* 25 of 1999; the *National Water Act* 36 of 1998; and the *Water Services Act* 108 of 1997.⁹⁹

⁹⁵ Van der Linde and Basson above n 26 at 50-42. Section 24 also contains its own inherent limitation clause since *reasonable* legislative and other measures must be taken or passed for only the three items listed in sections 24(b)(i)-(iii). Kidd above n 18 at 37 observes in this regard that if reasonableness is considered from the state's perspective, it may very well be argued that only those measures which may not place too great a burden on already limited resources will be considered to be 'reasonable'.

⁹⁶ See paragraph 3.1 above.

⁹⁷ Glazewski above n 15 at 131-161.

⁹⁸ See in this regard chapters 1-10 of the NEMA.

⁹⁹ For a detailed discussion, see Glazewski above n 15 at 165-664.

5. A CRITICAL SURVEY

It may be derived from the foregoing that the South African legal order provides for a comprehensive array of provisions that essentially aim to secure constitutional environmental protection both in a substantive and procedural sense. This must be lauded as a positive and progressive legal development. This is especially true when considering the background against which this development took place and the challenges of the past dispensation it essentially aims to address.¹⁰⁰ The obvious benefits that constitutional protection offers, arguably outweighs any potential objections to the constitutional entrenchment of environmental rights.¹⁰¹ Some of these benefits include: that environmental protection is elevated to the highest legislative level of protection, since constitutional provisions override ordinary legislation and administrative and judicial rules and decisions; the environmental right is arguably afforded the same protected status as other fundamental rights; and environmental protection is firmly entrenched in the legal order of the country by way of constitutional affirmation.¹⁰² Some commentators further point out that constitutional protection of the environment may provide a 'safety net' in those instances where legislative and regulatory regimes are incomplete or unenforceable for the sake of environmental protection; that constitutional entrenchment may safeguard environmental interests against unreasonable political intervention since government is (or at least should be) subject to constitutional provisions in a constitutional state; and environmental rights may arguably also elevate the status of international environmental instruments.¹⁰³

One should however not make the crucial mistake of accepting constitutional provisions relating to environmental protection as being necessarily 'all good' and not subject to some critique. There are a number of concerns which may be raised in this regard.¹⁰⁴ The first concern relates to the relationship between the environmental right and other constitutional provisions that may be applicable to environmental protection.¹⁰⁵ Must the environmental right be considered as the principal and primary source of constitutional entitlements insofar as the environment is concerned? Or should environmental entitlements be seen in terms of numerous constitutional provisions that each contribute to environmental protection? In light of the discussion above, it may be derived that both these scenarios are true for South Africa and that no real conflict exists between the various constitutional rights and provisions that

¹⁰⁰ See paragraph 2 above.

¹⁰¹ See also JW Nickel 'The Human Right to a Safe Environment: Philosophical Perspectives on its Scope and Justification' 1993 18(281) *Yale Journal of International Law* 281-282.

¹⁰² Van Reenen above n 25 at 269.

¹⁰³ Bruch, Coker and Van Arsdale above n 6 at 23, 30-32.

¹⁰⁴ Apart from the various concerns discussed hereafter, Van Reenen above n 25 at 282-284, points out further concerns which must also be considered. These include, *inter alia*: environmental rights are sometimes formulated and defined in a vague fashion which renders it difficult to implement and enforce; formulation of environmental rights are also sometimes ambiguous which does not promote legal certainty and predictability; the wide legal standing usually offered in terms of environmental rights may result in the potential abuse of the judicial process to the detriment of the judiciary and the executive branch of government; and environmental rights which are too ambitious may result in the imposition of unreasonable demands on limited resources of government, especially in developing countries.

¹⁰⁵ Du Bois and Glazewski above n 12 at 7.

directly or indirectly relate to the environment. On the one hand it is evident from the explicit wording of section 24 that it constitutes the principal source of any potential constitutional entitlements relating to the environment. No other constitutional provision, at least in the Bill of Rights and with exception to the right of access to water,¹⁰⁶ explicitly mentions the environment as its primary object of concern. On the other hand, various other rights and constitutional provisions play a supplementary role (such as procedural rights which may be employed to enforce section 24) in giving effect to, and supporting the substantive elements of the section 24 right. Such an interpretation arguably supports the notion that constitutional protection of the South African environment is further enhanced by affording it the 'luxury' of its own directly applicable right with subsequent rights, other constitutional provisions and environmental legislation to enhance and support the substantive elements of the right.

A second concern relates to the question whether the environmental right is self-executing or not.¹⁰⁷ If the environmental right is self-executing, it will not necessarily need further environmental legislation to concretise and enforce its substantive content. It may also mean that the judiciary will arguably fulfil the role of the primary enforcement institution in the absence of relevant environmental legislation. This may be particularly problematic since the South African judiciary, in the absence of a specialised environmental court, does not necessarily have the required technical, scientific, financial and managerial resources, expertise and capacity to address complex environmental issues.¹⁰⁸ It has been proposed in this regard that section 24 is indeed enforceable without legislative implementation.¹⁰⁹ This contention is substantiated by the argument that the environmental right needs no more legislative definition than any of the other rights (for example, the right to life)¹¹⁰ in the Bill of Rights, and hence no specific acts to facilitate legislative implementation and enforcement.¹¹¹ Even though numerous environmental acts have been promulgated since 1996 to 'give effect' to the section 24 and subsequent rights,¹¹² it may arguably be more correct to argue that courts, through judicial intervention, should set parameters within which rights relating to the environment are to be interpreted and ultimately enforced by the various environmental governance institutions and the applicable legislation at their disposal. This, at least seems to be the current strategy employed by the South African judiciary. Courts have had some opportunity since the advent of constitutional democracy to interpret constitutional provisions relating to the environment, and have done so in each instance by emphasising the importance of the environmental right and by relying on specific legislative provisions that are meant to enforce this right.

¹⁰⁶ See paragraph 3 above.

¹⁰⁷ Du Bois and Glazewski above n 12 at 7.

¹⁰⁸ *Ibid.*

¹⁰⁹ *Ibid.*

¹¹⁰ Section 11.

¹¹¹ Du Bois and Glazewski above n 12 at 8.

¹¹² See paragraph 4 above.

It is also observed that the constitutionalisation of environmental protection means little if provisions in this regard are not adequately enforced by government. Whilst the South African legal order comprehensively provides for constitutional protection of the environment on paper, it is questionable whether these provisions will be adequately enforced given the limits of government resources and other more pressing priorities such as alleviation of poverty and combating of HIV/AIDS. One may only trust that environmental concerns will be given due recognition and afforded the importance it deserve as a central component in enhancing the quality of life, health, and well-being of all South Africans.

6. CONCLUSION

South Africa has recently celebrated its tenth year of democratic governance. From a legal point of view, much has happened in this period insofar as the creation of a democratic society based on the values of human dignity, the achievement of equality and the advancement of human rights and freedoms are concerned.¹¹³ This is also certainly true as far as environmental protection is concerned.

The new constitutional dispensation represents a dramatic different approach to environmental protection when compared to the pre-1996 legal order. South Africa currently has a comprehensive set of substantive and procedural constitutional provisions and a progressive corpus of environmental legislation that may be invoked to further sustainable environmental protection in a country which is renowned for its natural beauty. However, as is the case with most constitutional provisions in developed and developing countries, only future interpretation, application, implementation and enforcement of these provisions will tell to what extent South Africa has succeeded in ensuring the achievement of theoretically well-established environmental protection measures in the current constitutional dispensation.

¹¹³ Section 1 of the 1996 Constitution.