

# Environmental Justice in South African Law and Policy<sup>1</sup>

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## A. Introduction

Due to her history, the Republic of South Africa faces serious environmental problems that traditionally affect the underprivileged black population disproportionately. The majority of people live in distressing conditions, including lack of access to resources, such as clean drinking water or land, and exposition to natural hazards and pollution. After the end of the apartheid regime, addressing these disparities in environmental conditions became part of the new political agenda. They culminated in an encompassing goal of “environmental justice”, which is used as a buzzword by NGO’s and which also forms part of political programs and of legislation.<sup>2</sup>

The notion of “environmental justice” is not a South African creation. It appeared first in the United States of America where the environmental justice movement aimed at a just distribution of “unwanted land uses” like polluting industries and waste sites and at equitable participation in environmental decision-making.<sup>3</sup> In the context of the history of South Africa, environmental justice also requires massive redistribution of resources. In the following, environmental justice is understood as equitable access to, use and enjoyment of environmental resources and nature for all people and all parts of population, as well as equal distribution of environmental pollution. This implies the integration of environmental justice concerns with social and economic justice concerns, the redress of past dispossession of environmental resources, the upgrading of unequally polluted areas and the accountability of polluters. Traditional or indigenous needs have to be considered. Environmental Justice also means equitable representation and participation of all people and parts of population in political, legal and administrative decision-making on the environ-

<sup>1</sup> The article summarises central findings of *C. Glinski*, *Environmental Justice and the South African Legal System*, enro+biz-Studienreihe, Aachen, 2003.

<sup>2</sup> For details on the environmental justice movement, see *C. Glinski* (fn. 1), Chapter 3, III. and IV.

<sup>3</sup> See, for example, *D.E. Newton*, *Environmental Justice*, Santa Barbara et al., 1996; *O.L. Moya*, 5 *Dickinson Journal of Environmental Law & Policy* (1996), 215 et seq.; *A. Kaswan*, 47 *The American University Law Review* (1997), 221 et seq.; *M. Kloepper*, *Deutsche Verwaltungsblätter* 2000, 750 et seq.; *C. Glinski* (fn. 1), Chapter 2.

ment or the use of resources. This includes the introduction of special mechanisms to particularly include marginalized groups of society.

This article analyses the potential of the new legislation in order to bring about environmental justice. The focus lies on the fundamental rights of the South African constitution of 1996, on recent environmental legislation, and also on recent development in procedural law, which has been identified as being of utmost importance for the pursuance of environmental justice. The analysis also includes the application of the new law by the courts, in particular by the Constitutional Court. The article illustrates that both the legislative development and the attitude of the courts are promising but also critiques the process where it seems to be still insufficient or too slow.

## **B. The South African Background**

When one assesses environmental injustice and its sources in South Africa, particular factors are to be taken into account. Environmental injustice was, to a great extent, caused by the combination of the Apartheid system with some of the common law rules of the South African legal order. Looking at the presence and into the future, the prospects of remedying past injustice might be more promising than elsewhere since the previously disadvantaged parts of the population are now represented by a democratically elected regime that has the political will to address and remedy past injustice.

### **I. Apartheid and Environmental Injustice**

South Africa's history<sup>4</sup> was marked by the denial of fundamental rights and freedoms to the great majority of the population. Political rights such as the right to vote were reduced to political irrelevance for the non-white population or even denied at all to the black population that partially also lost their citizenship. None of South Africa's former constitutions contained an equality clause.<sup>5</sup> The Apartheid system<sup>6</sup> was institutionalised by statutes and regulations which sought to classify all South Africans and to control their lives, thereby advancing the interests of the white community and marginalizing the great majority of the

<sup>4</sup> Beginning in 1910 when the four crown colonies of Cape Province, Natal, Transvaal and Oranje Free State joined together with a common constitution and founded the "Union of South Africa".

<sup>5</sup> The constitutions of 1910, 1961 and 1983.

<sup>6</sup> Apartheid means segregation of legally defined "races" and their "separate development". Its basic ideas can be traced back to the 19<sup>th</sup> century and pieces of legislation known as Apartheid acts date back to 1913, although Apartheid only became an official state policy in 1948, after the National Party had won the elections.

non-white population. Apartheid legislation denied ownership and occupation of most of the land, mobility, proper education and work opportunities for the majority of the population and caused poverty and environmental degradation on a massive scale.<sup>7</sup> The legislation on land distribution forced the majority of the population to live in economically and ecologically marginalised areas, with the homelands that covered only 14 % of the national territory, and townships for the urban black workers. Due to their location in ecologically unstable areas, massive overpopulation and poor or no services at all, most of these regions are in environmentally disastrous conditions. Besides, Apartheid town planning usually located polluting industries or waste dumps in black neighbourhoods.<sup>8</sup> As the Apartheid system excluded the non-white population from political debate, they were also excluded from environmental decision-making.<sup>9</sup>

The consequences of Apartheid still prevail. Dramatic disparities between white and non-white living conditions testify the continuing impact of Apartheid. In particular, after the end of Apartheid, an increasing interaction between poverty and environmental living conditions can be noted. Even though the black population is today not forced by law to live in a severely degraded or polluted environment, a majority are factually forced to stay in or move into such regions for economic reasons.<sup>10</sup>

## II. Lack of Legal Protection in General

The Apartheid system was enabled and complemented by certain peculiarities of the South African legal system. The system lacked legal safeguards in general. In particular, it did not allow for efficient protection of environmental and health interests or for procedural rights.

Due to its history, the South African legal system consists of a mixture of Roman-Dutch Law and of common law of English origin. Whilst private law is derived from Roman-Dutch law, administrative law and the administrative system, procedural law and the court system stem from the common law system. Like the English legal system, South Africa did not have a constitutional court. The Supreme Court, as the top of the ordinary courts, had jurisdiction for constitutional affairs including the competence to control the constitution-

<sup>7</sup> See, for example, *H.W. Nopens*, Die rechtliche Ausgestaltung der Apartheid: am Beispiel des Group Area Act No. 36 of 1966, Frankfurt a. M., 1999; *A. Chaskalson*, European Human Rights Law Review 1998, 181 et seq.

<sup>8</sup> For examples and details, see *A. B. Durning*, Apartheid's Environmental Toll, 1990; *D. Hallows (ed.)*, Hidden Faces, Durban 1993; *J. Cock / E. Koch (ed.)*, Going Green – People, politics and the environment in South Africa, Cape Town, 1991.

<sup>9</sup> See *F. Du Bois / J. Glazewski*, in: Bill of Rights Compendium, Durban, 1997, 2B2.1.

<sup>10</sup> See for example *B. Lohnert*, GAIA 1998, 265 et seq.

ality of parliamentary acts.<sup>11</sup> However, the (English) principle of the sovereignty of Parliament did not allow for judicial control of the merits of parliamentary acts but only for the control of parliamentary procedures. Whereas this system can be justified in a democratic State, the South African parliament was one in which the majority of the population had no say, and therefore, the application of the doctrine of sovereignty of parliament in South Africa lacked the foundation upon which its legitimacy depends.<sup>12</sup> In addition to that, former South African constitutions did not provide for comprehensive protection of fundamental rights. Therefore, parliament was able to infringe seriously on the people's liberty and property. Principles of common law and customary law, which guaranteed some protection of fundamental rights, were only applied to a very limited extent by South African courts. Firstly, judges were appointed by parliament and used to be loyal to the political line and, secondly, the courts' approach towards law was a very positivist one.<sup>13</sup> Parliament, on their part, excessively transferred discretion to the executive. The courts increasingly acquiesced to this development, not willing to control the executive.<sup>14</sup> Substantial degrees of discretion in the hands of the administration have been vital to implement racial discrimination and to suppress people's resistance.<sup>15</sup>

This development had been facilitated by the fact that in South Africa administrative action could only be challenged at their procedural compliance with the law, not at the merits of the decision. Only gross unreasonableness was contestable before the courts ("doctrine of unreasonableness").<sup>16</sup> Other problems in the legal system were the lack of comprehensive environmental legislation and of mechanisms available to force administration to take positive environmental action.<sup>17</sup> There were very limited litigation mechanisms available, and in particular the approach towards *locus standi* was very narrow. Effective remedies also were rarely available. Moreover, there were difficulties in proving causation, and litigation costs were high.<sup>18</sup> Generally speaking, judicial review and other controls and safeguards in the administrative process had been relegated to unimportant positions or

<sup>11</sup> See *H. W. Nopens* (fn. 7), 11 et seq.

<sup>12</sup> See also *A. Chaskalson* (fn. 7), 181 (182); *H. W. Nopens* (fn. 7), 17 et seq.; *F.F. Haase*, Einführung in das Recht der Republik Südafrika, Berlin, 1999, 4 et seq.

<sup>13</sup> See *F.F. Haase* (Fn. 12), 5.

<sup>14</sup> In particular, the Appellate Division of the Supreme Court is said to have been extremely executive-minded. See *H. Corder*, 13 South African Journal on Human Rights (1997), 28 (30). See also *J. White*, in: *J. Cock / E. Koch* (fn. 8), 244 et seq.

<sup>15</sup> See *H. Corder* (fn. 14), 28 (29).

<sup>16</sup> For details see *C. Glinski*, Recht in Afrika 2000, 107 (113).

<sup>17</sup> See, for example, the case of mining of asbestos in Mafefe; see *M. Felix*, in: *J. Cock / E. Koch* (fn. 8), 33 et seq.

<sup>18</sup> For details see *C. Glinski* (fn. 16), 107 et seq.

neglected altogether.<sup>19</sup> Two studies in the mid-1980s found that South African administrative law had clearly failed to limit the development of an autocratic executive as the major means of expressing public power.<sup>20</sup> Last but not least, secrecy clauses in South African legislation allowed for withholding information from the public.<sup>21</sup>

## **C. The Legal Process since the First Democratic Elections**

### **I. Introduction**

Since 1990, South Africa has undertaken a transition process from Apartheid to a lawful democracy, accompanied by a process of negotiations between all political actors as well as the representatives of the civil society.<sup>22</sup> The most significant outcome was the introduction of the Interim Constitution that came into force on 27 April 1994, at the same time with the first democratic elections. The Interim Constitution had been created for the first phase and provided the bridge between Apartheid and democracy. It contained for the first time in the nation's history an entrenched and justiciable Bill of Rights.<sup>23</sup> The formal transition was completed in February 1997 when the final Constitution, which had been adopted by the elected Constitutional Assembly, came into force.

The Constitution is supreme law, which is binding on all organs of state at all levels of government. It requires a coherent system of law to be built on the foundations of the Bill of Rights, the further development of pre-existing common law rules, and the interpretation of legislation in a manner consistent with the Bill of Rights. Provisions are not only made for civil and political rights but also for socio-economic rights, requiring the state to take reasonable legislative and other measures within its available resources, in order to provide access to housing, health care, food, water and social security.<sup>24</sup> South Africa's first democratic constitution also provides for a right to environment. Moreover, the experience of the past led to the inclusion of a number of procedural rights and guarantees. The constitutional rights have subsequently been complemented by specific legislation through which they are made operative.

<sup>19</sup> See *C. Hoexter*, *South African Law Journal* 2000, 484.

<sup>20</sup> See *H. Corder* (fn. 14), 28 (29).

<sup>21</sup> See for example *J. White* (fn. 14), 244 (249 et seq.).

<sup>22</sup> For the transition process in general, see *R. Taylor / M. Shaw and D. Glaser*, both in: *D. R. Howarth / A. J. Norval* (eds.), *South Africa in Transition*, Chippenham, 1998, 13 et seq. and 31 et seq. For an insider look into the negotiations on the constitution see *A. Sachs*, 41 *Saint Louis University Law Journal* 1997, 1249 et seq.

<sup>23</sup> See *A. Jeffery*, *Bill of Rights Report*, Johannesburg, 1997, 1 et seq.

<sup>24</sup> See *A. Chaskalson* (fn. 7), 181 et seq.

The following analysis centres around those provisions of the Constitution and of other legislation which are new on the political agenda and which have an impact on environmental justice such as equality, environmental protection, access to resources and equitable participation in and control of decision-making.

## II. Substantive Provisions

Substantive provisions include the constitutional right to equality, the right to an environment not harmful to health or well-being, as complemented by the National Environmental Management Act 1999 and specific environmental laws, provisions on access to adequate housing and to water, and the right to property in connection with land redistribution laws. Furthermore, the Government envisages to introduce market based instruments in pursuing environmental justice.<sup>25</sup>

### 1. *The Right to Equality*

The Bill of Rights begins with the right to equality in the most prominent position, in sec. 9. Where probably all constitutions world-wide provide for a right to equality, the South African version of it introduces special features which are also of particular relevance for the achievement of environmental justice.

The Constitution calls for more than formal equality.<sup>26</sup> Sec. 9 (2) clarifies that the right to equality aims at the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken. In *Soobramoney*,<sup>27</sup> judge Chaskalson P held for the Constitutional Court: “We live in a society in which there are great disparities of 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 that aspiration will have a hollow ring.” Con-

<sup>25</sup> For example, the internalisation of environmental costs, see White Paper on Environmental Management Policy for South Africa, Notice 749 of 1998, Government Gazette No. 18894 of 15 May 1998, 32.

<sup>26</sup> See A. Chaskalson (fn. 7), 181 (188).

<sup>27</sup> *Soobramoney v Minister of Health, KwaZulu-Natal*, 1998 (1) SA 765 (CC), at par 8.

sequently, the right to equality aims at abolishing the effects of Apartheid and at closing the gap between people's living conditions over time. This concept of equality is capable of dealing with deploring living conditions notwithstanding that discrimination, whether direct or indirect, is not the primary cause of the social evil.<sup>28</sup> The exact translation of sec. 9 (2) into specific rights is less clear. Certainly, this section interacts with specific provisions of the Constitution, such as the right to access to housing or the right to environment. It introduces the progressive element into such rights and demonstrates that the right to equality requires that all citizens will be put into a position in which they can enjoy their specific rights under the Constitution.

In discrimination cases under sec. 9 (3), the criteria relevant are whether there has been differential treatment and, if so, whether it was discriminatory. Where there is discrimination, the second inquiry is whether it is unfair.<sup>29</sup> The courts have not yet considered environmental issues under the equality clause. However, one can draw conclusions from the approach they took in other equality cases.<sup>30</sup> Environmental injustice type scenarios, such as the fact that waste disposals are located in the neighbourhood of black or poor communities only, or that garbage is collected twice a week in a wealthy area but only once in two weeks or even less in a black township falling under the jurisdiction of the same local authority could at least *prima facie* be invoked under this clause.<sup>31</sup> According to sec. 9 (5), the burden of proof would then lie with the state to establish that the differential treatment was justified.

Similar to German law, direct and indirect unfair discrimination is forbidden. Indirect discrimination occurs when apparently neutral laws or measures have a disproportionate impact on one group of people.<sup>32</sup> The equality clause does not only apply to acts of the state but also horizontally to acts of private persons, sec. 9 (4).

<sup>28</sup> See *D. Davis*, in: *D. van Wyk, J. Dugard, B. de Villiers / D. Davis (eds.)*, *Rights and Constitutionalism*, Kenwyn, 1994, 196 (208).

<sup>29</sup> The purpose of distinguishing between unfair discrimination and fair discrimination is to allow positive action in favour of historically disadvantaged groups of persons, as provided for in subsection 2, which might otherwise be regarded as discriminating against other groups, see *D. Davis* (fn. 28), 196 (208). For relevant case-law in the field of appointments to the public service see *A. Jeffery* (fn. 23), 34 et seq. See also *P. R. Melot de Beauregard*, *Zeitschrift für Rechtsvergleichung* 2002, 66 et seq.

<sup>30</sup> For an overview, see *J. Glazewski*, *Acta Juridica* 1999, 1 (22).

<sup>31</sup> See *J. Glazewski* (fn. 29), 1 (21).

<sup>32</sup> See for example *A. Cachalia / H. Cheadle / D. Davis / N. Haysom / P. Maduna / G. Marcus*, *Fundamental Rights in the New Constitution*, Kenwyn, 1994, 30.

## 2. *The Right to an Environment not harmful to Health or Well-Being*

The inclusion of an environmental right in the Constitution reflects growing South African concerns as well as international developments. Examples for the establishment of a constitutional right to environment are manifold in recent constitutional law development world-wide,<sup>33</sup> including a number of African countries.<sup>34</sup> Nevertheless, it is essential to bear the historical context of the Constitution in mind, and its purpose as summarised in the Preamble. As the rest of the Bill of Rights, the right to environment in sec. 24 therefore aims to “improve the quality of life of all citizens”.<sup>35</sup> It is rooted in South Africa’s particular environmental problems as described above.

The right to environment comprises two components: Subsection (a) is, in its wording,<sup>36</sup> shaped as a traditional fundamental right and, therefore, widely regarded as a (first generation) right which is clearly enforceable,<sup>37</sup> while subsection (b)<sup>38</sup> has a socio-economic right character imposing on the state the duty to secure the right of individuals.<sup>39</sup> South Africa has constitutionally decided that both, traditional fundamental rights and socio-economic rights are on a par.<sup>40</sup> In fact, courts have already applied the right to environment in several cases. For example, in *Woodcarb*,<sup>41</sup> emissions from a sawmill were held to violate the neighbours’ right to environment under sec. 29 of the Interim Constitution. The environmental right is positioned before the right to property. This shows the importance given to that provision. This could be a hint that the environmental right should have a stronger importance than the private use of land or economic activities, which fall under the property clause.<sup>42</sup>

<sup>33</sup> See, for example, *E. Brandl / H. Bungert*, 16 *Harvard Environmental Law Review* (1992), 1 et seq.

<sup>34</sup> For an overview of the right to environment in African constitutions see *C. Bruch / W. Coker / C. van Arsdale*, (2001) *Columbia Journal of Environmental Law*, 131 et seq.

<sup>35</sup> Preamble of the Constitution.

<sup>36</sup> “Everyone has the right to an environment that is not harmful to their health or well-being”.

<sup>37</sup> See for example *A. Cachalia et al.* (fn. 32), 98. This was recognised in the White Paper (fn. 25), 17.

<sup>38</sup> “Everyone has the right to have the environment protected, for the benefit of present and future generations, through legislative and other means (...)”.

<sup>39</sup> See *J. Glazewski* (fn. 29), 1 (6).

<sup>40</sup> See *P. de Vos*, 13 *South African Journal on Human Rights* (1997), 67 (71 et seq.), with an overview of the relevant socio-economic rights.

<sup>41</sup> *Minister of Health and Welfare v Woodcarb (Pty) Ltd and another*, 1996 (3) SA 155 (N).

<sup>42</sup> Although the right to property is, in general, shaped very similar to the German right to property, it seems to be less central than in German law. Besides the explicitly mentioned limitations to the



With a view to environmental justice, it is noteworthy that sec. 24 (a) provides the right to an environment of a certain quality to everyone. The precise scope has not yet been clarified.<sup>43</sup> Obviously, it must cover aspects beyond those of the protection of the health and property of individuals; otherwise it would be useless. The term “health” seems to be rather clear. Courts will be able to determine the extent of any limitation upon this right and the actual evidence of harm in accordance with established approaches. The term “well-being” is more diffuse.<sup>44</sup> One may think of the right to use the environment without molestation by pollution. Yet, it will be the duty of the courts to fill this right with meaning. Sec. 24 does not create a right to health or well-being to everyone, but a right to an *environment* which is not harmful to health or well-being. This is of great importance: an infringement of sec. 24 occurs whenever the environment is rendered harmful to health or well-being, and not only when an individual has been injured. The proof of damage to health or well-being is not necessary.<sup>45</sup> Also, in a multicultural society as the South African society is, it is vital to recognise that the “well-being” of many communities depend on the maintenance of a way of life that is integrated with a particular environmental status quo. In this respect, sec. 24 requires the consideration of the special environmental needs of, for example, indigenous communities.<sup>46</sup>

Since the right to environment as such limits the extent to which environments may be burdened with pollution, it contributes significantly to achieving environmental justice in preventing further pollution of already polluted areas. However, the required quality of the environment is, at many locations, only attainable through restoration of their environmental quality. This raises the question whether sec. 24 entitles individuals to claim active measures by the state in order to reduce the current level of pollution,<sup>47</sup> for example, that the state undertakes clean-up measures or relocates waste sites away from overly polluted areas.<sup>48</sup> Sec. 7 (2) of the Constitution, according to which “the state must respect, protect, *promote and fulfil* the rights in the Bill of Rights”, seems to suggest such an interpretation. In this context, the judgement of the Constitutional Court in *Grootboom*<sup>49</sup> merits attention. In this case, the right to access to housing, sec. 26 of the Constitution, was at the centre of a

right to property by the nation’s commitment to land reform and to equitable access to natural resources, the environmental clause could also implicitly play a role. For details see below.

<sup>43</sup> For a detailed commentary see *F. Du Bois / J. Glazewski* (fn. 9), 2B4 et seq.

<sup>44</sup> For details see *F. Du Bois / J. Glazewski* (fn. 9), 2B4.1(a).

<sup>45</sup> See *F. Du Bois / J. Glazewski* (fn. 9), 2B4.1(b).

<sup>46</sup> This may apply, for example, to the San people.

<sup>47</sup> For an extensive overview of the discussion in South Africa see *E. de Wet*, *The Constitutional Enforceability of Economic and Social Rights*, Durban, 1996, 91 et seq.

<sup>48</sup> See *A. Cachalia et al.* (fn. 32), 99.

<sup>49</sup> *The Government of the Republic of South Africa and others v Irene Grootboom and others*, 2001 (1) SA 46 (CC).

legal dispute. A group of people had lived in appalling circumstances in an informal settlement. After having illegally occupied land and having been evicted again, they ended up without shelter. In *Grootboom*, the question whether these people could rely on sec. 26 of the Constitution and demand shelter from the state, was answered in the affirmative. The Constitutional Court held that the Constitution obliged the state to act positively to ameliorate the plight of the hundreds of thousands of people living in deplorable conditions throughout the country. Amongst others, the state must provide access to housing, health-care, sufficient food and water. According to the Court, all the constitutional rights are inter-linked and mutually supportive. Realising socio-economic rights is an imperative prerequisite for the enjoyment of the other rights of the Constitution, in particular, the right to equality. The Court also addressed the well-known problem of lack of funds available, and held that the state cannot, for practical reasons, be required to remedy all problems at once. However, the state has the constitutional duty to elaborate related programmes which themselves have to be in compliance with the Constitution. This means that such programmes have to take into account the degree and extent of the present denial of such rights to particular groups and, therefore, consider those groups whose needs are the most urgent in the first place.<sup>50</sup> This judgement can be applied directly to the right of environment in sec. 24 of the Constitution. Firstly, it requires adopting clean-up programmes for spoiled places, and secondly, it requires considering those places first where people live in the worst environmental conditions.<sup>51</sup>

Another important question is whether the environmental right only obliges the state (vertical application) or also the individual (horizontal application). Sec. 8 (2) of the Constitution renders the Bill of Rights binding for natural and juristic persons “if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right”. Thus, the ruling in *Du Plessis*, decided under sec. 7 of the Interim Constitution of 1993, in which a merely indirect effect in relationships of private parties – following German constitutional law doctrine – was established,<sup>52</sup> is no longer valid.<sup>53</sup> As

<sup>50</sup> A similar approach was very recently taken in *Minister of Health and others v Treatment Action Campaign and others*, Case CCT8/02, 5 July 2002, where the Constitutional Court ordered that sec. 27 of the Constitution required to devise and implement, within its available resources, a comprehensive and co-ordinated programme to realise progressively the rights of pregnant women and their new-born children to have access to health services to combat mother-to-child transmission of HIV. See also *P. de Vos* (fn. 40), 67 (93 et seq.).

<sup>51</sup> More cautious before the above-mentioned judgments, *E. de Wet* (fn. 47), 119.

<sup>52</sup> See *Du Plessis and Others v De Klerk and Another* 1996 (3) SA 850 (CC), par. 41. See also *J. de Waal*, 11 South African Journal on Human Rights (1995), 1 et seq.

<sup>53</sup> In this sense *T.M. Grupp*, Südafrikas neue Verfassung, Baden-Baden, 1999, 40 et seq.; *J. Cockrell*, in: Bill of Rights Compendium, Durban, 1997, 3A1-3A17; *F. Du Bois / J. Glazewski* (fn. 9), 2B4.4. See also the dissenting opinion of *C. Sprigman / M. Osborne*, 15 South African Journal on Human Rights (1999), 30 et seq.

the major part of the pollution and environmental deterioration which is detrimental for health and well-being is caused by private companies, sec. 24 is predestined for horizontal application.<sup>54</sup> Consequently, the right to environment can now be enforced in disputes between private parties even if there is no statutory or common law rule to support a claim. According to sec. 8 (3), such a rule then has to be developed by the court.<sup>55</sup>

In conclusion, the constitutional right to environment offers protection against environmentally harmful acts by the state and by private actors. Moreover, it grants the right to have environmental degradation cured with first priority to the most polluted places. It could thus serve as an effective tool in attempts to achieve environmental justice.

### 3. *Access to Resources*

Two provisions of the Constitution, the right to housing, sec. 26, and the right to health care, food, water and social security, sec. 27, deal with the right to access to resources with an impact on environmental justice.<sup>56</sup> This is rather obvious in the right to have access to sufficient food and water. Clearly, this does include water of decent quality, instead of contaminated water. But also sec. 26, which provides for the right to access to housing, was interpreted by the courts in a way which renders it important with a view to environmental living conditions. In *Grootboom*,<sup>57</sup> Yacoob J held for the Constitutional Court: "(...) housing requires more than brick and mortar. It requires available land, appropriate services such as the provision of water and the removal of sewage and the financing of all of these (...). For a person to have access to adequate housing all of these conditions need to be met (...). Access to land for the purpose of housing is therefore included in the right of access to housing in section 26. (...) The state must create the condition for access to adequate housing for people at all economic levels of our society." Sec. 1 of the Housing Act<sup>58</sup> defines housing development in a similar way, including access to domestic energy supply and economic and social amenities. The right to housing appears thus as a super-right, comprising all aspects needed for living in a healthy neighbourhood. The Constitutional Court deduced from the right to access to housing the duty of the state to realise the needs of the worst-off first.

<sup>54</sup> See also *F. Du Bois / J. Glazewski* (fn. 9), 2B4.4; *H. Cheadle / D. Davis*, 13 South African Journal on Human Rights (1997), 58.

<sup>55</sup> Subsection (3) was included into the final Constitution only short time before its enactment. There was no comparable provision in the Interim Constitution; see *T.M. Grupp* (fn. 53), 36.

<sup>56</sup> See White Paper (fn. 25), 42.

<sup>57</sup> *The Government of the Republic of South Africa and others v Irene Grootboom and others*, 2001 (1) South Africa 46 (CC), par. 35.

<sup>58</sup> Act 107 of 1997.

#### 4. *The National Environmental Management Act (NEMA)*

The NEMA<sup>59</sup> came into effect on 29 January 1999. It constitutes the legal framework for the entire body of environmental legislation. Its main aims are the implementation of the concept of sustainable development, the promotion and protection of the constitutional right to environment and the promotion of environmental justice. Further, it aims to address the problem of fragmentation of environmental management by bringing it under the umbrella of one act and by co-ordinating the various organs of state.

According to the preceding White Paper on Environmental Management, the overarching goal of environmental policy “is to move from a previous situation of unrestrained and environmentally insensitive development to sustainable development (...)” with a new vision “towards a society where all people have sufficient food, clean air and water, decent homes and green spaces in their neighbourhoods enabling them to live in spiritual, cultural and physical harmony with their natural surroundings”.<sup>60</sup> Hence, South African environmental policy envisages the living conditions of the people and their different cultural backgrounds, including traditional ways of living.<sup>61</sup> It is linked to the South African approach towards development which is defined as a “process for improving human well-being through a reallocation of resources (...)”. It addresses basic needs, equity and the redistribution of wealth. Its focus is on the quality of life rather than the quantity of economic activity.<sup>62</sup> Also, the state shall ensure that there is no uncontrolled transfer of ownership of the nation’s natural resources to private parties.<sup>63</sup>

In sec. 2, the NEMA sets out principles that apply to the actions of all organs of state that may significantly affect the environment. These principles serve as a general framework within which environmental management has to be carried out. Thereby, it expresses the goals of environmental justice and equity in a prominent position, in sec. 2 (4) (c) and (d): “Environmental justice must be pursued so that adverse environmental impacts shall not be distributed in such a manner as to unfairly discriminate against any person, particularly disadvantaged and vulnerable persons”. And: “Equitable access to environmental resources, benefits and services to meet basic human needs and ensure human well-being must be pursued and special measures may be taken to ensure access thereto by categories of

<sup>59</sup> Act 107 of 1998.

<sup>60</sup> See White Paper (fn. 25), 25.

<sup>61</sup> See White Paper (fn. 25), 24.

<sup>62</sup> See White Paper (fn. 25), 14 et seq.

<sup>63</sup> See White Paper (fn. 25), 20.

persons disadvantaged by unfair discrimination”.<sup>64</sup> It can be concluded, that South Africa has acknowledged that the environment is a common good that has to be distributed fairly, at least until the environmental right of everyone is secured.

#### 5. *The National Water Act 1998*

In its preamble, the National Water Act<sup>65</sup> recognises that “water is a scarce and unevenly distributed resource (...)” and that “while water is a natural resource that belongs to all people, the discriminatory laws and practices of the past have prevented equal access to water, and use of water resources”. The Act therefore aims, amongst others, at the redistribution of water.

The new Act repealed the Water Act of 1956, which had essentially consolidated water law as it had developed over the history of colonial expansion. From its sec. 2, it is obvious that the Act does not only aim at the prevention of future injustice but also at remedying past injustice. An important innovation is the concept of an ecological “reserve” provided for in Chapter 3 Part 3. A “reserve” is defined as “that quantity and quality of water required (i) to satisfy basic human needs for all people who are, or may be, supplied from the relevant water resource; and (ii) to protect aquatic ecosystems in order to secure ecologically sustainable development and use of the relevant water resource.”<sup>66</sup> Thus, basic needs and the ecological reserve enjoy priority over other claims to water. The “basic need” was quantified by 25 litres per person, as a short-term target.<sup>67</sup>

Other innovations in the National Water Act complement the clear commitment to more equitable access to the nation’s scarce water resources. One example is the abolition of the system of riparian rights to water which formerly enabled owners of land to prohibit access to water to others. Furthermore, water use charges are restructured on the principle of equity allowing for differentiating between different groups of users.

#### 6. *Waste Management and Pollution Control*

Apartheid in pre-constitutional waste and pollution control management and law was striking. Much needs to be done as regards the implementation and administration of

<sup>64</sup> One important goal of equity is to establish equitable pricing structures for life support resources to ensure that poor people can afford them, see White Paper (fn. 25), 33.

<sup>65</sup> Act 36 of 1998.

<sup>66</sup> See *J. Glazewski* (fn. 29), 1 (25 et seq.).

<sup>67</sup> White Paper on a National Water Policy for South Africa, par. 5.2.1.

pollution control and waste management legislation in South Africa. Waste management legislation was found to be “fragmented, unfocussed and ineffective”.<sup>68</sup> A guide on minimum requirements for waste disposal by landfill, published by the Department of Water Affairs and Forestry in 1994, made no mention of environmental justice concerns at all. Rather, it presented the usual criteria for site selection, including economic criteria and public acceptance criteria, which are precisely the criteria that tend to unequally burden politically, socially and economically marginalised parts of the population. Environmental justice concerns are therefore particularly important in the re-drafting of national waste and pollution control legislation. After a lengthy process of negotiations, including representatives of civil society, a White Paper was published in March 2000. The adoption of a new waste law is expected for the near future.

The White Paper subscribes to the goals, principles and regulatory approach set out in the general environmental management policy of the Constitution and the NEMA. It aims at the prevention of pollution, the minimisation of waste, the control of impacts and remediation. The White Paper explicitly states the aim to ensure environmental justice by integrating environmental considerations with the social, political and development needs and rights of all sectors, communities and individuals.<sup>69</sup> However, despite this continued confession to environmental justice, the White Paper fails to elaborate concrete measures, such as the cleaning up of overly polluted land. Of course, waste law will provide for minimum standards for emissions and also for waste collection,<sup>70</sup> which will reduce pollution in certain areas. Besides, the consideration of existing pollution in decisions on the allocation of further waste sites and polluting industries will prevent further increasing disparities. However, given the years of discussions preceding the White Paper, it is disappointingly vague in its ideas on implementation.<sup>71</sup>

## 7. *The Right to Property in the Context of Land Redistribution*

In South Africa’s history, expulsion, expropriation, and, more generally, lack of access to land have been a major reason for environmental injustice. Sec. 25 of the Constitution now protects the right to property and provides for compensation where property is expropriated for a public purpose or in the public interest. At the same time, it is open for land redistribution, with a view to equitable access to land.

<sup>68</sup> White Paper (fn. 67), par. 3.4.

<sup>69</sup> White Paper on Integrated Pollution and Waste Management for South Africa, Notice 227 of 2000, Government Gazette No. 20978 of 17 March 2000, 12.

<sup>70</sup> White Paper (fn. 69), 34 et seq.

<sup>71</sup> See also *J. Glazewski* (fn. 29), 1 (30).

Sec. 25 (3), dealing with compensation for expropriation, allows for consideration of past injustice when it aims at striking an equitable balance between the public interest and the interests of those affected, having regard to all relevant circumstances, including the history of the acquisition and the purpose of the expropriation. For the purpose of sec. 25, 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, sec. 25 (4). Also, 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 a equitable basis, sec. 25 (5). Implementing legislation distinguishes between the remediation of racially motivated expropriation in a narrow sense, and access to land in the public interest in general.

People who were dispossessed of their land under the Apartheid regime, come under the regime of the Restitution of Land Rights Act of 1994<sup>72</sup> that provides for the restitution of such rights and established a Commission on Restitution of Land Rights, regional land claims commissioners and a Land Claims Court.<sup>73</sup>

Land reform in the public interest will come under a different set of rules. In February 1996, the Department on Land affairs published a Green Paper on Land Reform according to which the poor<sup>74</sup> should be entitled to apply for government grants of up to 15,000 Rand to help them buy and improve land, especially acquire land, upgrade tenure rights, improve homes and infrastructure such as fences, roads and water.<sup>75</sup> The Reconstruction and Development Programme (RDP) initially envisaged the redistribution of 30 % of the arable land within five years, which, according to the Minister of Land Affairs, would have been possible without expropriation. The Green Paper on Land Reform, nevertheless, proposed circumstances under which land can be expropriated as a last resort.<sup>76</sup> In 1998, the Green Paper was followed by a White Paper, which elaborates these ideas further.<sup>77</sup>

<sup>72</sup> Act 22 of 1994.

<sup>73</sup> See the overview by the Department of Land Affairs, <http://land.pwv.gov.za>. By 7 September 2001, 68, 878 claims had been registered throughout the country, among them claims concerning a Daimler-Benz plant in East London.

<sup>74</sup> Prospective farmers and city dwellers with a household income of less than 1,500 Rand per month or disadvantaged communities.

<sup>75</sup> The grant is especially aimed at landless people wanting access to land in rural or urban areas, farm workers who want to improve their living conditions and tenure, people wanting to secure and upgrade their tenure, beneficiaries of the land restitution programme under the Restitution of Land Rights Act, and dispossessed people not covered by that act, see *A. Jeffery* (fn. 23), 112.

<sup>76</sup> See *A. Jeffery* (fn. 23), 113.

<sup>77</sup> Available at [http://land.pwv.gov.za/legislation\\_policies/white\\_papers.htm](http://land.pwv.gov.za/legislation_policies/white_papers.htm).

In addition, the Constitution protects in sec. 25 (6) legally insecure tenure of land, which was a widespread phenomenon under the Apartheid regime. Therefore, the Land Reform (Labour Tenants) Act of 1996<sup>78</sup> grants labour tenants the right to use and occupy the land they had been using and occupying on 2 June 1995. They may only be evicted by order of court and on the basis of just and equitable compensation.

Courts have already demonstrated their willingness to rule in favour of persons seeking access to land. In *Diepsloot*<sup>79</sup> the applicant landowners' association challenged the Administrator's decision to settle squatters near a residential area. The landowners argued that this would interfere with their property rights as the planned settlement would create a nuisance, causing dust and smoke and polluting the underground water. The Appellate Division dismissed the application.<sup>80</sup>

#### 8. *Conclusion*

All the substantive aspects of environmental justice, namely equality in environmental protection and equitable access to land, water and other natural resources, are clearly reflected in the South African Constitution and also progressively in environmental laws. The Constitutional Court's interpretation of these provisions raises optimism for the future development towards environmental justice. Implementation particularly in the field of substantive environmental provisions is lagging behind.

### **III. Procedural Provisions**

Procedural rights are indispensable in order to enable individuals or organisations to take influence on the achievement of the substantive goal of environmental justice. Moreover, they have a value in themselves, in guaranteeing participation in the decision-making on a fair and equitable basis. Relevant aspects are the right of access to information, the right to participation in decision-making processes, the right to administrative justice, access to courts, legal standing before courts, cost rules and language rules.<sup>81</sup>

<sup>78</sup> The Land Reform (Labour Tenants) Act, Act 3 of 1996.

<sup>79</sup> *Diepsloot Landowners and Residents' Association v Administrator, Transvaal*, 1993 (1) SA 577 (T).

<sup>80</sup> 1994 (3) SA (A)

<sup>81</sup> A further element is the increasing share of non-whites in the civil and judicial service, which certainly improves mutual understanding between the administration, the courts and the people.



## 1. *The Right to Information*

According to sec. 32 (1) of the Constitution, everyone has the right of access to any information held by the state and to any information that is held by another person and that is required for the exercise or protection of any rights. In the context of South Africa's transition to democracy, an information clause has been considered a necessary component in a democratic society committed to the principles of openness and accountability.<sup>82</sup> Especially in environmental affairs, the right to information is enormously important since effective environmental protection usually requires information, for example, about emissions from a factory. In fact, the information clause has already been successfully invoked in environmental law cases.<sup>83</sup>

In February 2000, the Promotion of Access to Information Act was enacted<sup>84</sup> in order to give effect to the constitutional right to information, thereby concretising its content, mandatory and discretionary grounds for refusal of information and procedural requirements. Usually, a person requesting information has to pay a fee. However, the Minister is authorised to regulate exemptions from this duty in favour of certain persons or categories of persons, sec. 22, 45. The information required must be given in the language that the requester prefers if the record exists in that language, sec. 31. And in sec. 10, the Act itself provides for the dissemination of its content "in an easily comprehensible form and manner, as may reasonably be required by a person who wishes to exercise any right contemplated in this Act."

In environmental matters, the NEMA also concretises the right to access to information. Sec. 2 (3) (k) NEMA provides that decisions must be taken in an open and transparent manner, and that access to information must be provided for in accordance with the law. Sec. 31 NEMA spells out the right of every person to access to information held by the state and the right of organs of state to privately held information, whereas the right of the public to privately held information is left to a regulation by the minister. Sec. 31 NEMA introduced a further interesting element of South African environmental law: the protection of whistle-blowers. According to sec. 31 (4) NEMA, no person is civilly or criminally liable or may be dismissed, disciplined, prejudiced or harassed on account of having disclosed any information, if the person in good faith reasonably believed at the time of the

<sup>82</sup> See *Quezeleni v Minister of Law and Order*, 1994 (3) SA 625 (E). The inclusion of a right to access to information into a national constitution is rather unique, see *L. du Plessis / H. Corder*, Understanding South Africa's Transitional Bill of Rights, Kenwyn, 1994, 164.

<sup>83</sup> See, in particular, *Van Huyssteen & others NNO v Minister of Environmental Affairs and Tourism & others*, 1996 (1) SA 283. For cases outside the environmental law context, see *J. Glazewski* (fn. 29), 1 (15 et seq.).

<sup>84</sup> Act 2 of 2000. For details on the drafting process, see *A. Jeffery* (fn. 23), 81.

disclosure that he or she was disclosing evidence of an environmental risk. Thus, for example employees can inform specific bodies on environmental hazards created by their employers, without facing the threat of losing their jobs.

One aspect remains to criticise: Neither the Promotion of Access to Information Act nor the NEMA impose a duty on the state or private persons to collect information. Special environmental laws should therefore include such duties. For example, one of the objectives for integrated pollution and waste management is to set up information systems on chemical hazards and toxic releases.<sup>85</sup>

## 2. *Participation*

Participation of all members of society in all stages of decision-making is regarded as a key element of the new (environmental) law and policy. The White Paper on Environmental Management Policy, for example, stresses, “public participation mechanisms and processes that are fair, transparent and effective, and will promote the participation of marginalized sectors of society” and “of special interest groups such as women, workers, the unemployed, the disabled, traditional biers, the elderly and others” have to be developed.<sup>86</sup> Like the drafting of the new Constitution, the adoption of the White Paper itself was preceded by an extensive consultative process. The purpose of this four years long so-called CONNEPP (Consultative National Environmental Policy Process). was to give all stakeholders the possibility to contribute to developing the new environmental policy. In fact, throughout the process millions of people were involved.<sup>87</sup> The forthcoming enactment of other legislation, in particular on integrated pollution control and waste management, is also being discussed in a participative manner.

The NEMA also established the National Environmental Advisory Forum and the Committee for Environmental Co-ordination, procedures for co-operative governance including the preparation of environmental management plans, fair decision-making and conflict management as well as integrated environmental management.

Sec. 23 of the NEMA provides, for the first time in South African environmental law history, for integrated environmental management in order to promote the integration of the principles set out in sec. 2 and to identify, predict and evaluate the actual and potential impact on the environment, socio-economic conditions and the cultural heritage. Since the

<sup>85</sup> See the White Paper (fn. 69), par. 2.2.2.

<sup>86</sup> White Paper (fn. 25), 10.

<sup>87</sup> See White Paper (fn. 25), 10-11.

Environmental Impact Assessment (EIA) has to consider the “cultural heritage”, it should also serve as a tool to protect indigenous groups from environmental and cultural harm. Adequate and appropriate opportunity for public participation in decisions must be ensured.

The special involvement of people from historically disadvantaged sectors of society which is emphasised in the White Paper must, however, be made operative in practice since guidelines of how to achieve the involvement of marginalized groups have not been included in the NEMA.<sup>88</sup>

### 3. *The Right to Administrative Justice*

Administrative law is central to the judicial pursuit of environmental justice, as conflicts around natural resources invariably entail the exercise of administrative decision-making powers. Almost every serious participant in the negotiation process accepted without question that administrative justice was a goal worth to be included in the Constitution.<sup>89</sup> The relevance of correct administrative action has been emphasised by the courts repeatedly. In the Supreme Court of Appeal case of *Save the Vaal Environment*,<sup>90</sup> Olivier JA held with respect to the environmental right: “Together with the change in the political climate must also come a change in our legal and administrative approach to environmental law”.

Sec. 33 (1) of the Constitution provides that everyone has the right to administrative action that is lawful, reasonable and procedurally fair, which is an extension of pre-existing common law.<sup>91</sup> It replaces the “doctrine of unreasonableness”. Now, according to the Cape High Court in *Roman v Williams*,<sup>92</sup> an administrative action, in order to prove justifiable in relation to the decisions given for it, must be objectively tested against the three requirements of suitability, necessity and proportionality.<sup>93</sup> Besides, it must be lawful and procedurally fair. The requirement of procedural fairness forces legislation and administration to

<sup>88</sup> Marginalized sectors of society and special interest groups shall also be encouraged and supported in their involvement in the design, planning and implementation of environmental education and capacity building programmes and projects; see White Paper (fn. 25), 36.

<sup>89</sup> See *H. Corder*, in: *D. van Wyk / J. Dugard / B. de Villiers / D. Davis* (fn. 28), 387 (390 et seq.).

<sup>90</sup> *The Director: Mineral Development, Gauteng Region and another v Save the Vaal Environment and others*, Decision of 12 March 1999.

<sup>91</sup> See *Van Huyssteen & others NNO v Minister of Environmental Affairs and Tourism & others*, 1996 (1) SA 283 at 303-305.

<sup>92</sup> *Roman v Williams*, 1998 (1) SA 270 (C) at 281 E-F.

<sup>93</sup> Hence, it is clear that the reviewing body must also consider the merits of administrative actions, see *H. Corder* (fn. 89), 387 (399).

adopt procedures that ensure equal participation opportunities for all parts of the population.<sup>94</sup>

Another improvement of the previous law is sec. 33 (2), according to which everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.<sup>95</sup> Under sec. 13 of the NEMA, environmental planning decisions must comprise a description of all policies, plans and programmes that may significantly affect the environment, a description of the manner in which the relevant national department or province will ensure that the policies, plans and programmes referred to will comply with the principles set out in sec. 2, and a description of the manner in which the relevant national department or province will ensure that its functions are exercised so as to ensure compliance with relevant legislative provisions, including the principles set out in sec. 2. Since equity and environmental justice are principles mentioned in sec. 2 of the NEMA, all planning decisions now have to explain in which way these aspects have been considered.

In connection with the right to environment in the Constitution and the set of statutory environmental management principles in the NEMA, the right to administrative justice constitutes an important tool for the inclusion of considerations of fairness and equality in environmental administrative decision-making. In the above-mentioned case of *Van Huyssteen*,<sup>96</sup> the court granted the interdict on the grounds that it would be administratively unfair if the application to rezone the land was decided before the inquiry had been finalized and that the applicants were entitled to receive the documents which they sought from the Minister in order to exercise their rights to object to the rezoning.

In February 2000, the Promotion of Administrative Justice Act 2000, was enacted in order to implement sec. 33 of the Constitution.<sup>97</sup> This act, in sec. 6, regulates also the review of cases where administrative action “was materially influenced by an error of law”.

<sup>94</sup> See [http://www.doj.gov.za/reg/regulation\\_adminprocedure.htm](http://www.doj.gov.za/reg/regulation_adminprocedure.htm) for the 2002 Regulations on Fair Administrative Procedures.

<sup>95</sup> Concerning the abuse of discretion in administrative law, see *H. Corder* (fn. 14), 28 (29 et seq.). See also *J. de Ville*, 11 South African Journal on Human Rights (1995), 265 et seq.

<sup>96</sup> *Van Huyssteen & others NNO v Minister of Environmental Affairs and Tourism & others in terms of the interim Constitution*, 1996 (1) SA 283 (C).

<sup>97</sup> Act 3 of 2000.

#### 4. Access to Courts

Sec. 34 of the Constitution provides the right to everyone 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. This right complements the right to administrative justice in providing for independent control of administrative decisions. A strict construction of the right to access to court would imply that access to court could not be denied due to lack of financial means, where a claimant is unable to afford court proceedings. Nevertheless, neither this clause nor additional legislation provide for access to courts free of costs in such a case. Legislation on legal aid has not yet been adopted, obviously for budgetary reasons.

For environmental litigation, however, the NEMA has introduced specific cost rules. Sec. 32 NEMA allows courts not to award costs against a person or group of persons who took legal action in favour of the protection of the environment or the use of natural resources where they acted reasonable out of concern of for the public interest or in the interest of protecting the environment and had made due efforts to other means reasonably available for obtaining the relief sought. The decision as to whether a claimant who loses an environmental law case has to pay the litigation costs of the action is left to the discretion of the courts.<sup>98</sup> The efficiency of sec. 32 NEMA to promote environmental litigation will depend on the courts' making use of this provision.

#### 5. Locus Standi

Under the common law, a claimant needed to demonstrate a sufficient interest in a case, in other words a right or recognized interest that was direct and personal to the complainant.<sup>99</sup> Therefore, it was difficult to take judicial action in order to protect environmental concerns. The only situation in which *locus standi* was granted was the simultaneous violation of the environment and of personal rights such as property or health.<sup>100</sup>

One of the principal aims of the new Constitution is to empower individuals and groups likewise to enforce constitutional rights. Sec. 38 of the final Constitution accordingly grants *locus standi*, provided that there is a threat or infringement of a right in the Bill of

<sup>98</sup> The court will normally require the claimant to have acted reasonably which includes the user of other means of dispute resolution before going to court. In particular, the claimant should seek help from the state or municipal authorities first; see "A User Guide to the National Environmental Management Act", Part 7.1.

<sup>99</sup> See *M. Kidd*, *Environmental Law, A South African Guide*, Kenwyn, 1997, 27.

<sup>100</sup> For details, see *C. Glinski* (fn. 16), 107 et seq.

Rights,<sup>101</sup> which includes the right to environment. The courts even took a generous stance where constitutional rights outside the Bill of Rights were concerned.<sup>102</sup> And finally, courts regard legal standing of interest groups in favour of individuals or of the nature to be of utmost importance. In *Wildlife Society*,<sup>103</sup> Pickering J even held that where a statute imposes the obligation on the state to protect the environment, a body such as the Wildlife society should have *locus standi at common law*.<sup>104</sup>

Sec. 38 (a) is the classic form of *locus standi* of individuals. However, due to the inclusion of the environmental right in the Constitution, it extends to alleged violations of this right. A violation of the right to property or health is not necessary any longer.<sup>105</sup>

Sec. 38 (b) allows litigating on behalf of another person who cannot act in his or her own name. The broad approach to *locus standi* especially in this provision has its grounds in South Africa's past. The political climate of today dictates that effective legal protection should not fail because of lack of knowledge about legal mechanisms, lack of education or lack of money. This provision might compensate for the lack of financial legal aid, which the state cannot afford to give on a sufficient scale.<sup>106</sup> An example for the interpretation of sec. 38 (b) is the case of *Woodcarb*<sup>107</sup> where the Minister of Health and Welfare was allowed to act on behalf of the people living in the area in which a wood-burner was operated without a current registration certificate.

Sec. 38 (c) recognises class actions. This section allows a person to act in the interest of or as a member of a group or class of persons whose (environmental) rights have been infringed or are under a threat of being infringed.<sup>108</sup> The importance of class actions as a means of empowerment was emphasised in the recent Supreme Court of Appeal case of

<sup>101</sup> See *Van Huyssteen & others NNO v Minister of Environmental Affairs and Tourism & others in terms of the interim Constitution*, 1996 (1) SA 283 (C) at 301 H-I; *Beukes v Krugersdorp Transitional Local Council and Another*, 1996 (3) SA 467 (W) at 473 C.

<sup>102</sup> See *Ferreira v Levin NO & others: Vryenhoek & others v Powell NO & others*, 1996 (1) SA 984 (CC), at 1082 G-H, per *Chaskalson P*. See also *M. Kidd* (fn. 99), 31; *C. Glinski* (fn. 16), 107 (116 et seq.).

<sup>103</sup> See *Wildlife Society of Southern Africa & others v Minister of Environmental Affairs and Tourism of the Republic of South Africa & others* 1996 (3) SA 1095 (Tk), 1105 A-B.

<sup>104</sup> See also *N. Mbodla*, *South African Law Journal* 2000, 362 (364).

<sup>105</sup> For more details, see *C. Glinski* (fn. 16), 107 (119 et seq.).

<sup>106</sup> See *T.M. Grupp* (fn. 53), 48.

<sup>107</sup> *Minister of Health & Welfare v Woodcarb (Pty) Ltd & Another*, 1996 (3) SA 155 (N).

<sup>108</sup> For the interpretation of sec. 38 (c), see *T. P. van Reenen*, 2 *South African Journal of Environmental Law and Policy* (1995), 121 (146); *C. Loots*, 4 *South African Journal of Environmental Law and Policy* (1997), 57 (65).

*Ngxuza*<sup>109</sup> where Cameron JA held that class actions are an important tool to overcome the problems of those who are in a poor position to seek legal redress. Details will be laid down in special legislation.

Sec. 38 (d) re-instituted the *actio popularis*. According to this section, any person may champion the public interest in court where an infringement or a threat of infringement of the environmental right is evident. The claimant does not have to prove personal harm or injury; his or her interest is recognised simply due to his or her membership of society.<sup>110</sup> Sec. 38 (d) only applies where the public interest is concerned.<sup>111</sup> Thus, violations of the right to environment which do not affect the public interest but only individuals or perhaps a small group of persons can merely be challenged under sec. 38 (a) to (c).

Finally, sec. 38 (e) provides that associations may institute representative actions on behalf of their members and approach the court even if they have no direct or substantial interest in a particular dispute.

The NEMA extends, in sec. 32 (1), the *locus standi* rule of sec. 38 of the Constitution to the field of environmental law. The *locus standi* rule in sec. 32 (1) applies to any breach or threatened breach of any provision of the NEMA or any other statutory provision concerned with the protection of the environment or the use of natural resources. Thus, litigation for the enforcement of environmental statutes is no longer restricted to the common law rules. However, since NEMA is only binding on the state,<sup>112</sup> its provisions cannot be enforced directly against private polluters. Whilst the provisions in sec. 32 (1) (a)-(d) NEMA are identical to the provisions of sec. 38 (a)-(d) of the final Constitution, sec. 32 (1) (e) allows legal action by any person or group of persons acting in the interest of protecting the environment, which takes into account the special interests of environmental associations.

In summary, *locus standi* is no longer an obstacle for environmental litigation against the state. Further, as there is a strong argument for allowing the right to environment to have a horizontal effect, the *locus standi* rules might also be applied in environmental litigation against private parties.

<sup>109</sup> *Dept. of Welfare, Eastern Cape Provincial Government and another v Ngxuza and others*, Case no. 493/2000, available at [www.law.wits.ac.za](http://www.law.wits.ac.za).

<sup>110</sup> See *T.P. van Reenen* (fn. 108), 121 (146).

<sup>111</sup> See *Ferreira v Levin NO & others: Vryenhoek & others v Powell NO & others* 1996 (1) SA 984 (CC), 1082 G-H, per Justice O'Reagan.

<sup>112</sup> Sec. 48 (2) of the NEMA.

## 6. Remedies

Under pre-constitutional law, effective remedies were rarely available.<sup>113</sup> While remedies have not been addressed in the Constitution, the NEMA provides for new, more efficient statutory remedies.

Firstly, sec. 28 NEMA establishes duties of polluters and mechanisms to enforce them and remedy the situation.<sup>114</sup> Sec. 28 (12) in connection with (4) offer the possibility for individuals suing the state to take action against a third person who fails to take the measures required. In that way, the new law shares the control of private actors between the state and, for example, environmental organisations. Sec. 28 (12) does not refer to (7) and therefore makes no provision for the individual to force the public body to take reasonable measures to remedy the situation itself if the polluter responsible is not able (for example, for lack of resources) to remedy the situation or has already disappeared. However, this interpretation might not be in accordance with the Constitution. As the NEMA is supposed to concretise the environmental right in sec. 24 of the Constitution, the “may” in sec. 28 (7) should read as a “shall” as far as the constitutional environmental right is concerned. Moreover, there must be the option of enforcing this obligation through litigation.

Secondly, criminal law has been made more effective. In the tradition of South African law, criminal law plays a major role to control the compliance of private actors with environ-

<sup>113</sup> See *C. Glinski* (fn. 16), 107 (112 et seq.).

<sup>114</sup> Sec. 28 (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 minimise and rectify such 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 (...); (c) cease, modify or control any act, activity or process causing the pollution or degradation; (d) contain or prevent the movement of pollutants or the causant of degradation; (e) eliminate any source of the pollution or degradation; or (f) remedy the effects of the pollution or degradation.

(4) The Director-General or a provincial head of department may, after consultation with any other organ of state concerned and after having given adequate opportunity to affected persons to inform him or her of their relevant interests, direct any person who fails to take the measures required under subsection (1) (...)

(7) Should a person fail to comply, or inadequately comply, with a directive under subsection (4), the Director-General or provincial head of department may take reasonable measures to remedy the situation.

(12) Any person may, after giving the Director-General or provincial head of department 30 days' notice, apply to a competent court for an order directing the Director-General or any provincial head of department to take any of the steps listed in subsection (4) (...).”



mental provisions.<sup>115</sup> This tradition is continued by sec. 34 NEMA.<sup>116</sup> However, although criminal sanctions had been part of most of the environmental statutes, this mechanism has been inadequate in the past.<sup>117</sup> Therefore, sec. 33 NEMA now provides for private prosecution by allowing individuals to institute and conduct a prosecution, in the public interest or in the interest of the protection of the environment, in respect of any breach or threatened breach of any environmental law duty the breach of which is an offence. This right to institute a prosecution against polluters, which can be directed against the heads of the relevant firms, should have the potential to impose sufficient threat on those responsible for environmental degradation.

Finally, private law remedies may be used to stop environmentally harmful behaviour by private polluters, or to obtain compensation for damages. The remedies against private parties remain unaltered in general, as the NEMA does not provide for private litigation. However, they might become far more powerful with the new constitutional right to information and with the environmental right if the latter is recognised as a right that can be enforced horizontally.

## 7. *Languages*

In reaction to the Apartheid language policy, sec. 6 (1) of the Constitution extended the number of official languages from formerly two (Afrikaans and English) to eleven even though they do not enjoy equal treatment.<sup>118</sup> In particular, national legislation is not published in all official languages. Nevertheless, the Promotion of Access to Information Act, for example, provides for its explanation and publication in a guidebook, which has to be published in each official language.<sup>119</sup> Provinces have intensified the use of languages spoken by significant parts of their respective populations.<sup>120</sup> In practice, efforts are made to inform people who do not speak Afrikaans or English. For example, conferences on the redistribution of land were held in all official languages, in order to ensure maximum par-

<sup>115</sup> See also White Paper (fn. 25), 57.

<sup>116</sup> In addition to general rules, it contains regulations concerning the liability of managers, agents or employers and the employing firms.

<sup>117</sup> See *C. Loots*, 1 South African Journal of Environmental Law and Policy (1994), 17 et seq. See also White Paper (fn. 69), 22

<sup>118</sup> For the historical context see *K. Skovsholm*, *Verfassung und Recht in Übersee* 33 (2000), 5 et seq.

<sup>119</sup> Sec. 10 of the Promotion of Access to Information Act.

<sup>120</sup> See the overview by *K. Skovsholm* (fn. 118), 25.

ticipation by all parts of the population.<sup>121</sup> Moreover, the increasing share of non-whites in the administration improves communication between the administration and the people.

#### **D. Conclusion and Perspectives**

The legal mechanisms available to ensure environmental justice in future decision-making and to address past environmental injustice illustrate the promising development of South Africa in this respect. Indeed, the Constitution of 1996, and in particular its interpretation by the Constitutional Court, could be regarded as a model for the promotion of social rights, including environmental rights. The equality clause, the right to environment, the provisions on access to housing and on access to health care, food, water and social security are substantive rights, which in their interplay should guarantee environmental justice throughout the whole South African legal system. They are complemented by impressively far-reaching procedural guarantees, in particular on access to information, access to courts, the right to administrative justice and *locus standi*.

The implementation of these overarching guarantees in substantive environmental law regulation is somewhat lagging behind. The most telling example is waste management and pollution control law, where still no new comprehensive legislation has been adopted. Other laws, such as the Water Act 1998, have been passed but refer, for details, to subordinated regulations or orders that have not yet been published. The implementation of the procedural rights, in contrast, has already progressed thoroughly, in particular with the NEMA and the new acts on access to information and access to administrative justice. Another most positive feature of South African decision-making, on both the legislative and the administrative level, is an unusually high degree of public participation. Evidently, the government and the legislature highly appreciate the input made by civil society.

Overall, the Republic of South Africa is on her way into an environmentally just future, even though it may take a long time to reverse the injustices of centuries. Lack of funds is one major factor delaying the process. The legal framework could anyway serve as a model for many countries.

<sup>121</sup> See White Paper on Land Reform (fn. 77), par. 1.1.

Senate as an elected body; German Bundesrat as an instructed council), distribution of competences in legislative, executive and judicial matters, fiscal equilibrium and federal intervention.

The author states a crisis of federalism in Latin America due to upcoming tendencies to reanimate centralism in real politics not only in the named countries, but generally south of Rio Grande. Notwithstanding those symptoms – visible mainly in Latin American presidentialism – he concludes with an optimistic outlook: Federalism as a constitutional and political dogma still remains necessary in Latin America to guarantee freedom, democratic development and even administrative efficiency in these spacious territories.

### **Environmental Justice in South African Law and Policy**

By *Carola Glinski*, Bremen

After the end of Apartheid, building a democratic state based on the rule of law encompassed the redress of past injustice. Part of this heritage are the great disparities in environmental living conditions. A majority of people still live in distressing conditions, including lack of access to resources, such as clean water or land, and exposition to pollution and natural hazards. Therefore civil society, politics and legislation have subscribed to the goal of environmental justice.

The post-Apartheid legislation has the potential to ensure environmental justice in future decision making and to address past injustice. Namely the Constitution of 1996, and in particular its interpretation by the Constitutional Court, could serve as a model for many countries. The equality clause, the right to environment, the provisions on access to housing and on access to health care, food, water and social security are substantive rights, which in their interplay should guarantee environmental justice throughout the whole South African legal system. They are complemented by impressively far-reaching procedural guarantees, in particular of access to information, access to courts, the right to administrative justice and *locus standi*.

Whilst the implementation of the procedural rights has already progressed thoroughly, in particular with the National Environmental Management Act and new acts on access to information and access to administrative justice, the implementation of substantive environmental law is somewhat lagging behind. The most telling example is waste management and pollution control law, where still no new comprehensive legislation has been adopted. However, this delay is also owed to the highly participative way of decision-making and legislating.