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BY

LAWRENCE DHEKA



STUDENT NUMBER: 2854082

UNIVERSITY of the  
WESTERN CAPE

SUPERVISOR: PROFESSOR WERNER SCHOLTZ

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Title of the Research Paper : The Bill Of Rights As The Cornerstone Of Environmental Justice In South Africa: An Analysis Of Section 24

## **DECLARATION**

I declare that, **The Bill Of Rights As The Cornerstone Of Environmental Justice In South Africa: An Analysis Of Section 24** is my own work, that it has not been submitted before for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged as complete references.

Signed: Lawrence Dheka

Lawrence Dheka (2854082)

December 2015



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## **DEDICATION**

I dedicate this work to the Almighty God for the wisdom he gave me and to my loving family.



## 1. **Keywords**

Access

Basic services

Constitution

Democracy

Environmental justice

Environmental conservation

Environmental degradation

Environmental inequality

Equity

Equal distribution

Natural resources

Socio-economic

Sustainable development

Intergenerational equity

Intra-generational equity



## **LIST OF ACRONYMS**

NEMA (National Environmental Management Act)

NEMAQA (National Environmental Management Air Quality Act)

NWA (National Water Act)

ECA (Environmental Conservation Act)

USA (United States of America)

SA (South Africa)

WHO (World Health Organisation)

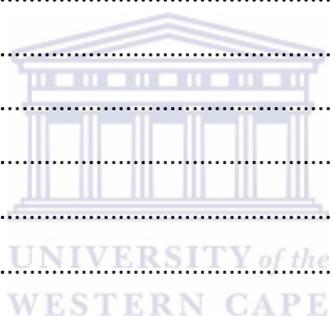
WCED (World Commission on Environment and Development (Brundtland Commission))



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## **Chapter 1**

### **1.1 Introduction**

Environmental issues are at the forefront of world attention. Issues, such as, global warming, ocean system collapse, electronic and nuclear waste, water degradation and increased human population which are adding pressure on the world ecosystem, are frequently discussed at both local and international levels.<sup>1</sup> Environmental justice can therefore not be ignored since environmental inequality has immediate and greater harm to those affected by it at both national and global levels.<sup>2</sup>

### **1.2 Background**

The notion of environmental justice emanated from the United States of America (USA) in the 1990s. The term has no precise legal definition. Environmental injustices in the USA became known in the 1980s when the studies conducted by the General Accounting Office and the United Church of Christ Commission for Racial Justice both proved that hazardous waste landfill sites in eight southern states of the USA were located next to communities with Black majority residents,<sup>3</sup> and that race still proved to be more significant in the location of commercial hazardous waste plants.<sup>4</sup> In 1991 the term environmental justice made its first appearance in the United Church of Christ Commission for Racial Justice First National People of Colour Environmental Leadership Summit. Principle 2 states that '*environmental justice demands that public policy be based on mutual respect for justice for all people, free from any form of discrimination or bias*'.<sup>5</sup>

Since then there have been many different descriptions of the term environmental justice, e.g., Lazarus defines it as a 'principle that focuses on fair distribution of hazards across all societies and that this includes purview of distributional

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<sup>1</sup> Karimian Y 'Environmental Injustice: The Bright Line Solution' *George Journal of Law and Modern Critical Race Perspectives* 5 (2013) 143. (hereafter Karimian Y)

<sup>2</sup> Karimian Y (2013) 143.

<sup>3</sup> Clifford R, Gauna E and O'Neill C *Environmental Justice: Law, Policy and Regulation* 2<sup>nd</sup> ed (2009) 37.

<sup>4</sup> Kidd M 'Environmental Justice - A South African Perspective' (1999) 142 *Acta Juridica* 143. (hereafter Kidd M (1999))

<sup>5</sup> Principle 2 of The First National People of Colour Environmental Leadership Summit of October 1992 in Clifford R, Gauna E and O'Neill C *Environmental Justice: Law, Policy and Regulation* 2<sup>nd</sup> ed (2009) 24.

implications of environmental protection laws designed to redress those hazards'.<sup>6</sup> Environmental justice is about social transformation which is directed towards meeting human needs and enhancing their quality of life using the resources sustainably.<sup>7</sup> Central to the principle of environmental justice is equal access to air, water, natural resources and good health. This means that the notion of environmental justice covers both the environment and socio-economic aspects of human life.

Furthermore Article 3 of the draft Charter for the Participation of People's Organisation in Environmental Governance in Southern Africa<sup>8</sup> describes environmental justice as environmental degradation and a form of dispossession and often the result of dispossession.<sup>9</sup> It goes on to state that people that suffer from most environmental degradation benefit the least from the wealth produced and that women in particular bear most of the environmental degradation. The Charter further highlights that environmental justice requires a commitment to equity in distribution of resources, in decision making and in distribution of hazards produced, irrespective of people's gender, race, ethnicity and geographical location.

From all the above descriptions of environmental justice, it becomes clear that environmental justice is about equity in sharing both the benefits and the burdens that comes with development that affects the environment, irrespective of people's race, gender, ethnicity and geographical location.<sup>10</sup> It is also clear that women bears the greatest burden of environmental injustice, especially in South Africa where women are in most cases the ones that bear the primary responsibility of looking after the family. It is this drive for sharing both the benefits and the burdens caused by economic development that advocates of environmental justice seek to promote through encouraging and lobbying the government to pass norms and regulations

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<sup>6</sup> Lazarus R.J 'The Meaning and Promotion of Environmental Justice' (1994) 5 *Modern Journal Contemporary Legal Issues* 1 in Glazewski J 'Environmental Justice and the New South African Democratic Legal Order' (1999) 1 *Acta Juridica* 3.

<sup>7</sup> Glazewski J 'Environmental Justice and the New South African Democratic Legal Order' (1999) 1 *Acta Juridica* 3. (hereafter Glazewski J (1999))

<sup>8</sup> Draft Charter for the Participation of People's Organisation in Environmental Governance in Southern Africa, "The Charter" (1996) 5 *Track Two: Constructive Approaches to Community and Political Conflict: Conflict and Environment Journal* 1.

<sup>9</sup> Glazewski J (1999) 4.

<sup>10</sup> Glazewski J (1999) 4.

and to encourage corporate behaviour that supports sustainable development.<sup>11</sup> Sustainable development is defined by the World Commission on Environment and Development (Brundtland Commission) as ‘...development that meets the needs of the present without compromising the ability of future generations to meet their own needs’.<sup>12</sup> This definition highlights two important elements: the recognition that development has to meet the needs of the present generation, and that development is limited by constraints on human abilities and environmental problems.<sup>13</sup> Central to this notion of sustainable development is the idea that members of the present generation hold the earth in trust for future generations.<sup>14</sup> This idea is well known in international law and in the South African context the constitutional court in Fuel Retailers Association of Southern Africa case applied this idea when it held that environmental considerations must be balanced with socio-economic considerations through the ideal of sustainable development.<sup>15</sup> The court furthermore held that the ideal of sustainable development requires that the present generation holds the earth in trust for the next generation and that this trusteeship carries with it responsibility to look after the environment.<sup>16</sup>

While both sustainable development and environmental justice have distinguishable goals they relate and are interdependent.<sup>17</sup> While environmental justice seeks to remedy the disparate impacts of industrial pollution and ecological damage to the poor and low income communities, sustainable development attempts to close the loophole between environmental consumption and waste management<sup>18</sup>. Sustainable development attempts to harmonise the relationship between humans and the ecological system and advocates for use of technology that integrates natural processes rather than counteract them.<sup>19</sup> Furthermore sustainable

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<sup>11</sup> Karimian Y (2013) 144.

<sup>12</sup> World Commission on ‘Environment and Development *Our Common Future: The Brundtland Report*’ (1987) 43.

<sup>13</sup> Cordonier Segger M and Khalfan A ‘*Sustainable Development Law: Principles, Practises and Prospects*’ (2004) 3.

<sup>14</sup> Sands P, Peel J, Fabra A and Mckenzie R ‘*Principles of International Environmental Law: Third Edition* (2012) 9.

<sup>15</sup> Fuel Retailers Association of Southern Africa v Director General: Environment Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province 2005 (6) SA 4 (CC) Para 45.

<sup>16</sup> Fuel Retailers v Director General Para 102.

<sup>17</sup> Fisher E ‘Sustainable Development and Environmental Justice: Same Planet, Different Worlds’ (2003) 1 *Environs: Environmental Law and Policy Journal* 207. (hereafter Fisher E (2003))

<sup>18</sup> Fisher E (2003) 207.

<sup>19</sup> Fisher E (2003) 207.

development promotes ecological development that builds community self-reliance and responsibility.

However, environmental justice problems in South Africa differ from those of the USA because of the apartheid government policies that created greater injustice for the majority of the population unlike in the USA where the minority suffers injustice.<sup>20</sup>

The discriminatory mechanisms employed by the apartheid government to control the movement of Blacks resulted in a deeply divided society, with enormous differences in the lifestyles of Blacks and Whites. These differences are demonstrated not only by the sharp contrasts in quality of life, but also by the appalling statistics on unemployment, health, poverty, illiteracy and homelessness.<sup>21</sup>

Although there has been a change in political power, not much has changed with regards to the country's wealth. The gap between the rich and the poor is forever increasing in South Africa which goes against the principle of environmental justice.

The majority of Black South Africans have no access to basic services, they still suffer from the high unemployment rate, and most of their informal settlements are located in close proximity of polluting industries, resulting in them suffering from lots of diseases. Furthermore, lack of access to electricity means that the majority of the people in the townships rely on coal and wood for power which further causes diseases, like asthma, TB, and colds.<sup>22</sup>

In addition, the apartheid government policies moved the majority of the Blacks to live on marginal land which resulted in overgrazing, soil erosion and land degradation.<sup>23</sup> Environmental conservation also resulted in forced removals, and parks, game reserves and wetlands created as part of these conservation efforts were not accessible to Blacks.<sup>24</sup>

The quest for social justice in South Africa needs to redress all the aforementioned issues. Environmental justice in the South African context will entail linking environmental and social justice approaches to challenge the abuse of power by the

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<sup>20</sup> Kidd M (1999) 149.

<sup>21</sup> Glazewski J 'Environmental Provisions in a New South African Bill of Rights' 177 (1993) *Journal of African Law* 178.

<sup>22</sup> Kidd M (1999) 151.

<sup>23</sup> Kidd M (1999) 151.

<sup>24</sup> Kidd M (1999) 151.

former White government which resulted in the poor having to suffer the effects of environmental damage caused by the greed of others.<sup>25</sup>

However, after coming into power in 1994, the new democratic government began to redress the environmental legacy of apartheid policies by passing the new Constitution of the Republic of South Africa, 1996 and other relevant legislation, such as, the NEMA<sup>26</sup> , the NWA<sup>27</sup> and NEMAQA.<sup>28</sup> Of interest in the Constitution is section 24 which provides that:

*'Everyone has the right (a) to an environment that is not harmful to their health or well-being; (b) to have the environment protected for present and future generations through reasonable legislation and other measures that: (i) prevent pollution and damage to the natural resources; (ii) promote conservation; and (iii) secure ecological sustainable development and use of resources while promoting justifiable economic and social development.'*<sup>29</sup>

Furthermore section 2 provides that the Constitution is the highest law in the country and everyone will be bound by the Constitution. Any laws that contravene the Constitution will be invalid.<sup>30</sup> Section 8 furthermore also makes the Bill of Rights applicable to all laws, meaning that the obligation imposed by section 24 is binding on all organs of states and even on private entities.<sup>31</sup>

Section 24 has now become the standard by which the new government is measured on issues of environmental justice.<sup>32</sup> It is also of interest to note that sustainable development was made part of section 24, meaning that it is the type of development on which the new South African government intended to build its foundation. This is in line with the government's obligation to address the issue of environmental injustices of the past. Other sections of the Constitution, e.g. access,

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<sup>25</sup> Kidd M 'Environmental Law' 2ed (2011) 302.

<sup>26</sup> (National Environmental Management Act 107 of 1998)

<sup>27</sup> (National Water Act 36 of 1998)

<sup>28</sup> (National Environmental Management Air Quality Act 36 of 2004)

<sup>29</sup> Section 24 of the Constitution of the Republic of South Africa of 1996

<sup>30</sup> Section 24 of the Constitution of the Republic of South Africa of 1996

<sup>31</sup> Section 8 of the Constitution

<sup>32</sup> Glazewski J (2005) 67.

to information,<sup>33</sup> the right to human dignity,<sup>34</sup> enforcing rights,<sup>35</sup> also play a great role in environmental justice discourse in South Africa.

Through section 24 a South African environmental justice framework will seek to ultimately synthesise aspirations for community empowerment, participatory democracy, distributional equity and social justice.<sup>36</sup> Furthermore section 24 also makes provision of the protection of the environment through reasonable legislative and other measures.<sup>37</sup> NEMA falls under the legislative measures designed to bolster environmental protection and has become the framework for environmental protection in South Africa. Therefore NEMA plays a pivotal role in environmental justice especially its section 2 principles. Section 2(4) of NEMA requires environmental justice to be pursued so that adverse environmental impacts shall not be distributed in such a manner as to unfairly discriminate against any person, particularly vulnerable and disadvantaged persons. It is this section that could be used to promote environmental justice in South Africa.

### **1.3. Problem statement**

This study analyses section 24 and specifically focus on how it has become the heart of socio-economic and environmental justice in South Africa. The study furthermore explains how sustainable development in section 24 bridges the gap between socio-economic and environmental development and how it has become a pillar of environmental justice in South Africa.

Everyone is bound by the Constitution. Section 24 imposes obligations on everyone to ensure that all the citizens, especially the previously disadvantaged, have access to a good and quality environment and fair distribution of the country's wealth. It is from this perspective that the proposed paper seeks to analyse the normative contribution of section 24 of the Constitution and section 2 of NEMA towards environmental justice. Furthermore, the paper will provide other tools that citizens can use to strengthen environmental justice in South Africa.

The paper will attempt to offer answers to the following questions:

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<sup>33</sup> Section 32 of the Constitution of the Republic of South Africa, 1996.

<sup>34</sup> Section 10 of the Constitution of the Republic of South Africa, 1996.

<sup>35</sup> Section 38 of the Constitution of the Republic of South Africa, 1996.

<sup>36</sup> Foster S 'The Challenge of Environmental Justice' (2004) 1 *Rutgers Journal of Law and Urban Policy* 11.

<sup>37</sup> Section 24 (b) of the Constitution of Republic of South Africa, 1996.

**(a) To what extent is section 24 the pillar of environmental justice in South Africa;**

**(b) What role does sustainable development play in environmental justice**

#### 1.4. Literature review

Very little has been written on the significance of section 24 for environmental justice. However, Kidd argues that environmental justice is a critical consideration for properly managing our environment for the sake of the present and future generations. He argues that the extent of environmental injustice in South Africa runs so deep that government will have to take a major step to redress many of the problems that people are facing.<sup>38</sup> Glazewski agrees with Kidd and argues that the concept of 'environmental justice' cannot be legally defined. He furthermore argues that the inclusion of Bill of Rights, and especially section 24, has given this notion momentum to legally develop.<sup>39</sup>

Du Plessis additionally agrees with Glazewski that the notion of 'environmental justice' is shy of legal definition, but argues that in the South African context section 24 must be read in line with sections 27(1) and (2) since section 24 is a socio-economic right, in so far as it aims to secure, like all socio-economic rights, for all members a good quality of life and equal access to natural resources.<sup>40</sup> She argues that a specific environmental quality is the goal of environmental justice, and that environmental quality transcends the mere conservation of natural resources, but that it has more to do with people's access to basic services, such as, water, sanitation and health.<sup>41</sup> Du Plessis concludes by stating that the State has to realise that it is responsible and accountable to the public on issues of environmental justice, whether pollution or environmental harm is caused by an organ of State or through its failure to regulate private entities.<sup>42</sup>

Lastly, Kotze and Du Plessis take the view that section 24 cannot be fully effective without section 34 and argue that access to courts is vital to establish extent and

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<sup>38</sup> Kidd M (1999) 158.

<sup>39</sup> Glazewski J (1999) 30.

<sup>40</sup> Du Plessis A 'South Africa's Constitutional Environmental Right (Generously Interpreted: What Is in It for Poverty?)' (2011) 279 *SAJHR* 282. (hereafter Du Plessis A (2011))

<sup>41</sup> Du Plessis (2011) 286.

<sup>42</sup> Du Plessis (2011) 306.

promote access to justice.<sup>43</sup> They furthermore highlight the significance of other rights in the Bill of Rights e.g. the rights to equality and dignity and how such rights can be used in environmental justice litigation

### 1.5 Objectives of the study

This research seeks to:

- (a) Review the potential contribution of section 24 in the advancement of environmental justice in South Africa in the post-democracy era;
- (b) Review how section 24 can be linked with other rights in the Bill of Rights in advancing environmental justice;
- (c) Assess how sustainable development has brought harmony between the two potentially conflicting rights of section 24 and sections 27(1) and (2)

### 1.6 Research question

The clearly defined question is:

**(a) To what extent is section 24 the foundation of environmental justice in South Africa?**



### 1.7 Significance of the study

The research topic seeks to address the issue of environmental justice. It aims to contribute to the knowledge in the area of environmental justice which is presently very limited in South Africa especially considering its past history of environmental injustices, some of which have not yet been addressed. Even though the problem of environmental injustice is not the only problem facing the current democratically elected government of South Africa, environmental justice is one of the most important means of addressing all other socio- economic problems and it therefore deserves to be given proper attention. Given the daily problems that communities around the country still continue to face due to the past of environmental injustices, this paper seeks to provide legal knowledge and evaluate the current legal regime of environmental justice. Lastly, the research will provide examples of other alternatives that can be used to advance environmental justice.

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<sup>43</sup> Kotze L. J and Du Plessis A 'Some Brief Observations on Fifteen Years of Environmental Rights Jurisprudence in South Africa' (2010) 157 *Journal of Court Innovation* 162.

### 1.8 Limitations of the study

The study does not invoke an empirical analysis of environmental justice in South Africa.

### 1.9 Overview of chapters

#### Chapter one

This will be an overview chapter which would provide an overview of the background to the research, the problem statement, a literature review, and objectives of the study, the research questions, and the significance of the study, the research methodology, and the limitations of the study.

#### Chapter two

This chapter will analyse the extent to which section 24 forms the foundation of environmental justice in South Africa. Hence, this chapter will analyse the content of section 24. Furthermore, it analyse other rights in the Bill of Rights that are relevant for the advancement of environmental justice e.g. the rights to dignity and equality.

#### Chapter three

This chapter will examine how sustainable development has brought harmony between section 24 and socio-economic rights, such as section 27. It will analyse sustainable development specifically focusing on what it means for environmental justice South Africa.

#### Chapter four

This chapter will be contain the conclusion of the research paper and will provide recommendations and insights concerning the advancement of environmental justice through section 24.

## CHAPTER TWO

### AN ANALYSIS OF SECTION 24

#### 2.1 INTRODUCTION

Prior to the changes brought about by the 1996 Constitution environmental issues were perceived to be White elitist concerns.<sup>44</sup> However section 24 of the constitution has become the touchstone by which delivery of environmental justice by the new democratic government is measured. It is through this section that the new government is tasked with the obligation to redress the environmental legacy of apartheid. In this chapter the content of section 24 and how it gives effect to the notion of environmental justice are examined. Furthermore, the nature of the right vis-à-vis other rights in the Bill of Rights that are pertinent to the advancement of environment justice in South Africa is analysed.

#### 2.2 Analysis of section 24

Section 24 of the Constitution provides *everyone with the right to an **environment that is not harmful to their health or well-being***; Read with section (7) 2 of the Constitution which provides that “the state must respect, protect, promote and fulfil the rights in the Bill of Rights”, it becomes clear that whilst everyone in South Africa must respect the right, the state incurs an additional duty to take positive action towards its fulfilment.<sup>45</sup> Thus environmental responsibilities and duties apply both horizontally and vertically to both private individuals, corporations and the government.<sup>46</sup> One cannot but notice that section 24 places people at the centre of the environmental right, and that its objectives are seen in the meaning of important words, such as, “environment”, “well-being” and “sustainable development”<sup>47</sup>.

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<sup>44</sup> Glazewski J ‘Environmental justice and the new South African democratic legal order’ 1999 1 *Acta Juridica* 2 (hereafter Glazewski J (1999)).

<sup>45</sup> Kotze L J and Du Plessis A ‘Some brief observations on fifteen years of environmental rights jurisprudence in South Africa (2010) 157 *Journal of Court Innovation* 158. (hereafter Kotze J & Du Plessis (2010)).

<sup>46</sup> Christiansen E ‘Empowerment, Fairness, Integration: South African Answers to The Question of Constitutional Environmental Rights (2013) 32 *Stanford Environmental Law Journal* 245. (hereafter Christiansen E (2013))

<sup>47</sup> Du Plessis A ‘South Africa’s Constitutional Environmental Right (Generously) Interpreted: What Is in It for Poverty? (2011) 27 *South African Journal on Human Rights* 292. (hereafter Du Plessis A (2011))

### **2.2.1. The meaning of the term “environment”**

In South Africa, man is placed at the centre of the definition of “environment” in that NEMA defines the term “environment” as ‘the surroundings to which humans exist which includes *the physical, chemical, aesthetic and cultural properties and conditions of the foregoing that influence human health and well-being;....*’ thus we follow the anthropocentric approach which requires that we embrace socio-economic and cultural dimensions of the inter-relationships between people and the natural environment.<sup>48</sup> By placing man at the centre of section 24 right in the Constitution one can then argue that the word “everyone” includes only people and not objects like plants and animals.<sup>49</sup>

However, for one to be able to understand the nature and scope of the right to an environment that is not detrimental to one’s health and well-being, one has to understand the meaning of the word “environment”. The English Oxford dictionary defines the environment as ‘the set of circumstances or conditions especially physical conditions, in which a person or community lives, work, develops etc., or a thing exists or operates or as the external condition affecting the life of plant or animal’.<sup>50</sup> This definition is very broad and vague and is similar to that of Bell and McGillivray who defines ‘environment’ as ‘the physical surroundings that are common to all of us, including air, space, waters, land, plants and animals’.<sup>51</sup> However, like all the aforementioned definitions that place man at the centre of the definition of ‘environment’, the first piece of environmental legislation in South Africa, the Environmental Conservation Act<sup>52</sup> also defined the environment as ‘the aggregate of surrounding objects, conditions and influences that influence the life and habitats of man or any other organisms or collection of organisms’.<sup>53</sup> Thus, the environment was defined in South African law for the first time using the anthropocentric approach. However with the new democratic era, NEMA was passed which defines environment as ‘.....*the surroundings within which humans exist and that are made of:*

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<sup>48</sup> Du Plessis A (2011) 293.

<sup>49</sup> Kotze L J ‘The South African Environment and The 1996 Constitution: Some Reflections on a Decade of Democracy and Constitutional Protection of the Environment (2007) *Doutrina Estengeira* 41. (Hereafter Kotze J (2007))

<sup>50</sup> *Shorter Oxford English Dictionary 6<sup>th</sup> Edition Vol. 1 A-M*(2007) 845.

<sup>51</sup> Bell S and McGillivray D *Environmental Law 7<sup>th</sup> Edition* (2008) 7.

<sup>52</sup> Act 73 of 1989.

<sup>53</sup> Section 1 of the Environment Conservation Act 73 of 1989.

- (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’.*<sup>54</sup>

The Nema definition of the environment, places people at the centre of the environment, and includes all forms of environmental media, bio-life and processes, chemical, aesthetic and cultural components that may affect human health, thus making the NEMA definition to be very broad and comprehensive one. One of the section 24 objectives is to ensure that there is harmony in the relationship between people and the natural environment as such that the state of the environment will not become harmful to people’s health and wellbeing.<sup>55</sup> The broad definition of the term “environment” in NEMA thus lends itself to the response to socio-economic issues which have implications on environmental justice. Thus the inter-relationship between people and the environment encompasses all the interest that people hold in the environment whether they are of cultural nature or rather reflect environment justice issues such as provision of services provided by natural environment to the poor and previously disadvantages e.g. access to water to drink, good quality air to breathe or even access to food and proper housing.<sup>56</sup>

#### **2.2.1.2 The meaning of ‘health’.**

In terms of section 24 (a) of the Constitution health refers to the health of individuals or that of the general public. The World Health Organisation (WHO) defines ‘healthy’ ‘as being in a state of complete mental, physical and social wellbeing and not just the absence of any diseases’.<sup>57</sup> Thus one’s health is often beyond the control of oneself and of the State due to nature of the causes of ill health e.g. pollution from nearby industries can cause respiratory and lung diseases.

In the context of the environment right in section 24, health refers to the extent that external factors and causes, such as, pollution and exposure to hazardous waste,

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<sup>54</sup> Section 1 of the National Environmental Management Act of 107 of 1998.

<sup>55</sup> Du Plessis A (2011) 293.

<sup>56</sup> Du Plessis A (2011) 293.

<sup>57</sup> Du Plessis A (2011) 293 and World Health Organisation <http://www.who.int/en/> accessed on 10 June 2015.

could negatively affect it.<sup>58</sup> Thus when health is viewed in terms of section 24 it should include both the mental and physical integrity and the quality of life of the people concerned.<sup>59</sup> The objective of the inclusion of the word 'health' in section 24 is to ensure that the State maintains a level of quality of the environment so that it will not become harmful to people. With an understanding of the notion of health it is much easier to pinpoint some of the environmental injustices that people in South Africa continue to suffer even today. These includes: poor health outcomes as a result of pollution from industries; safety effects because of crumbling infrastructure; lack of access to essential services such as, water, electricity, sanitation and exposure to hazardous substances and waste.<sup>60</sup>

However the notion of health in section 24 should not be construed to mean the same thing as the right to health care in section 27 as it goes beyond what is required in section 27. Given the serious health consequences of air and water pollution, the siting of most heavy industries due to apartheid settlement policies as well as location of waste disposal sites, health is a very strong and essential element of environmental justice operating under section 24.<sup>61</sup> Thus air pollution or placement of disposal sites can be subjected to constitutional challenge on the ground that it affects people's health in terms of section 24 and not section 27.

### **2.2.1.3 The meaning of the term 'well-being'**

Section 24(a) also provides for a right to have an environment that is not harmful to one's well-being. Section 24 requires the protection of one's welfare which includes environmental interests without evident health consequences.<sup>62</sup> As it was held in the *HTF Developers Pty Ltd v Minister of Environmental Affairs and Tourism and Others (the HTF Developers case)* 'the term "well-being" is open ended and manifestly incapable of precise definition. The Court furthermore held that the term 'wellbeing' defines for the environmental authorities the constitutional objectives of their task'.<sup>63</sup>

<sup>58</sup> Kotze J and Du Plessis (2010) 166.

<sup>59</sup> Kotze J and Du Plessis (2010) 166.

<sup>60</sup> Pieterse M 'The Right to the City and the Urban Environment: Re-imagining section 24 of the 1996 Constitution (2014) 29 *Southern African Public Law Journal* 182. (Hereafter Pieterse M (2014))

<sup>61</sup> Glazewski J (1999)7.

<sup>62</sup> Kotze J and Du Plessis A (2010) 166.

<sup>63</sup> 2006 (5) SA 512 (T) Para 18.

Thus the term implies that people have to be protected against environmental harm which impacts their ability to be at comfort and to have a peace of mind.<sup>64</sup> The right to well-being has a psychological meaning<sup>65</sup>, e.g. the aesthetic value people have in the environment, enjoyment of sustainable livelihood, environmental benefit sharing, and cultural and religious values attached to lakes and forests. Furthermore, the knowledge, fear or reasonable anticipation of a threat to the environment and natural resources anywhere may also impact on a person's well-being.<sup>66</sup>

By the notion of well-being, section 24(a) seeks to protect a person's sense of environmental security (the process of peacefully reducing human vulnerability to human-induced environmental degradation by addressing the root causes of environmental degradation)<sup>67</sup> and safekeeping which are directly available to people in the other rights in the Bill of Rights. Thus wellbeing can be easily linked to other rights in the Bill of Rights, such as, human dignity and equality, e.g. living in poverty results in inadequate well-being and thus deters people from enjoying a sustainable livelihood and impairs their right to dignity. Section 24 (a) explicitly refers to well-being because it extends beyond the notion of health or right to health care in section 27. Thus in order to bring a case of impact on well-being one cannot use section 27 but has to directly rely on section 24. Well-being in terms of section 24 thus advances environmental justice by requiring that the state provides means that a person can have adequate nourishment, live in an environmentally clean and safe shelter, have adequate and clean drinking water, have clean air, have access to electricity, and have access to the benefits of the natural elements found in the ecosystems.<sup>68</sup>

People have a direct and indirect interest in the protection of certain environmental resources. As provided by section 24 (a) of the Constitution the ambit of the right to well-being is very broad. However, well-being requires a sense of environmental integrity that ought to use and conserve the environment in a morally responsible

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<sup>64</sup> Kotze J and Du Plessis (2010) 166.

<sup>65</sup> Glazewski J Environmental law in South Africa (2013) issue 2 5-16.

<sup>66</sup> Kidd M *Environmental Law 2<sup>nd</sup> Edition* (2011) 23.

<sup>67</sup> Barnett J *The Meaning of Environmental Security: Ecological Politics and Policy in the New Security Era* (2001) 129.

<sup>68</sup> Du Plessis A (2011) 297.

and ethical manner.<sup>69</sup> An environment conducive to wellbeing also embraces a sense of stewardship, that the environment is held in trust for future generations.<sup>70</sup> This trusteeship position carries with it the responsibility to look after the environment.<sup>71</sup> It is only through care and responsibility towards the environment that a right to an environment conducive to well-being can be achieved.<sup>72</sup> Thus in the environmental justice discourse, concerns, such as, quality of life, quantity and accessibility of public space and quality of air, water and sanitation and other essential services help inform whether citizens are living in an environment that does not harm their wellbeing. In South Africa the reality is that the health and wellbeing of the poor with low incomes are at bigger risk than those of the wealthy class.<sup>73</sup> Whilst the wealthy are concerned with environmental issues such as quality of life and wellbeing which is threatened by pollution, the poor will be concerned with basic things such as water pollution, lack of sanitation, lack of housing and living space which results in overcrowding, all which have a greater effect and threaten their health and livelihood.<sup>74</sup> The poor suffers the most from lack of basic services such as access to clean water, housing, health care and in most cases get a disproportionate share of environmental degradation.<sup>75</sup> This distributional inequality in socio-economic and environmental welfare is mostly responsible for environmental degradation.<sup>76</sup> Thus environmental justice can be addressed through sustainability by addressing the socio-economic and environmental issues affecting the poor.

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<sup>69</sup> Glazewski J (1999) 8.

<sup>70</sup> *Fuel Retailers Association of Southern Africa v Director General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province, and Others 2007 (6) SA 4 (CC) para 102.* (hereafter Fuel Retailers)

<sup>71</sup> Fuel Retailers para 102.

<sup>72</sup> Glazewski J (2013) 5-16.

<sup>73</sup> Feris L 'Constitutional Environmental Rights: An Under-Utilised Resource' (2008) 24 *South African Journal on Human Rights* 43 (hereafter Feris L (2008)).

<sup>74</sup> Feris L (2008) 43.

<sup>75</sup> Feris L (2008) 43.

<sup>76</sup> Feris L (2008) 43.

## **2.2.2. Section 24 (b)**

### **2.2.2.1 Sustainable development**

Sustainable development is discussed in depth in part 3; however it is briefly examined now. Sustainable development is defined by the World Commission on Environment and Development (Brundtland Commission) as ‘....development that meets the needs of the present without compromising the ability of future generations to meet their own needs’.<sup>77</sup> Thus the concept requires that the essential needs of the world’s poor be given overriding priority, and that cognisance be taken of limitations imposed by the State of technology and social organisations which threaten the ability to meet present and future needs.<sup>78</sup> Therefore sustainable development is very important and is central to the achievement of environmental justice. It requires a balance between environmental and development goals, and requires people to pursue development in terms of both inter-generational and intra-generational equity. While embodying these two principles and others, the notion seeks to balance the need for humans to protect the environment whilst pursuing their own developmental and economic objectives.<sup>79</sup> This notion cannot be separated from other important principles, such as, public participation in decision making, the polluter pay principle, and the need for access to information on environmental damage caused by any party.

The obligation to protect the environment for the benefit of the present and future generations in section 24 (b) can better be understood in accordance with the principles of inter-generational and intra-generational equity which are all crucial for sustainable development. The principle of intra-generational equity requires the environmental costs and benefits of development to be distributed equally between all the present generations.<sup>80</sup> Thus existing maldistribution of resources between the rich and the poor falls foul of the obligation to protect the environment, as do development projects which unequally benefit the previously advantaged people and further disadvantage particular groups of people in society.<sup>81</sup> Good examples of

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<sup>77</sup> World Commission on ‘Environment and Development *Our Common Future: The Brundtland Report*’ (1987) 43.

<sup>78</sup> Sands P, Peel J, Fabra A, Mackenzie R *Principles of International Environmental Law 3rd Edition* (2012) 91.

<sup>79</sup> Pieterse M (2014) 184.

<sup>80</sup> Thornton J and Beckwith S *Environmental law 2<sup>nd</sup> edition* (2004) 46. (hereafter Thornton j and Beckwith S (2004))

<sup>81</sup> Pieterse M (2014) 183.

existing maldistribution would include resource protection targeting the poor, failure to address over-consumption by the rich, and infrastructure upgrades being limited to affluent areas of the city only.<sup>82</sup>

The principle of intra-generational equity highlights how the poor inexplicably bear the burden of environmental problems. Therefore environmental protection under section 24(b) needs to prioritise the problems of the poor.

With inter-generational equity attention needs to be paid to the needs of future generations<sup>83</sup>. Natural resources get depleted over time as they are limited in quantity, and the effects of such depletion can be felt by future generations. Therefore inter-generational equity requires careful consideration to be given to the type of current development that is undertaken, in order to ensure that the development is for long-term sustainability<sup>84</sup>.

Section 24 sets the stage for a balancing of environmental and socio-economic rights through the notion of sustainable development. Furthermore, section 39 (1) can also help advance environmental justice through sustainable development as it requires South African courts to embrace international law when interpreting the Bill of Rights.<sup>85</sup> This means that section 39 (1) embraces binding and non-binding instruments, including treaties to which South Africa is a party. This was supported by the Constitutional court in *State v Makwanyane and Another* where the court reasoned that customary international law and international agreements were binding on South Africa and such public international law included both binding and non-binding law.<sup>86</sup> Some of these vital instruments that can assist in advancing environmental justice through sustainable development are the Rio Declaration, the United Nations Framework Convention on Climate Change, and the African Charter on Human and People's Rights.<sup>87</sup>

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<sup>82</sup> Pieterse M (2014) 183.

<sup>83</sup> Thornton J and Beckwith S *Environmental law 2<sup>nd</sup> edition* (2004) 46.

<sup>84</sup> World Commission on 'Environment and Development *Our Common Future: The Brundtland Report*' (1987) 43.

<sup>85</sup> Du Plessis A and De Wet E 'The Meaning of Certain Substantive Obligations Distilled from International Human Rights Instruments for Constitutional Environmental Rights in South Africa' (2010) 10 *African Human Rights Law Journal* 347. (Hereafter Du Plessis A and De Wet E (2010))

<sup>86</sup> See *State v Makwanyane and others* 1995 (3) SA 391 (CC) Para 35 'where the court gave its reasoning in regards to the application of international law and international agreement in South Africa'.

<sup>87</sup> Du Plessis A and De Wet E (2010) 347.

As indicated above, an in-depth discussion of sustainable development is undertaken in part 3 of this research paper.

#### 2.2.2.2 Reasonable Legislation and Other measures.

Section 24 introduces the standard of reasonableness as do sections 26<sup>88</sup> and section 27<sup>89</sup> of the Constitution. It is important to understand the meaning of reasonableness in section 24 as it helps us to determine whether the government has done enough to pass reasonable legislation and other measures. An analysis of the term reasonableness will help us determine what, in the eyes of our judiciary is considered to be “reasonableness” when passing legislation and other measures. The Constitutional Court explained the meaning of reasonableness in section 26 and section 27 in *Government of Republic of South Africa v Grootboom (the Grootboom case)*<sup>90</sup> where it held that reasonableness required measures used by the government to be balanced, coherent, flexible, inclusive, transparent and capable of achieving progressive realisation of the relevant rights in both conception and implementation.<sup>91</sup> The Court further held that reasonable measures had to balance short, medium and long-term needs in order to accommodate the needs of the most vulnerable and desperate beneficiaries and to cater for their most immediate needs.<sup>92</sup>

Since this was a decision of the Constitutional Court, its analysis of reasonableness as used in section 27 can also be applied to section 24 since both provisions are part and parcel of the Bill of Rights. A court will in addition have to add other factors, such as, sustainability, equity, and public participation of all affected persons, in assessing reasonableness in section 24. Thus public participation in decision making process is one of the vital elements of assessing the reasonableness of a decision making process which gave effect to a certain piece of legislation and other measures. The importance of public participation of all affected persons in assessing

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<sup>88</sup> Section 26 (1) provides that “Everyone has the right to have access to adequate housing”.....

<sup>89</sup> Section 27 (1) provides that “ Everyone has the right to have access to –

- (a) Health care services, including reproductive health care;
- (b) Sufficient food and water; and
- (c) Social security, including, if they are unable to support themselves and their dependents, appropriate social assistance.

<sup>90</sup> 2001 (1) SA 46 (CC) Paras 39-44.

<sup>91</sup> Pieterse M (2014) 185.

<sup>92</sup> Pieterse M (2014) 185.

reasonableness was confirmed by the constitutional court in *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others case (the Joe Slovo case)*, as the court acknowledged that the respondents had acted reasonably in compliance with the state obligation and there had been reasonable engagement almost all the way.<sup>93</sup> The court further argued that it would have been ideal for the state to have engaged individually and carefully with each of the families involved and that reasonableness involves realism and practicality.<sup>94</sup> However it held that there had been a reasonable engagement.<sup>95</sup>

In consequence, the section 24(b) standard of reasonableness needs to be understood as obligating the State to protect the environment through meaningful engagement with communities. It makes it clear that both sustainable development and environmental protection are participatory processes in which the input of those affected by environmental decisions must be considered.<sup>96</sup> This differs from the apartheid government policies where consultation was not considered in environmental decisions and inputs of other racial groups were not considered to be an integral part of the decision making process. It is through this lack of public participation and meaningful engagements with local communities in the decision making process by the previous white minority government that has resulted in most environmental challenges that the poor and the marginalised people face today. Therefore meaningful engagement with affected communities in the decision making process is one of the ways in which environmental justice is promoted under section 24.

Section 24 requires the positive obligations that it imposes to be executed through reasonable legislative and other measures. Section 24 (b) (i) – (iii) specifically list the objectives that the State should aim to achieve. However legislative measures in themselves are not likely to ensure constitutional compliance and thus legislative measures have to be supported by other appropriate, well-directed programs and policies directed by the Executive.<sup>97</sup> As the Court held in the *Grootboom case*:

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<sup>93</sup> (2011) (7) BCLR 723 (CC) para 117 and 238.

<sup>94</sup> Joe Slovo case para 117.

<sup>95</sup> Joe Slovo case para 117.

<sup>96</sup> Pieterse M (2014) 187.

<sup>97</sup> Du Plessis A (2011) 300.

*'These policies and programs must be reasonable both in their conception and implementation. The formulation of a programme is only the first stage in meeting the state's obligations. Otherwise reasonable program that is not implemented reasonably will not constitute compliance with the state's obligations'.<sup>98</sup>*

This means that policies and programs of environmental protection also need to address issues of environmental justice, sustainable development and ecological degradation, as well as conservation. Failure by the state to fulfil its direct and immediate obligations in terms of section 24(b) will be a violation of the right to an environment that is not harmful to one's health and well-being.

The meaning of "other measures" is broad and seems to be directed at the executive and judicial branches of government.<sup>99</sup> 'Other measures' could mean environment and service delivery information systems that cater for and are easily accessible and understood by the people; that promote environmental degradation awareness; that encourage environmental investment; that enhance the enforcement procedures of command and control to achieve environmental justice; that contribute to sustainable development.<sup>100</sup> In *Minister of Water Affairs and Forestry v Stilfontien Gold Mining Company Ltd*, the Court held that other measures that the state pursues to fulfil its statutory obligations should be in support of section 24 of the Constitution through sustainable mechanisms.<sup>101</sup> An example of other measures in the environmental justice discourse would include government introducing statutory measures or policies to be complied with by mining companies or industries that want to make use of fresh water resources in their operations.<sup>102</sup> Such measures would also deal with how such mining companies or industries would address issues, such as, reduction of pollution and contamination of rivers resulting from their operations. It would also address the use of resources for the purposes of personal hygiene by members of the poor community surrounding the mines or industries and their entire operations.<sup>103</sup> From the above analysis of section 24, it is clear that environment

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<sup>98</sup> 2001 (1) SA 46 (CC) para 42.

<sup>99</sup> Du Plessis A (2011) 300.

<sup>100</sup> Du Plessis A (2011) 300.

<sup>101</sup> (2006) (5) SA 333 (W) 352 D-H.

<sup>102</sup> Du Plessis A (2011) 301.

<sup>103</sup> Du Plessis A (2011) 301.

considerations need to be respected with regards to issues of execution of administrative processes and public decision making.<sup>104</sup>

Due to past environmental injustices the poor and their suffering are a challenge to sustainable development. A direct link exists between environment, health, wellbeing, the State and environmental justice. Therefore the State needs to realise that it is accountable, whether pollution or environmental harm is directly caused by the State or arises because of its failure to regulate the activities of companies in the private sector. Everyone has a responsibility to ensure that scarce resources are properly utilised and that cumulative environmental impacts, such as, emissions and waste products are equally shared between the rich and the poor in recognition of South Africa's past history. Although legislation has to be promulgated, enforcement of these laws to ensure compliance with section 24 is still problematic.

### 2.3 Other rights in the Bill of Rights that Advance Environmental Justice

There are various other procedural and substantive human rights in the Bill of Rights that or rather has an impact on environmental justice. These provisions which will be dealt with are:

#### 2.3.1 The equality clause(section 9)

Section 9 (1) of the Constitution advocates the social idea of equality and provides: 'everyone is equal before the law and has the right to equal protection and benefit of the law.' Central to environmental justice is the idea of equality, that all people have access to natural resources, and the right to clean air, water, shelter and adequate health care services.<sup>105</sup> Thus environmental problems are linked with other social injustices, such as, poverty, racism and unemployment, all which have a negative effect on the right to equality.<sup>106</sup> Therefore the right to equality can be instrumental in advancing environmental justice.

Given the discriminatory practices of the apartheid government, the South African government has a huge task to address the issue of environmental injustice. Where unequal treatment has resulted in unequal negative environmental effects thereby

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<sup>104</sup> *Director: Mineral Development, Gauteng Region v Save the Vaal Environment (1999) (2) SA 709 SCA 715* and the minority judgement of Sachs J in *Fuel Retailers* para 116.

<sup>105</sup> Kotze J (2007) 45.

<sup>106</sup> Kotze J (2007) 45.

infringing on section 9 of the Constitution and other rights in the Bill of Rights e.g. right to dignity, those affected by such unequal treatment can use section 9 to address such inequality. In the case of *Modjadji Florah Mayelane v Mpephu Maria Ngwenyana and others* the court analysed the importance of section 9 in the constitution. It argued that:

*'at the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a society in which all human beings will be accorded equal dignity and respect regardless of their membership of particular groups'.<sup>107</sup>*

The court furthermore argued that:

*'there can be no doubt that the guarantee of equality lies at the very heart of the Constitution. It permeates and defines the very ethos upon which the Constitution is premised. In the very first paragraph of the preamble it is declared that there is a ' . . . need to create a new order . . . in which there is equality between men and women and people of all races so that all citizens shall be able to enjoy and exercise their fundamental rights and freedoms'.<sup>108</sup>*

Therefore section 9 is also very important in addressing issues emanating from environmental injustices of the past government. Of greater importance is also The Promotion of Equality and Unfair Discrimination Act<sup>109</sup> which can also be invoked by the affected parties to assert their right to equality in the context of environmental justice. Although the Act does not specifically list environmental inequality in its Preamble, it refers to the eradication of social and economic inequalities. Social inequalities, such as, lack of access to clean water and air have negative implications on the environmental right in the Constitution. Therefore social inequality could be extended to include environmental inequality.

Section 2 (b) (i) and (ii) list some of the objectives of the Act as to give effect to the letter and spirit of the Constitution in section 9, in particular the equal enjoyment of all the rights in the Bill of Rights (e.g. section 24) and the promotion of equality.

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<sup>107</sup> 2013 (4) SA 415 (CC) Para 64.

<sup>108</sup> 2013 (4) SA 415 (CC) Para 65.

<sup>109</sup> 4 of 2000.

Therefore section 2 (b) (i) and (ii) advances environmental justice by promoting equality in all issues dealing with the environment e.g. the distribution of environmental hazards to all persons in the cities. It also addresses other social inequalities with environmental concerns such as, lack of access to proper sanitation. By this, the section advances the environmental justice cause.

Furthermore pursuant to sections 25 and 26, section 27 (1) of the Act requires all persons, non-governmental organisations, community based organisations and traditional institutions to promote equality in their relationships with other bodies, and in their public activities. 'All persons' means both private individuals and juristic entities. Therefore the public activities of all these 'persons', be it its manufacturing or agriculture or mining, must not promote environmental inequality between members of the community.

A good example of inequality with negative implications for environmental justice is when rubbish bins are collected twice a week in affluent areas of the city and once a week in the informal settlements in the same city.<sup>110</sup> However if the affected parties approach the court using the equality clause the court will have to make use of the two stage test outlined in the *Harksen v Lane No and others Case*<sup>111</sup> and both stages of the enquiry will have to be answered in the affirmative.<sup>112</sup>

### **2.3.2 Human dignity (section 10)**

Section 10 of the Constitution guarantees everyone a right to dignity. It provides that: 'everyone has inherent dignity and the right to have their dignity respected and

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<sup>110</sup> Glazewski J (1999) 21.

<sup>111</sup> 1997 (11) BCLR 1489 (CC) para 52.

<sup>112</sup> Under the Harksen test court reasoned that the first enquiry is directed to the question as to whether the relevant provision does differentiate between people or categories of people. If it does differentiate then in order not to fall foul of section 8 (1) of the Interim Constitution, there must be a rational connection between the differentiation in question and the legitimate government purpose it is designed to achieve. If there is a rational connection then there is no breach of section 8 (1). However, differentiation that doesn't constitute a violation in terms of section 8 (1) can amount to differentiation in section 8 (2). Thus once rational connection is established in section 8(1) then we proceed section 8 (2) to determine if, despite the rationality, the differentiation amounts to unfair discrimination in terms of the section. Bear in mind that Section 8 (2) of the interim Constitution is identical to Section 9 (3) of the Final Constitution. The two stage analysis in section 8 (2) requires us firstly to ask the question, whether the differentiation amounts to discrimination and if it does whether secondly it amounts to unfair discrimination. The two stage of the enquiry are to be done separately and independent of each other. As a guide to determine the presence of discrimination in terms of section 8 (2), 14 specified grounds are provided which should be used in the first stage of the enquiry. On the second stage, the grounds of discrimination aren't specified but should be analogous to such grounds listed in section 8 (2). Such an analysis of the equality clause in the interim constitution by the Constitutional court is equally applicable to the current section 9 as the provisions are identical to each other.

protected'. This right lies at the heart of all the rights in the Bill of Rights and is the foundation of all other rights. Section 1 of the Constitution also includes human dignity as a principle and provides that:

The republic of South Africa is one sovereign, democratic state founded on the following values:

- (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.....

Thus human dignity and environmental justice are linked in that any imposition of environmental injustice will be an infringement of the right to dignity. Therefore people whose houses are located next to industries and hazardous waste sites and are subject to continuous environmental pollution and those who stay in the informal settlements without access to clean air and water may claim to have their human dignity infringed.

This means that environmental injustices that most citizens currently face can be challenged through the courts using section 10 as it impairs their right to dignity and deprive them of an environment that is not harmful to their health and well-being. Any conditions that affect people's health and well-being in terms of section 24 potentially also infringe their dignity.

### **2.3.3 The property clause (section 25)**

Due to South Africa's past political history, environmental issues and land dispossessions are linked as many unfair land dispossessions were affected by the previous government to create protected areas.<sup>113</sup> However the Constitution in section 25 guarantees everyone the right not to be deprived of their property unless it is for public interest purposes.<sup>114</sup> The term 'public interest' includes the land reform

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<sup>113</sup> Glazewski J (1999) 10.

<sup>114</sup> Section 25 of the Constitution of the Republic of South Africa of 1996 provides that :

- (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 public purpose or in public interest; and
  - (b) Subject to compensation, the amount of which and the time and manner of payment of which have either been agreed to by those affected or decided or approved by a court
- (3) The amount of compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interest of those affected, having regard to all relevant circumstances, including-

objectives of the government and the need to bring about equitable access to all South African natural resources.<sup>115</sup>

In *Bengwenyana Minerals Pty Ltd v Genorah Resources (Pty) Ltd*<sup>116</sup> the Court had to determine the appropriateness of administration action against South Africa's history of the unequal impact on control and access to the riches and diversity of the country's natural resources has had on the allocation and distribution of wealth. The Court held that the constitution anticipates 'legislative and other measures...to protect and advance persons disadvantaged by unfair discrimination'.<sup>117</sup> This was relevant for the Bengwenyana people because they were discriminated against by the apartheid government especially on issues of access to land and wealth. The Court held that 'past mining legislation and the general history of racial discrimination in the country prevented Black people from acquiring access to mineral resources and that deprivation of land aggravated the situation'.<sup>118</sup> The Court further held that in addition to the right to own property, people also have a preferent right to prospect on their own land.<sup>119</sup> Thus such right exists because of the interaction between section 24 and 25.<sup>120</sup> The court therefore confirmed the relevance of section 25 to environmental issues in South Africa. Thus, in order to achieve environmental justice, issues such as, unequal control and access to natural resources which have severely impacted on the allocation and distribution of wealth thereby creating an unequal society, will have to be addressed. Section 25 read together with section 10 (1)<sup>121</sup> of the Restitution of Land Rights Act 22 of 1994 also addresses environmental justice for the people who lost their land and resources due to the apartheid era land

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- (a) The current use of the property;
  - (b) The history of the acquisition and use of the property;
  - (c) The market value of the property
  - (d) The extent of direct state investment and subsidy in the acquisition and beneficial capital improvement of property; and
  - (e) The purpose of the expropriation

(4) .....

<sup>115</sup> Glazewski J (1999) 10.

<sup>116</sup> (2010) (3) BCLR 229 (CC).

<sup>117</sup> (2010) (3) BCLR 229 (CC) para 3.

<sup>118</sup> (2010) (3) BCLR 229 (CC) para 28.

<sup>119</sup> (2010) (3) BCLR 229 (CC) para 73.

<sup>120</sup> Christiansen E (2013) 262.

<sup>121</sup> Section 10 (1) of the Restitution of Land Rights Act 22 of 1994 Provides that: " A person who or the representative of any community which is entitled to claim restitution of a right in land, may lodge such claim, which shall include a description of the land in question, the nature of the right in land of which he, she or such community was disposed and the nature of the right or equitable redress being claimed, on the form prescribed for this purpose by the Chief Land Claims Commissioner under section 16".

resettlement policies by providing them with the option of receiving compensation for the land or alternatively giving them back their land. Furthermore section 25 advances the government's effort to provide all citizens with a healthy environment through the provision of proper housing, energy and adequate sanitation by allowing the government to expropriate land with compensation for public interest. Provision of citizens with adequate land, housing, energy and sanitation advances environmental justice and helps in realising the section 24 right to an environment that is not harmful to ones' health and well-being. Proper sanitation, housing and energy sources will reduce reliance on the bucket system, reduce exposure to diseases and reduce the high usage of fossil fuels thereby advancing environmental justice.

The meaning of "property" in section 25 is broad and should be understood to include natural resources and other public goods, such as, mountains, rivers and nature parks.<sup>122</sup> Thus people have the right to have the integrity of such property maintained. However such a right to property has to be exercised with restraint in that it must not cause harm to neighbours, e.g. pollution resulting from the activities of a neighbour may affect the health and wellbeing of all the people in the surrounding areas, thereby infringing their section 24 right. Equitable access to natural resources ensures that all people have a chance to develop economically and socially and that some of the environmental challenges (e.g. access to infrastructure, clean water, clean air and proper sanitation) that people face are eradicated which in turn help realise the right to a clean health environment and advance environmental justice.

Therefore section 25 supports section 24 and is very important especially within the current environmental justice issues of land reform, acid mine drainage and the debate over the economic, social and environmental viability of the current mines ownership schemes.

Whilst all the rights discussed above are substantive rights, the rights discussed below are procedural rights. Thus all the rights in the constitution dealing with access to information, just administrative action, and access to the courts, arrest and detainment of accused persons, evidentiary rules and privileges and rights regarding

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<sup>122</sup> Kotze J (2007) 47.

assistance of counsel fall into the category of procedural rights. Therefore procedural rights are secondary to substantive rights mostly because they are rights that deal with determination of facts governing the application of substantive rights<sup>123</sup>. Procedural rights are therefore derived from substantive rights we possess and exist primarily as instruments to help realise the substantive rights<sup>124</sup>. Some of the procedural rights that are relevant to the environmental justice cause will be discussed in the following section...are:

#### **2.3.4 Access to information (section 32) and access to courts( section 34).**

Section 32 of the Constitution<sup>125</sup> guarantees everyone access to information. This is important as availability of information has a great effect on the enforceability of rights, including section 24. The right of access to information provided by section 32 is broad enough to include information used in decision making, including policies and criteria used by the administrative bodies to reach a particular decision.<sup>126</sup> Thus in the environmental context, administrative action, policy and technical considerations and other measures may have a direct and indirect bearing on the environment and developers who will be responsible for the infrastructure development.<sup>127</sup>

Other legislation, such as, the Promotion of Access to Information Act 2 of 2000 which was passed to give effect to section 32, also plays a great role in accessing information. Section 36 (2) (c), 46 (a) (ii) and 70 (1) of the Act specifically make provision for access to information held by commercial industries and third parties for public safety and environmental risk.<sup>128</sup>

Constitutional access to information has been subject to judicial scrutiny as in the case of *Minister for Provincial and Local Government v Unrecognised Traditional*

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<sup>123</sup> Alexander L (1998) 23.

<sup>124</sup> Alexander L (1998) 42.

<sup>125</sup> Section 32 provides that (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 administration and financial burden on the state.

<sup>126</sup> Kotze J (2007) 49.

<sup>127</sup> Kotze J (2007) 49.

<sup>128</sup> Kotze J (2007) 50.

*Leaders, Limpopo Province, Sekhukhuland* <sup>129</sup> where the Court argued that the provisions in PAIA limiting access to information should be construed in light of the constitution particularly section 32. Judge Jafta, AJA held that

*'.....the genesis of the legislation [The Promotion of Access to Information Act] was the Constitution and the Act must be interpreted with due regard to its terms and spirit. The right of access to information held by the state is couched therein in wide terms. Subsection 44(1)(a) must be construed in the context of s 32(1)(a), read with s36 and 39(2) of the Constitution. It is clear that s44 (1) (a) limits the right of access to information and s36 of the Constitution requires that the scope of such a provision be restricted only to an extent which is reasonable and justifiable. Section 39(2) obliges every court to promote 'the spirit, purport and objects of the Bill of Rights' when interpreting any legislation. It must also be borne in mind that the Act was enacted in order to give effect to access to information and promote the values of openness, transparency and accountability which are foundational to the Constitution.'*<sup>130</sup>

Furthermore NEMA which was passed to give effect to section 24 of the Constitution under section 31 (1) (a) and 2 (4) (k) also provides for the right of access to information for people affected by environmental pollution. Section 2 (4) (k) requires that 'decisions be taken in an open and transparent manner and access to information be provided in line with the law'<sup>131</sup>, and section 31 (1) (a) 'provides for everyone to be entitled to access to information held by the state and its organs on issues pertaining to environmental pollution and degradation'.<sup>132</sup>

Furthermore section 34 of the Constitution<sup>133</sup> also supports section 24 and gives everyone the right to approach a court of law or tribunal to have an environmental dispute or any other dispute adjudicated on. These sections are interlinked since access to information is vital for an environment litigation case to be successful.

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<sup>129</sup> 2005 (2) SA 110 (SCA).

<sup>130</sup> 2005 (2) SA 110 (SCA) para 16.

<sup>131</sup> Section 2 (4) (k) of the National Environment Management Act 108 1998.

<sup>132</sup> Section 31 (1) of the National Environment Management Act 108 of 1998.

<sup>133</sup> Section 24 of the Constitution of Republic of South Africa of 1996.

### **2.3.5 Just administrative justice (section 33)**

S33 of the Constitution provides for administrative justice in South Africa as it reads that:

*'(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'.*

Thus section 33 advocates for administrative justice which is a vital component of environmental justice. It aims to ensure good administration, and ensuring fairness in administrative action promotes public participation and strengthens the notion of accountability to the public.<sup>134</sup> This is in sharp contrast to the system of parliamentary sovereignty used by the apartheid government where the people and the courts had no say on with regards to administrative action taken by the government. The government was accountable only to the parliament.

However in accordance with the Constitution any unlawful and unreasonable application of administrative action will be contrary to the provisions of the Administrative Justice Act 3 of 2003 and will infringe on section 33 of the Constitution. Thus any unjust administrative action on the environmental issues can be challenged using section 33. Therefore section 33 plays a vital role in supporting the achievement of environmental justice.

### **2.4 Enforcement and limitation of Rights**

Section 38 of the Constitution<sup>135</sup> is the legal basis for *locus standi* on any violation of the rights in the Bill of Rights. It promotes enforcement of the rights in the Bill of Rights, and offers a wide *locus standi* which links with the environmental right which is offered to 'everyone'.<sup>136</sup> Furthermore *locus standi* for environmental purposes is also extended by section 32<sup>137</sup> of the NEMA which allows individuals and groups to act in the interest of the environment. However the rights in the Bill of Rights are not

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<sup>134</sup> Kotze J (2007) 51.

<sup>135</sup> Section 38 of the Constitution of South Africa of 1996.

<sup>136</sup> Kotze J (2007) 52.

<sup>137</sup> Section 32 of the National Environmental Management Act 107 of 1998.

absolute and are subject to limitation in terms of section 36 of the Constitution.<sup>138</sup> Section 36 allows for rights in the Bill of Rights, e.g. the right to an environment that is not detrimental to one's health and wellbeing, to be limited provided that such limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. Thus no one has the right to indiscriminately deny anyone their rights in the Bill of Rights, except in terms of section 36.<sup>139</sup> Thus the constitution envisages situations where the rights in the Bill of Rights might be limited and provide a list of factors that needs to be considered for the limitation to be considered justifiable.

In dealing with an alleged infringement of section 24 rights the court will apply the two stage enquiry. The first stage requires that the court determines whether there has been an infringement of a right in the Bill of Rights. If the first stage of the enquiry is met, then the second stage of the enquiry begins.<sup>140</sup> This stage requires the court applying the factors listed in section 36 to determine whether the limitation of the right is justifiable.<sup>141</sup> The court will have to determine if the infringement is justifiable in an open and democratic society based on human dignity, equality and freedom<sup>142</sup> or that the limit is provided for by a law of general application. From the court's analysis of section 36 it is clear that law of general application includes the common law and statutory law provided that the statute is clear.<sup>143</sup>

The purpose of section 36 is to prevent arbitrarily limitations of rights in the Bill of Rights.

As the Constitutional court said in *S v Bhulwana*

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<sup>138</sup> Section 36 of the Constitution of South Africa of 1996.

<sup>139</sup> Section 36 provides that:

- (1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-
  - (a) The nature of the right
  - (b) The importance of the purpose of the limitation
  - (c) The nature and extent of the limitation
  - (d) The relation between the limitation and its purpose; and
  - (e) Less restrictive means to achieve the purpose
- (2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.

<sup>140</sup> Currie I and De Waal j *The Bill of Rights Handbook 5ed* (2005) 165. (hereafter Currie I and De Waal J (2005))

<sup>141</sup> Currie I and De Waal J (2005) 165.

<sup>142</sup> Currie I and De Waal J (2005) 167.

<sup>143</sup> Kevin I (2007) A Fresh Look at Limitations: Unpacking section 36 (23) *South African Journal on Human Rights*: 76.

*The court places the purpose, effects and importance of the infringing legislation on one side of the scales and the nature and effect of the infringement caused by the legislation on the other. The more substantial the inroad into fundamental rights, the more persuasive the grounds of justification be.*<sup>144</sup>

However in determining the limitation of the rights in the constitution the constitutional court makes use of the proportionality approach as it was applied in *S v Makwanyane*. Although the case dealt with S33 of the Interim Constitution which is similar to section 36 of the final constitution the approach it took has been accepted and subsequently used by the constitutional court in many of its judgements. In *S v Makwanyane* the court analysed the limitation clause as requiring:

*The weighing up of competing values, and ultimately an assessment based on proportionality. This is implicit in the provisions of section 33(1). The fact that different rights have different implications for democracy, and in the case of our Constitution, for "an open and democratic society based on freedom and equality", means that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done on a case by case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests. In the balancing process, the relevant considerations will include the nature of the right that is limited, and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to such a society; the extent of the limitation, its efficacy, and particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question. In the process regard must be had to the provisions of section 33(1), and the underlying values of the Constitution, bearing in mind that, as a Canadian Judge has said, "the role of the Court is not to second-guess the wisdom of policy choices made by legislators."*

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<sup>144</sup> *S v Bhulwana* 1996 (1) SA 388 (CC) para 18.

Thus the proportionality test will be the basis of an analysis of whether there is a reasonable justification of the infringement of section 24 rights. The fact that the right to a clean and healthy environment can't be arbitrarily limited without a reasonable justification provided for by section 36 promotes environmental justice and protects the right of the poor and the marginalised in regards to a clean and healthy environment that isn't detrimental to their health and wellbeing.

## **2.5 Conclusion**

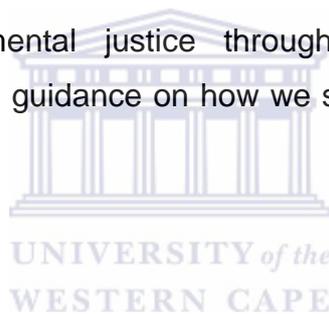
It is clear from the above analysis of the constitution that section 24 places all people in the country irrespective of their race, colour, origin, economic and social status and education, at the centre of the environmental right and its objectives such as environmental justice should be seen in line with important words in the sections such as, sustainable development, health and wellbeing. Furthermore the broader meaning that is given to the term "environment" in South Africa lends itself to the response to socio-economic and environmental issues that affects environmental justice. Thus issues such as environmental degradation that affects the poor and the vulnerable, lack of proper housing, pollution from nearby industries, poor air quality and lack of access to water can be regarded as environmental issues that affect the right to a clean and health environment.

It is clear from the analysis of section 24 that the meaning of the word "health" extends beyond the ordinary dictionary meaning. The term well-being further widens the application of section 24 due to its wider meaning. As I discussed above, wellbeing of an individual extends to and includes environmental interests without evidential health consequences. Furthermore the notion could further be linked to other rights such as human dignity and equality thereby widening the application of the section 24. This all positively contributes towards environmental justice in that clean and healthy environment for all people could only be achieved by addressing the environmental injustices of the past government thereby creating equality for all people of the present generations.

The socio-economic and environmental equality which we seek to achieve can be achieved through sustainable development as it caters for both the needs of the present and future generations. Interestingly section 24(b) also provides for sustainable development making it the basic foundation of economic and

environmental development. Therefore sustainable development is also very important and central to the achievement of environmental justice. Thus in achieving environmental justice through sustainable development section 24 can also be linked with other important rights in the constitution such as, the right to dignity, the property right and the right to access to information and the courts.

From the analysis of section 24, it becomes clear that the constitutional environmental right isn't about stopping human activities but more about fair use of resources and fair distribution and sharing of product emission and waste on both the rich and the poor. In seeking to achieve environmental justice through section 24 the government has tried its best by passing laws such as NEMA, NEMBA e.t.c to ensure that pollution causing activities are limited or prohibited and that the environmental interests of the poor are protected. As seen from all the cases cited in this chapter, the judiciary has also advanced the realisation of section 24 right, thereby advancing environmental justice through assessing, interpreting the environmental right and giving guidance on how we should apply and adhere to the right.



## **Chapter 3**

### **Sustainable Development and what it means for Environmental Justice**

#### **3.1 Introduction**

Global environmental problems such as, increasing pollution and extreme resource consumption on the part of global elites has negative implications on the livelihood and health of the poor.<sup>145</sup> The environmental crisis is tied to increasing socio-economic injustices and the exclusion of the poor yet they are the ones that suffer the most from pollution and environmental degradation.<sup>146</sup> The imbalance in economic distribution is highlighted in that the 20% of the world's richest consumes 80% of the world resources results in the calls for justice for the poor.<sup>147</sup> This global pattern of deprivation and over consumption is also evident in South Africa which has one of the most unequal societies in the world.<sup>148</sup> Thus such disparities between the rich and the poor in regards to distribution of natural resources and wealth could be addressed by sustainable development. Sustainable development is thus concerned with intra-generational equity in the distribution of resources and environmental burdens, hence justice will be achieved. Thus sustainable development could be the foundation of environmental justice which could enhance the achievement of harmony between the environmental and socio-economic needs of the poor. Sustainable development therefore encourages the protection of the environmental rights especially of the poor in terms of section 24 of the Constitution while at the same time improving their lives through the advancement of the provision of their socio-economic needs. Therefore sustainable development is the pillar of the protection of section 24 rights and the foundation of achieving environmental justice in South Africa.

In this chapter I will be discussing the notion of sustainable development and how it has been developed, analysed and interpreted to advance environmental justice in South Africa. I will start with a brief discussion of the notion of sustainable

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<sup>145</sup> Cock J 'Sustainable Development or Environmental justice: Questions for the South African Labour Movement from the Steel Valley Struggle' (2007) 40 1&2 Labour, *Capital and Society Journal* 37. (Hereafter Cock J (2007))

<sup>146</sup> Cock J (2007) 37.

<sup>147</sup> Cock J (2007) 45.

<sup>148</sup> Cock J (2007) 45.

development and its link with environmental justice before I will dissect how these notions are applicable in the South African context. Lastly I will discuss how sustainable development furthers environmental justice.

### **3.2 The term “Sustainable Development”**

The concept of sustainable development is characterised by the integration of three elements: the economy, humans and the ecology.<sup>149</sup> Sustainable development was defined in the report by the WCED “Our common future” as a process of change in which the exploitation of resources, the direction of investments, the orientation of technology development and institutional changes are all in harmony and enhance both current and future potential to meet human needs and aspirations.<sup>150</sup> Thus development which meets the needs of the present generation without compromising the ability of future generations to meet their own needs could be regarded as the aim of sustainable development.<sup>151</sup> This aim acknowledges that natural resources would have to be exploited to meet our developmental objectives but such exploitation and use of the natural resources could not happen in a limitless way.<sup>152</sup> Under this definition, the overriding priority is the achievement basic needs for all humankind for those living in absolute poverty.<sup>153</sup> Secondly the definition point to the limitation imposed by the technological, cultural and social organisation on the environmental ability to meet present and future generations.<sup>154</sup> Therefore at the heart of the Brundtland definition for sustainable development is the belief in equity between the current and future generations. The definition advocates for economic growth and environmental maintenance, simultaneously for each nation to achieve full economic potential.<sup>155</sup>

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<sup>149</sup> Pereira L ‘The Role of Substantive Equality in Finding Sustainable Development Pathways in South Africa’ (2014) 147 *McGill International Journal of Sustainable Development Law and Policy* 149. (Hereafter Pereira L (2014))

<sup>150</sup> World Commission on Environment and Development ‘Our Common Future’ Brundtland Report 1987 accessed at [www.un-documents.net](http://www.un-documents.net) 46.

<sup>151</sup> Feris L. A ‘The Role of Good Environmental Governance in The Sustainable Development of South Africa’ 13 (1) (2010) *Potchefstroom Electronical Law Journal* 83. (hereafter Feris L. A (2010))

<sup>152</sup> Feris L. A (2010) 83.

<sup>153</sup> Kirkby J, O’Keefe P and Timberlake L ‘*The EarthScan Readers in Sustainable Development*’ (1995) 7. (hereafter Kirby et al (1995))

<sup>154</sup> Kirkby et al (1995) 7.

<sup>155</sup> Kirkby et al (1995) 7.

Therefore one can argue that sustainable development requires a progressive transformation of the economy and society.<sup>156</sup> Thus developmental policies have to pay attention to such considerations as changes in access to resources and the distribution of costs and benefits.<sup>157</sup> Sustainable development implies concerns for social equity between generations a concern that has to be extended to equity within generations.<sup>158</sup>

### **3.3 The content of Sustainable Development**

#### **3.3.1 Intra-generational Equity**

This principle requires that the state must fairly allocate and regulate scarce resources to ensure that benefits of environmental resources, costs incurred in protecting them and any degradation are equally shared by members of all society.<sup>159</sup> By this, Intra-generational equity makes environmental justice one of its core components as it seeks to obtain equitable sharing of resources and environmental burdens between all races.<sup>160</sup>

Thus Intra-generational equity is concerned with equity among those that are living today (the current generation). Therefore under the principle the state has responsibility to devote resources to help all people to meet their basic needs for food, water and shelter.<sup>161</sup> The achievement of equity amongst the living is not only limited to the provision of socio-economic needs of the poor but is also linked to environmental justice issues that the poor face e.g. exposure to hazardous waste, pollution from industries, to acid water drainage and environmental degradation.

As Weiss argues, poverty is the primary cause of ecological degradation. In communities where poverty is rife there is more likely to be over exploitation of resources they have to meet their basic needs<sup>162</sup> e.g. deforestation caused by people seeking firewood due to lack of electricity or fuel. As the eco-system

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<sup>156</sup> Dresner T 'The Principles of Sustainability' (2002) 67. (hereafter Dresner T (2002))

<sup>157</sup> Dresner T (2002) 67.

<sup>158</sup> Dresner T (2002) 67.

<sup>159</sup> Shelton D and Kiss A 'Foundations of International Environmental Law' (2004) 15. (hereafter Shelton et al (2004))

<sup>160</sup> Shelton et al (2004) 15.

<sup>161</sup> Weiss E D 'In Fairness to Future Generations and Sustainable Development' 8 (1992) *American University International Law Review* 3. (hereafter Weiss E D (1992))

<sup>162</sup> Weiss E D 'Our Rights and Obligations to Future Generations for the Environment' 84 (1990) *International Environmental Law Journal* 201. (hereafter Weiss E D (1990))

deteriorates, these communities of poor people are the ones that will suffer the most as they can't control or adapt to degradation.<sup>163</sup> Therefore Intra-generational equity focuses in environmental justice issues such as equitable access to socio –economic benefits by the poor and protection from environmental degradation.<sup>164</sup> As beneficiary of the eco-system, all people of the present generation are entitled to equitable access to and use of the ecosystem.<sup>165</sup>

### **3.3.2 Inter-generational equity**

Weiss argues that we hold the earth and its resources as a trust passed to us by our ancestors for our benefit and we have a responsibility to pass it to our descendants in good condition for their use.<sup>166</sup> Thus through inter-generational equity, we have a right use the eco-system to our benefit but we also have a responsibility to look after it for the future generations. We as the current generations have a responsibility to future generations for the robustness and integrity of the eco-system.<sup>167</sup> Therefore we as the current generation can either use its resource in a sustainable manner or degrade it and destroy it to the consequences of future generations.<sup>168</sup> We have a duty of care towards the eco-system and all generations (past, present and future) have an equal place in relation to the ecosystem and there is no basis for special preference for any generations.<sup>169</sup> Thus environmental justice issues such as lack of access to clean water, housing, sanitation and environmental degradation points towards the failure by the current generation to care for the environment and for the future generations. Therefore intergenerational equity points to the link between environmental injustices of different generations in that the future generations of those whom we currently consider to be poor, are going to inherit those socio-economic and environmental problems. We as the current generation have an obligation to break this cycle of injustice by using the natural system to improve the human condition of the poor. When we degrade the environment through unsustainable use, and distribution of resources, we violate our inter-generational obligations to cater for the environment.<sup>170</sup> The future generations of the poor also

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<sup>163</sup> Weiss E D (1990) 201.

<sup>164</sup> Weiss D E (1990) 201.

<sup>165</sup> Weiss D E (1990) 201.

<sup>166</sup> Weiss D E (1990) 201.

<sup>167</sup> Weiss D E (1990) 201.

<sup>168</sup> Weiss D E (1992) 201.

<sup>169</sup> Weiss D E (1992) 201.

<sup>170</sup> Weiss D E (1992) 20.

wants to inherit the earth in good condition and with good access to resources so that that they can fulfil their basic needs.<sup>171</sup> Thus intra-generational equity should be used to advance inter-generational equity. As Weiss argues, there is a genetic urge in most humans to care for their offspring and that caring for the future is an effective way of managing the present.<sup>172</sup>

### **3.4 Relevance of Sustainable Development.**

Intra-generational equity, intergenerational equity and equitable use make the notion of environmental justice a component of sustainable development and they require an equitable distribution of environmental burdens and benefits within the current and future generations.<sup>173</sup> The state as a guardian of all resources has to ensure that all resources are shared equally and that the environmental rights of all the realised. As Hunter argues, the failure to protect and promote human rights prevents progress towards environmental protection and sustainable development....<sup>174</sup> He goes on to argue that it is no accident that where the environment has been most devastated from large uncontrolled development projects, human rights abuses especially those of socio-economic and environmental nature are the most severe.<sup>175</sup> Therefore environmental justice is likened with the concept of sustainable development as they both seek to encourage the development of a sustainable economy that equally caters for the needs of the people especially the poor and their future generations who are likely to inherit the unequal environmental burdens of the current generations.

In support of this, Field argues that sustainable development should be regarded as the vehicle chosen and employed by the state to negotiate the tensions arising from the need for socio-economic development and environmental protection of planet resources.<sup>176</sup> Sands identify the legal elements of ecological sustainable development as,

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<sup>171</sup> Weiss D E (1992) 21.

<sup>172</sup> Weiss D E (1992) 21.

<sup>173</sup> Murombo T 'The Utility of Environmental Rights to Sustainable Development in Zimbabwe: A contribution to Constitutional Reform Debate' *African Human Rights Journal* (2011) 132. (Hereafter Murombo T (2011))

<sup>174</sup> Hunter D 'International Law and Policy' (2002) 1281. (Hereafter Hunter D (2002))

<sup>175</sup> Hunter D (2002) 1281.

<sup>176</sup> Field T 'Sustainable Development versus Environmentalism: Competing Paradigms of for the South African EIA Regime' (2006) 123 *South African Law Journal* 409, 411.

*'integration of environmental protection and economic development (the principle of integration); sustainable utilisation of natural resources (the principle of sustainable use); the pursuit of equity in the use and allocation of natural resources (the principle of intra-generational equity); and the need to preserve natural resources for the benefit of present and future generations (the principle of inter-generational equity)'.<sup>177</sup>*

All the aforementioned elements are important for the achievement of environmental justice as they address environmental issues that the poor face such as poor sanitation, lack of access to clean water, lack of housing, unequal burden of environmental damage and distributional inequality in natural resource use.

Of importance in the South African context is the principle of integration which requires any development to cater for environmental protection and economic development. This ensures that the poor are not further exposed to further environmental problems whilst also protecting and promoting economic development which is vital for the realisation of socio-economic rights in section 27. Integration requires that socio-economic development be sustainable and that environmental protection remains part of the overall decision making processes<sup>178</sup> and should not be sacrificed for the achievement of socio-economic development as this will adversely affect the poor who are already bearing the brunt of environmental degradation.

All legal elements that Sands identifies are the means to which we can further sustainable development. They would include equity in use and allocation of natural resources and distributional equalities in the environmental burdens between the poor and the rich. By this, sustainable development would have integrated environmental justice as one of its pillars and set the foundation for socio-economic development that protects the poor and the vulnerable.

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<sup>177</sup> Sands P, Peel J, Fabra A, Mackenzie R *Principles of International Environmental Law 3rd Edition* (2012) 207.

<sup>178</sup> Feris L. A (2010) 86.

### **3.5 Critique of Sustainable Development**

Sustainable Development is regarded to be vague and could be shaped; altered and constructed to meet the objectives of whomever employs it.<sup>179</sup> Thus industrialist could mould the meaning of sustainable development to meet their economic growth likewise the environmentalist could also do the same. Pereira is of the opinion that the concept is vague due to false believe that environmental degradation is unrelated to poverty eradication and the imprecision of suitable pointers of sustainable development.<sup>180</sup> Furthermore the definition of the term “development” is also vague. The question of defining the term ‘development’ so that it can be able to further the objectives of sustainable development is very difficult. Do we define it in terms of improving socio-economic prospects for human beings, human resources development or in terms of economic growth?

However, taking an either strongly developmental or environmental approach will not assist in advancing the harmony that is brought by sustainable development through its acknowledgement of the link between environmental and socio- economic objectives.<sup>181</sup> Thus the relevance of sustainable development in the environmental justice cause is brought by the principle of integration which requires environmental and socio-economic objectives to be reconciled in the decision making processes.

As Pereira argues there is an undisputed link between environmental degradation and social problems such as, poverty, lack of access to clean water and housing, which have environmental justice implications.<sup>182</sup> Therefore sustainability should be viewed as the presence of ecological conditions necessary to support human life at a certain quantified level of wellbeing through current and future generations.<sup>183</sup> Thus under the notion of sustainable development, a country needs to deal with equitable allocation of resources which are under conditions of increased stress and are very scarce.<sup>184</sup> Therefore one can argue that the widening of the gap between the rich and the poor in South Africa is an indication of failure by the government to promote sustainable development and equitable distribution, which is aggravating the environmental injustice that the poor is facing. Therefore the realisation of certain

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<sup>179</sup> Pereira L (2014) 147.

<sup>180</sup> Pereira L (2014) 151.

<sup>181</sup> Pereira L (2014) 156.

<sup>182</sup> Pereira L (2014) 175.

<sup>183</sup> Pereira L (2014) 175.

<sup>184</sup> Pereira L (2014) 176.

socio-economic rights and environmental justice requires a sound environmental resource base upon which economic development should be based on. As I have argued in the previous chapter socio-economic rights are linked to safety and stability of the natural system and are vital for the realisation of section 24, right to a healthy environment that is not detrimental to ones wellbeing. Therefore the link places emphasis on sustainable development, environmental justice and fairness in usage of natural resources and distribution of environmental burdens

### **3.6 Sustainable Development as a means to achieve Environmental Justice in South Africa.**

The constitutionalisation of sustainable development affirms the importance to erase past environmental and socio-economic injustices. It is clear from the wording of section 24 (b) (iii), that government prioritise environmental protection, however reasonableness in the South African context requires government to address more pressing developmental issues such as unemployment, poverty, lack of access to clean water and environmental justice.<sup>185</sup> The question then is, how do we balance environmental protection with our developmental needs? The answer is clear from section 24 (b) (iii) which provides that ecological sustainable development is the kind of development that is envisioned for the country. In *BP Southern Africa Pty Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs* case, the court emphasized the importance of the notion of sustainable development in the aforementioned section when it argued that the concept of sustainable development,

*'Is the fundamental building block around which environmental legal norms have been fashioned, both internationally and in South Africa, and is reflected in section 24(b) (iii) of the constitution. Pure economic principles will no longer determine in an unbridled fashion whether a development is acceptable. Development, which may be regarded as economically and financially sound, will in future be balanced by its environmental impact, taking coherent cognisance of the principle of intergenerational equity and sustainable use of resources in order to arrive at an integrated management of the environment, sustainable development and socio-economic concerns. By elevating the environment to a fundamental justiciable human right, South Africa has*

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<sup>185</sup> Kotze L J ' The Constitutional Court's Contribution to Sustainable Development in South Africa' (2003) 6 *Potchefstroom Electronical Law Journal* 85. (hereafter Kotze L. J (2003))

*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*.<sup>186</sup>

In support of this Sachs J in *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province Case* (hereafter *Fuel Retailers case*) argued the ecologically sustainable development qualifies as the type of development that the constitution envisioned.<sup>187</sup> Therefore environmental considerations are placed more emphasis on and are regarded as the foundation of section 24 of the Constitution. Thus section 24 should be regarded as favouring sustainable development which requires integration of people socio-economic needs and environmental protection which are coined as ecological sustainable development in section 24 (b).<sup>188</sup>

Thus in the *Fuel Retailers case* the court recognised that section 24 should be understood as promoting sustainable development whilst at the same time requiring environmental protection. The environment cannot be protected if development doesn't pay attention to environment destruction which mostly affects the poor.

In giving effect to section 24 of the Constitution, the legislature passed NEMA which adopted a comprehensive and wide definition of the term sustainable development which includes at least eight internationally acknowledged sub principles located in section 2 of NEMA.<sup>189</sup> NEMA also includes other set of principles provided in the whole of section 2. Of greater importance in section 2 is section 2 (4) which provides the principles that underlies the notion of sustainable development in South Africa.<sup>190</sup>

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<sup>186</sup> 2004 (5) SA 124 (W) 24-25.

<sup>187</sup> 2007 (6) SA 4 (CC) 113- 117.

<sup>188</sup> Feris L. A (2010) 92.

<sup>189</sup> Glawzeski J and Plit L 'Towards the Application of The Precautionary Principle in South African Law' (2015) 1 *Stellenbosch Law Review* 215. (Hereafter Glawzeki J and Plit L (2015))

<sup>190</sup> Section 2 (4) (a) of NEMA provides that: '*Sustainable development requires the consideration of all relevant factors including the following:*

- (i) That the disturbance of ecosystems and loss of biological diversity are avoided, or, where they cannot be altogether avoided, are minimised and remedied;*
- (ii) that pollution and degradation of the environment are avoided, or, where they cannot be altogether avoided, are minimised and remedied;*
- (iii) that the disturbance of landscapes and sites that constitute the nation's cultural heritage is avoided, or where it cannot be altogether avoided, is minimised and remedied;*
- (iv) that waste is avoided, or where it cannot be altogether avoided, minimised and reused or recycled where possible and otherwise disposed of in a responsible manner;*
- (v) that the use and exploitation of non-renewable natural resources is responsible and equitable, and takes into account the consequences of the depletion of the resource;*

Thus all socio-economic and developmental projects need to be conducted in cognisance of all those principles. Therefore any developmental project, in its planning, implementing and closing stages has to strictly adhere to all the principles listed in section 2 of NEMA if it not to fall foul of protecting the environmental right in section 24. Furthermore section 2 (1) provides that:

*'The principles set out in the section apply throughout the Republic to the actions of all organs of state that may significantly affect the environment and—*

*(e) Guide the interpretation, administration and implementation of this Act, and any other law concerned with the protection or management of the environment.'*<sup>191</sup>

Also of major importance in section 2 is the principle of environmental justice in section 2 (4) (c) which requires that '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 vulnerable and disadvantaged persons'. Therefore section 2 (4) (c) requires the government to set up policies that address issues of unfair distribution of pollution and environmental hazards, even those that were caused by the apartheid government. Thus, section 2 (4) (c) can also be used to challenge the current trends in distribution of environmental resources which favours the rich to the detriment of the poor thereby widening the gap of wealth between the two classes. This section is important in light of the environmental challenges that the country is facing e.g. water scarcity, climate change, industrial locations which disadvantage the poor and the issue of acid water drainage. It makes it clear that in dealing with the aforementioned problems the government must not unfairly discriminate against the poor and the burdens that arise from the problems should be equitably distributed. The current gap between the poor and the rich points to the unequal distribution of the resources in the ecosystem which should be addressed using section 2(4) (c).

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*(vi) that the development, use and exploitation of renewable resources and the ecosystems of which they are part do not exceed the level beyond which their integrity is jeopardised;*  
*(vii) that a risk-averse and cautious approach is applied, which takes into account the limits of current knowledge about the consequences of decisions and actions; and*  
*(viii) that negative impacts on the environment and on people's environmental rights be anticipated and prevented, and where they cannot be altogether prevented, are minimised and remedied.'*

<sup>191</sup> Glawzeki J and Plit L (2015) 215.

This environmental justice principle should be understood in line with the preamble of NEMA which defines sustainable development as being the integration of social, economic and environmental factors into planning, implementation and decision making which benefits both the present and future generations. Thus sustainable development addresses the issue of environmental protection and socio-economic development of the poor; all which have implications on environmental justice. Sustainable resource use has to be a precondition for poverty eradication. Unsustainable socio-economic development will further expose the current and future generations to more environmental injustices, adding to those that they inherited from the past generations. Environmental justice as a principle of sustainable development will aim to address sustainable infrastructure development, built an inclusive economy especially for the poor blacks who are not regarded as part and parcel of the apartheid government formal economy and further enhance environmental protection.<sup>192</sup> Thus the environmental justice principle under sustainable development requires focus to be on justice and human rights elements of such development. Sustainable development seeks to improve the environmental health conditions within which impoverished communities live thereby improving on their living conditions. This is in response to the fact that poor communities, while without responsibility for environmental degradation, bears the brunt of that degradation and are less likely to adapt to changing conditions created by unsustainable resource use.<sup>193</sup> As Smith argues effective poverty eradication which is one of the goals of environmental justice deeply relies on conservation and protection of ecological resources and on sustainable economic development that addresses the needs of the poor.<sup>194</sup>

Under environmental justice, the economic dimension of sustainable development will have to focus on job creation for the poor, raising of their income levels to cover the gap between the rich and the poor and ensure that they are integrated into the formal economy. The aim will be to achieve economic sustainability which Kotze refers to as the maximisation of the economic benefits of economic development

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<sup>192</sup> Patel Z 'South Africa's Three Waves of Environmental Policy: (Mis) aligning the Goals of Sustainable Development, Environmental Justice and Climate Change' (2014) 8/3 *Geography Compass* 174.

<sup>193</sup> Smith T 'Enriching Lives, Preserving The Planet: Sustainable Development in South Africa' (2012) 20 *LBJ Journal of Public Affairs* 43. (Hereafter Smith T (2012))

<sup>194</sup> Smith T (2012) 44.

subject to maintenance of services and quality of natural resources over time.<sup>195</sup> Likewise the social dimension will focus on issues pertaining to the social life of the poor. It will focus on issues such as access to clean water, health, housing and education with the aim to achieve social sustainability which Kotze describes as the sustenance of all moral capital of a particular society.<sup>196</sup> The last goal of environmental justice will be environmental sustainability which concentrates on the resource base as an object of sustainability and aims to sustain global life support systems in an indefinite way.<sup>197</sup> Here issues such as past environmental injustices of the past, current pollution and environmental problems of the poor are of great importance. To sustain the resource base in the future we will have to address the environmental injustices of the past apartheid government.

As the constitutional court argued in Fuel Retailers case sustainable development doesn't necessarily require a moratorium on socio-economic development but given the inevitable risks consequent upon development, the concept must guide policy and decision makers to ensure that development don't unnecessarily damage life support systems.<sup>198</sup> Thus in the court's analysis of section 24 (b) it becomes clear that to achieve sustainable development the principle of integration which requires development and environment to be reconciled, have to be observed.<sup>199</sup> Ferris illustrates how the principle of integration would work with the following example

*'If a waste site is located close to a residential area, where that site generates an income for the managing company and the residents that live nearby, should then that site be closed down so as to accommodate environmental health considerations? Or should it be allowed to remain open in order to accommodate social and economic considerations? How does one integrate, if at all, these three contesting considerations? One could argue that integration is the 'happy medium' where one tightly regulates the operations of the waste site so as to minimise the exposure of the nearby residents, while*

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<sup>195</sup> Kotze L. J (2003) 86.

<sup>196</sup> Kotze L. J (2003) 86.

<sup>197</sup> Kotze L. J (2003) 86.

<sup>198</sup> 2007 (6) SA 4 (CC) Para 58.

<sup>199</sup> Murombo T 'From Crude Environmentalism to Sustainable Development: Fuel Retailers' (2008) 488 *South African Law Journal* 492. (Hereafter Murombo T (2008)).

*still ensuring that the site contribute to the economy and provides a source of income for its workers'.<sup>200</sup>*

Also of greater importance in the environmental justice discourse is the argument by the court that in the consideration of socio-economic factors, environmental authorities have to take into account the principle that requires people's needs to be placed first. In explaining this, the court stated that the idea of sustainability implies continuity and reflects a concern for socio-economic equity between generations, a concern that must logically be extended to equity within each generation.<sup>201</sup> That's the current socio-economic and environment inequality between generations and within generations defeats the achievement of sustainability. The gap between the rich and the poor is wide and keeps widening by the each year due to economic inequality. Therefore short term developmental interests with long term environmental effects have to be inhibited in favour of long-term development interests which benefit both the current and future generations. Most of the environmental injustices poor people face today are a result of failure by the apartheid government to adhere to this principle. Highly polluting industries and waste disposal sites and noisy factories were built next to settlements of poor and marginalised people in order to support short-term developmental benefit, such as, control of the movement of people into the city and control of urban population growth.<sup>202</sup> The long-term sustainability of such policies was never given careful consideration; hence environmental pollution is now a greater threat to the realisation of the environmental right, especially for most urban residents in the informal settlements. People still suffer from pollution coming from industries, and which causes them to suffer from diseases such as, asthma and tuberculosis. Further, the use of fossil fuels and firewood is still very high, which over time will disturb the rich bio-diverse ecosystem.<sup>203</sup>

Another good example of the failure by the government to adhere to the principle of intra-generational equity is its Reconstruction and Development Programme (RDP) for erecting low-cost housing with the aim of eradicating shacks within the poor

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<sup>200</sup> Feris L ' Sustainable Development in Practise: Fuel Retailers Association of Southern Africa v Director – General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province' (2008) 1 *Constitutional Court Review* 248- 249. (hereafter Feris L (2008))

<sup>201</sup> 2007 (5) SA 4 (CC) 116.

<sup>202</sup> Du Plessis A (2011) 298.

<sup>203</sup> Du Plessis A (2011) 298.

communities whilst failing to equip such houses with vents, chimneys or means to release harmful fumes caused by indoor cooking into the air.<sup>204</sup> Thus in fulfilling section 24 (b) the government will have to acknowledge and consider notions, such as inter-generational environmental justice and pollution and ecological degradation in its decision making processes.

Section 24 (b) places positive duties upon the State to protect the environment. Thus in the environmental justice discourse the obligation requires the State to look at the adaptation of previously disadvantaged people to environmental threats caused by external factors, such as, farms, industries and mines, climate change, economic setbacks, unemployment and population growth.<sup>205</sup>

Section 24 (b) requires measures to be put in place to address the environmental injustices of the past. These measures include the provision of public transport, upgrading of informal settlements, sustainable essential services delivery, and promotion of efficient energy and reduction of pollution in informal settlements where majority of the previously disadvantaged citizens inhabit.<sup>206</sup>

In order to advance environmental justice the notion of sustainable development needs to be understood in terms of our history which helped to shape our Constitution. Section 1 of the Constitution sets out its founding values as 'one of a sovereign, democratic state founded on the values of human dignity, the achievement of equality and the advancement of human rights and freedoms'.<sup>207</sup> Thus the values of the Constitution give effect to the vision of transforming an unjust society and fostering greater equality.<sup>208</sup> Therefore through sustainable development (in section 24(b)) the Constitution sets out to transform the environmental injustices of the previous apartheid government in order to bring equality to all people in South Africa.

In light of all the past injustices and the need to strengthen equity the court in Fuel Retailers case noted that the constitution and environmental legislation required

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<sup>204</sup> Du Plessis A (2011) 298.

<sup>205</sup> Pieterse M (2014) 184.

<sup>206</sup> Pieterse M (2014) 183.

<sup>207</sup> Section 1 of the Constitution of the Republic of South Africa of 1996.

<sup>208</sup> Feris L (2008) 39.

public participation by those whose needs development must serve.<sup>209</sup> By this the court highlighted the importance of public participation especially by the poor who suffers the most from environmental degradation. Public participation ensures that their needs and concerns are heard, addressed and catered for in the sustainable development agenda, thereby enhancing environmental justice. The public participation principle in section 2 (4) (f) requires the participation of all interested and affected parties in environmental governance to be promoted, and for all people to have the opportunity to develop the understanding, skills and capacity necessary for achieving equitable and effective participation and participation by vulnerable and disadvantaged persons.

However there are also various other legislations that have been passed that have a direct effect on the issues of environmental justice in South Africa. These includes section 31 of the Environment Conservation Act<sup>210</sup>, section 28 (1) (A) of NEMA<sup>211</sup> and section 19 of the National Water Act.<sup>212</sup> However these provisions are not dealt with in this research paper and only a brief discussion of them has been included in the footnotes.



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<sup>209</sup> 2007 (5) SA 4 (CC) 52.

<sup>210</sup> The section gives powers to environmental authorities to direct a polluter to take steps to prevent or minimise damage to environment and to rehabilitate any damage caused to the environment. Furthermore subsection 3 of the section gives powers to the authorities to take necessary steps to rehabilitate the environmental damage caused and to recover costs from the polluter. However the problem with the provision is that it doesn't apply to historic pollution as it didn't apply retrospectively.

<sup>211</sup> Section 28 (1) (A) gives effect to the polluter pay principle in section 2 (4) (p), the preventative principle and establishes a duty of care towards the environment and provides for liability in cases where this duty has been breached. The section seeks to enforce environmental justice by ensuring that past culprits of environmental degradation are brought to book. It was passed after the court incorrectly held in *Bareki and Another v Gencor Pty Ltd* that section 28 didn't apply to historic pollution as it didn't apply retrospectively. It is clear from the phrase "every person who caused or has caused....." that section 28 (1) applies retrospectively. Thus all people in terms of section 28 (1) are required to take reasonable measures to prevent pollution or remedy any pollution they would have caused. Therefore section 28 (1) is applicable to all past, present and future conduct that will or may cause environmental damage. Therefore environmental liability brought by section 28 is vital for enforcement of the environmental right in section 24 of the Constitution. It gives the poor who doesn't have any money or resources the option to have the government enforce section 28 on their behalf, by cleaning the environmental damage and recover costs from whoever caused the damage.

<sup>212</sup> The section is identical to section 28 discussed above. It gives the owner of land or a person in control of land who has right to use it, the obligation to take reasonable measures to prevent the pollution of water resources, Similar to section 28, this section applies retrospectively and could be used to address pollution of water resources that happened in the past. This section is very important especially for the poor communities that are suffering from acid water drainage generated from old disused mines and dump sites all over the country

### **3.7 Conclusion**

Sustainable development is a central component of s 24. Sustainable development requires integration – therefore of the promotion of socio-economic rights balanced with ecological restrictions. Thus in essence it ensures an integration of socio-economic and ecological needs in South Africa pursuant to the fulfilment of development that is required to assist the poor and vulnerable. It creates a leitmotif for the implementation of human rights in order to ensure that environmental justice is reached via the promotion of environmental and socio-economic rights. Thus, developmental rights and environmental rights should be guided by sustainable development.

Sustainable development via the elements of intra- and intergenerational equity requires a progressive transformation of the socio-economic lives of the poor. They require equity in the distribution of resources obtained from the eco-system and environmental burdens between the current generations so as not to disadvantage the future generations. Thus equity in natural resources use and distribution of environmental burdens forms the basis of sustainable development. Therefore the current pattern of unequal distribution of resources is unsustainable and fails to advance sustainable development. This failure to advance sustainable development, therefore contributes to more environmental injustice for the poor who will continue to suffer from perpetuating environmental degradation. However, the inclusion of inter and intra generational equity and other principles e.g. those of sustainable development in section 2 of NEMA ensures that the environmental concerns of the poor are integrated in economic development. Thus through section 2 of NEMA, the notion of sustainable development is given practical effect and environmental justice is enhanced.

## **Chapter 4**

### **4.1 Conclusion**

Environmental injustice exists in South Africa as highlighted by the gap of wealth between the rich and the poor. Therefore South Africa requires environmental justice if section 24 is to be realised. Thus, in terms of section 24 of the Constitution, environmental justice should be promoted via reasonable legislation and other measures. It is because of this reason and the need to protect the environmental rights of the poor that NEMA and other legislation were promulgated. Of importance in NEMA is section 2 which contains the principles that underlies environmental protection and socio-economic development in South Africa. Section 2 (4)(c) of the principles specifically refers to environmental justice and requires that environmental justice be pursued so that adverse environmental impacts shall not be distributed in such a manner as to unfairly discriminate against any person, particularly vulnerable and disadvantaged persons. This principle affirms that the environmental provision is not merely concerned with ecological concerns but also with the promotion of socio-economic issues and affirms the interrelated nature of rights in the Bill of Rights.

As I have indicated in my discussions above, section 24 in conjunction with other rights in the Bill of Rights constitute the foundation of environmental justice in South Africa. Section 24 places all people in the country irrespective of their race, colour, origin, economic and social status and education, at the centre of the environmental right. Environmental justice should be viewed against the background of the references to sustainable development, health and wellbeing. Furthermore the broader meaning that is given to the term “environment” in South Africa affirms the broad ambit of section 24 which is also concerned with socio-economic and environmental issues that affects environmental justice. Thus issues such as environmental degradation that affects the poor and the vulnerable, pollution from nearby industries, poor air quality and lack of access to water can be regarded as environmental issues that affect the right to a clean and health environment.

It is clear from the analysis of section 24 that the meaning of the word “health” extends beyond the ordinary dictionary meaning which defines “health” as the soundness of body: a condition in which its functions are duly discharged. The term well-being further extends the application of section 24 due to the broad scope of the

term which also refers to aesthetical and psychological aspects. Furthermore the notion could be linked to other rights such as human dignity and equality thereby widening the application of the section 24. An environment that is detrimental to the health and well-being of the poor also infringes upon their dignity in that, lack of access to sanitation and clean water in most cases results in the poor having to rely on using nearby forest and rivers as toilets and a source of water. This all positively contributes towards environmental justice in that a clean and healthy environment for all people could only be achieved by addressing the environmental injustices of the past government thereby creating equality, promoting human dignity and ensuring equity for all people of current and future generations.

The socio-economic and environmental equality which we seek to achieve can be achieved through sustainable development as it caters for both the needs of the present and future generations. Interestingly section 24(b) also provides for sustainable development making it the basic foundation of economic and environmental development. Therefore sustainable development is also very important and central to the achievement of environmental justice. Thus in achieving environmental justice through sustainable development section 24 can also be linked with other important rights in the constitution such as, the right to dignity, the property right and the right to access to information and the courts. These other rights are procedural and substantive human rights that support the achievement of environmental justice through the realisation of the section 24 right.

From the analysis of section 24, it becomes clear that the constitutional environmental right isn't about curbing all human activities that are detrimental to the environment but more about fair use of resources and fair distribution and sharing of the negative consequences of environmental degradation. In seeking to achieve environmental justice through section 24 the government promulgated laws such as NEMA and NEMBA to ensure that pollution causing activities are limited or prohibited and that the environmental interests of the poor are protected. As seen from all the cases cited in this research paper, the judiciary has also advanced the realisation of section 24 right, thereby advancing environmental justice through assessing as well as interpreting the environmental right and giving guidance on how we should apply and adhere to the right as well as sustainable development. Sustainable development is the bridge to environmental justice as it requires equity

but in an integrative manner. Thus the socio economic rights and environmental provision should be pursued under the broad notion of sustainable development in order to further environmental justice. Thus, sustainable development creates a *leitmotif* for the implementation of human rights in order to ensure that environmental justice is reached via the promotion of environmental and socio-economic rights. Thus, developmental rights and environmental rights should be guided by sustainable development.

Sustainable development as portrayed *via* the elements of intra- and intergenerational equity requires a progressive transformation of the socio-economic lives of the poor. They require equity in the distribution of resources obtained from the eco-system and environmental burdens between the current generations so as not to disadvantage the future generations. Thus equity in natural resources use and distribution of environmental burdens forms the basis of sustainable development. Therefore the current pattern of unequal distribution of resources is unsustainable and fails to advance sustainable development. This failure to advance sustainable development, therefore contributes to more environmental injustice for the poor who will continue to suffer from perpetuating environmental degradation. Therefore, sustainable development requires us to hold the earth in trust for future generations while at the same time using its resources to cater for the needs of current generations especially those of the poor. Thus sustainable development requires issues such as lack of access to clean water for the poor, lack of housing, and lack of access to clean energy to be addressed adequately so as to bring equality to all people. Through section 24, the state is under an obligation to promote sustainable development so as to promote the environmental rights of all, especially the poor and by this environmental justice is enhanced. Section 24 acknowledges that the poor are the ones that bear the brunt of environmental degradation and seeks to promote a form of development that doesn't further expose them to further environmental inequality.

Therefore section 24 provides for sustainable development as the means to achieve environmental justice in South Africa. Thus section 24 is the foundation of achieving environmental justice as it houses all the components that one needs in pursuit of environmental justice. These are the environmental rights of all people, ecological sustainable development and its elements of intergenerational and intra-generational

equity. However as much as section 24 is the foundation of environmental justice in South Africa and sustainable development is the type of development that is envisaged by the Constitution: more still needs to be done to redress the environmental injustice of the past. Enforcement of laws needs to be improved and compliance needs to be monitored.

## **4.2 Recommendations**

Section 24 takes cognisance of environmental injustice. Hence, it is imperative that the government furthers section 24 of the Constitution (and in particular section 2 of NEMA) in all its socio-economic development actions in order to serve justice. Thus, implementation and enforcement remains crucial. Access to natural resources for the poor should be expedited and past injustices rectified. A good example could be the bright line solution proposed by Karimian<sup>213</sup>. Such a bright line rule could establish that no projects, industries and farms that have a potential to harm the environment could be placed within or near the proximity of poor communities where the population earns below a specific threshold which will be set by the Minister or any authority dealing with the environment<sup>214</sup>. Furthermore the already established firms in the areas of the poor that falls below the threshold will be required to strictly adhere to a specified quantity of emission per month. Furthermore any new activity that will cause harm to the environment will have to be built in factory established zones that will be far from the poor. Equality in the distribution of environmental burdens requires a fair distribution of pollution between the rich and the poor and the current distributional trends can only be changed by the bright line solution. Limited income limits the poor's ability to leave polluted areas and their cheap land value attracts the big industries that care less about the existing neighbourhoods<sup>215</sup>. Thus industries targets low income communities with little education and political or economic power to challenge them when building their industries<sup>216</sup>. Such a rule will not allow the rich to target the low income communities of the poor as places to

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<sup>213</sup> Karimian Y ' Environmental Injustice: The Bright-line Solution' 143 (2013) *Georgetown Journal of Law & Modern Critical Race Perspectives*. (Hereafter Karimian Y (2013))

<sup>214</sup> Karimian Y (2013) 147.

<sup>215</sup> Karimian Y (2013) 151.

<sup>216</sup> Karimian Y (2013) 151.

establish their economic projects, which benefit them<sup>217</sup>. The creation of the rule will force the government to acknowledge the existence of environmental inequalities which has significant impact on environmental justice. This will in turn compel everyone to play a role towards the elimination of environmental injustice.

Although such a rule will be difficult to create and implement, it will be easier to be comprehended by the communities and would not allow them to be strong-armed into taking jobs or any other economic gain that force them to risk their own health and environmental health of their surroundings<sup>218</sup>.

**Total Word Count: 22 163**



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<sup>217</sup> Karimian Y (2013) 147.

<sup>218</sup> Karimian Y (2013) 150.

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