

UNIVERSITY OF THE WESTERN CAPE

FACULTY OF LAW

**THE RIGHT TO ENVIRONMENT UNDER THE ZANZIBAR CONSTITUTION: A
COMPARATIVE ANALYSIS BETWEEN REVOLUTIONARY GOVERNMENT OF
ZANZIBAR AND THE REPUBLIC OF SOUTH AFRICA**

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DECLARATION

I, **KHADIJA SHAMTE MZEE**, declare that the work presented in this research is original. It has never been presented before to any other University or Institution. Where other people's works have been used, references have been provided. It is in this regard that I declare this work as originally mine. It is hereby presented in partial fulfillment of the requirements for the award of Masters of Laws.

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Key Words/Concepts

1. Environment
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5. Protection
6. Human Right concept
7. South Africa
8. Tanzania
9. Zanzibar
10. Comparative



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List of Abbreviations

ACTS- African Centre for Technology Studies

APPA Atmospheric Pollution Prevention Act

CITES-Convention on International Trade in Endangered Species of Wild Fauna and Flora

EIA- Environmental Impact Assessment

ECHR-European Convention on Human Rights

EC –European Community

ECA- The Environment Conservation Act

EMSDA -The Environmental Management for Sustainable Development Act

FRMCA -Forest Resources Management and Conservation Act

ICRW-International Convention for the Regulation of Whaling

IELRC- International Environmental Law Research Centre

ILM International Legal Material

LAWSA- The Law of South Africa

NEMA- The National Environmental Management Act

SAJELP- South African Journal of Environmental Law and Policy

SAJHR- South African Journal on Human Rights

SPGA- Society for Prevention of Cruelty to animals

UN-United Nations

UNCED- United National Conference on Environment and Development

UNCCUR-United Nations Conference on the Conservation and Utilisation of Resources

UNCHE- Stockholm Conference on the Human Environment

UNCLOS- Convention on Biological Diversity

UNECOSOC -United Nations Economic and Social Council

UNEP- United Nation Environment Programme

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CHAPTER ONE

1.0 SCOPE OF THE STUDY AND THE CONSTITUTIONAL ENVIRONMENTAL RIGHTS

1.1 Research Problem

There are practical linkages between the respective causes of human rights and environmental protection since environmental harms and human rights abuses often go together. Moreover, threats to environment can themselves constitute threats to lives and livelihoods, health, and well-being. 'A corollary is that those concerned with the protection and promotion of environmental quality may often have reason to make common cause with defenders and promoters of human rights'.¹

Principle 1 of the Stockholm Declaration provides that 'man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and bears a solemn responsibility to protect and improve the environment to present and future generation'. On the other hand, Principle 1 of the Rio Declaration merely provides that 'human beings are at the centre of concerns for sustainable development'.

The Government has to consider an environmental right in the Constitution; and that environmental rights and responsibilities owed by all persons and institutions responsible in a particular society.

Comparatively, the South African Constitution provides a powerful safeguard in shaping Constitutional environmental rights while the Zanzibar Constitution provides the general socio-and economic right which includes right to life, right to personal freedom, the freedom of expression and other related rights. From this point, the Zanzibar Constitution deserves to be examined closely in environmental rights.

¹ Hayward Tim (2005) '*Constitutional Environmental Rights*', Oxford University Press, at 9

1.2 Significant of the Study

Right to environment under the Constitution strengthens the protection of fundamental rights, and ensures that citizens become more involved in environmental issues. The introduction of these rights in the constitution shall guarantee enforcement of environmental rights and the political willingness of all organs of state.

The findings of the study would benefit environmental law administrators; policy makers and others related stakeholders, by knowing the scope of the environmental rights under the Zanzibar Constitution. In addition to that, the study will add knowledge to students of the related subject or field, and serves as the stimulant for doing research on similar or related topics. The observation and comments also will help the government of Zanzibar to see the need of entrenching the specific environmental clause in the Constitution.

1.3 Research Method and Methodology

The main sources of information are legislation, textbooks, judicial decisions, journals, articles and case laws. These sources are relevant as they serve to identify the nature and the scope of environmental rights in international and national contexts, determine the intention of the legislature in constitutional environmental rights; and examine objectively the implementation and enforcement of the right to environment and related environmental rights in different jurisdictions in Zanzibar and South Africa. The sources will help in addressing the policy and legislations that protect environmental rights.

In this research, data will be obtained through desk survey study and literature survey with very limited scope for fieldwork. The desk study and literature survey will include relevant legislations, relevant chapters on the subject, articles, internet, and government official publications.

1.4 Chapter Structure

The Study is divided in to Six Chapters.

1. Chapter One is the Scope of the Study and the Constitutional Environmental Rights.
2. Chapter Two deals with the International context of the Right to Environment.
3. Chapter Three is the general concept of Constitutional Environmental Rights.

4. Chapter Four discusses the Discussion of environmental rights under the Constitutions of the Republic of South Africa
5. Chapter Five discusses the environmental rights under the Zanzibar Constitution; and
6. Chapter Six discusses the comparison analysis between the two Constitutions
7. Chapter Seven is Challenges, Conclusion and Recommendations.

1.5 Approaches to the concept of environmental rights

Several approaches to the concept of environmental rights have been pointed out, Kidd identifies essentially two kinds of environmental rights' the right of human to a safe and healthy environment, and the right of the environment itself to be degraded. He proposes that the environment ought to be accorded rights in order to be protected against degradation.²

Interpretation of environmental rights is very important in fact, the provisions of the Constitution may be used defensively or restrictively to protect against environmental constitutional rights, and affirmatively to compel the government to ensure constitutional rights.³

1.6 Environmental Rights under the Constitution

In South Africa, apart from the environmental clause which includes the notion of integration equity, the Bill of Rights chapter includes a number of other clauses which although do not directly refer to the environment, are nevertheless pertinent to environmental concerns.⁴

It is important that those lobbying for the inclusion of an environmental clause in the Constitution had to apply their minds to some fundamental questions concerning the nature and exact content of an environmental right. Its relationship to socio-economic rights generally, the potential role of human rights in environmental protection, and the general role, place and practical implications of an environmental clause in South Africa's emerging democratic legal order.⁵

² Kidd M, (1997) '*Environmental Law : a South Africa Guide*' at 34

³ Bruch, C. Coker W and Van Arsdale C (2000) 'Breathing life into fundamental principles: implementing constitutional environment protections in Africa' 7 SAJELP 21-96 at 23

⁴ Glazewski J, (2000) '*Environmental Law in South Africa*' Butterworths Durban at 77

⁵ Glazewski *ibid* at 78

'The environmental right is a collective right [that] does not supersede or eclipse other rights'.⁶ It is important to insert environmental clause in Constitution, by including environmental rights as a fundamental justifiable human right, environmental considerations be accorded appropriate recognition and respect in the administrative process in a particular country.⁷

1.7 Hypothesis

This research aims to answer the following hypothesis.

1. Whether the Bill of Rights included in the Zanzibar Constitution can be interpreted to include environmental rights;
2. The inclusion of socio-economic rights under the Zanzibar Constitution is not enough in guarantee and protect environmental rights;
3. The clearer the legal obligations and the Government commitment in environmental concern are indication of the Government's priority in environment protection.

1.8 Conclusion

Guarantee of environmental rights under the Constitution is very important. It ensures the implementation of the right. Feris observes that the principled proposition is that all human beings have a fundamental right to an environment that is ecologically sound and does not threaten health or well being.⁸

In my view, Zanzibar Constitution by not introducing the specific environmental clause in the Constitution fails to justify fundamental human rights this is because a fully fledged right to environment establishes individual right of action to conserve the environment. It can also be argued that Constitutional environmental clause offers ample opportunities for development and enjoyment of basic human rights, such as rights to life.⁹

⁶ In *MEC; Department of Agriculture, Conservation and Environment and Another v HTF Developers (Pty) Limited* [unreported] 3626/06 (C)(2007), the Constitutional Court considered sections 31A and 32 in light of section 24 of the Constitution of the Republic of South Africa, 1996, and the principles of section 2 of the National Environmental Management Act 107 of 1998

⁷ Oliver J, in his decision in *The Director : Mineral Development, Gauteng Region and Sasol Mining (Pty) Ltd v Save the Vaal Environmental and others* (1999 (2) SA 709 (SCA)

⁸ Feris L. 'Constitutional Environmental Rights: An Under Utilised Resource' at p.2 (last visited 26 March, 09)

⁹ Van der Vyver 'The Criminalisation and Prosecution of Environmental Malpractice in International Law' (1998) 23 *SAYIL* 1-33 at 9

CHAPTER TWO

2.0 INTERNATIONAL CONTEXT OF THE RIGHT TO ENVIRONMENT

2.1 Introduction

International Environmental Law is the part of the international law, deals with the protection, control and management of environment. It is for this reason that international environmental law found to be an increasingly important subject; and further the international law increasingly becoming the impetus behind domestic environmental law.¹⁰ In this case the role played by International law in protecting environment is not fundamentally different from domestic environmental law. International Law is concerned with regulating environmental problems, setting common international standards and objectives for prevention or mitigation of harm, and providing a flexible rule-making process.¹¹

2.2 Environmental Rights in International Law

There is no general, comprehensive international treaty on human rights and the environment. However, there are international instruments that proclaim environmental rights most notably regional instruments.¹² The environment rights are the most recent right under international law,¹³ the draft Declaration of Principles on Human Rights and the Environment identifies the close relationship between human rights violations and environmental degradation and declares human rights, an ecologically sound environment and sustainable development.¹⁴

Arguably, there is an unequivocal recognition of an environmental right in international law. The separate opinion of Vice President Weeramantry in the case concerning the *Gabcikovo-Nagymaros Project* (Hungary-Slovakia) in the environment in international law 'is a *sine qua non* for numerous human rights such as the right to health and the right to life itself.'¹⁵

¹⁰ Kidd M *op cit* (n 2) at 41

¹¹ Boyle A & Birnie P (2002) '*International Law and the Environment*', 2nd edn, Oxford University Press at 7

¹² Art 24 of the African Charter on Human and Peoples Right, At the international level, see art 12 of the 1966 Covenant on Economic, Social and Cultural rights' art 24(2)(c) of the 1989 Convention on the Right of the Child

¹³ Miller Christopher (1998) '*Environmental Rights: Critical Perspectives*' 1998, Routledge, London at 2

¹⁴ Winstanley T' (1995) '*Entrenching Environmental Protection in the new Constitution*'; 1 SAJELP 85-97 at 86

¹⁵ *Gabcikovo-Nagymaros Project* [Hungary/Slovakia] 1998 37 ILM 162

Development of a system of international norms for the protection of environment more or less coincided with the transformation of international human rights law in the late 1960s. Towards the end of the 1970s, international environmental rights came to be identified as part of 'third generation' of human rights.¹⁶

The current form and structure of the subject has become recognisable only since the mid - 1980s, a proper understanding of modern principles and rules requires a historic sense of earlier scientific and legal development'.¹⁷ At that time the UN's purposes include the achievement of international co-operation in solving international problems of an economic, social, cultural or humanitarian character, and this has provided the basis for the subsequent environmental activities of the UN.¹⁸

International environmental law shares the sources of international law. In terms of article 38(1) of the Statute of the International Court of Justice, the sources of international law are:-

- (a) International convention (treaties), whether general or particular
- (b) International custom, as evidence of general practice accepted as law;
- (c) The general principles of law recognised by civilized nations; and
- (d) Judicial decisions and the teachings of the mostly highly qualified publicists, as subsidiary means for the determination of the rule of law.¹⁹

These sources are relevant to international law, conventions, and customary law; although they are generally recognized as the primary sources of international law providing the substantive context of international environmental law.²⁰

Customary law generally recognized as 'Soft law', and on the other hand, consists of imprecise standards generated by declarations adopted by diplomatic conferences or resolutions of international organizations. They are intended to serve as guidelines to states in their conduct, but which lack the status of 'law'. Soft law sources such as Rio Declaration on Environment and Development and Agenda 21, contributed greatly to the development of

¹⁶ The emergence of a third generation of rights was first conceptualized by Karel Vasak in his inaugural Address to the Tenth Study Session of the International Institute of Human Rights in Strasbourg in France in 1972. The title of Vasak's address was 'for the third generation of human rights: the right to solidarity' see Van Vyver in 1 at 8)

¹⁷ Sands P (2003) '*Principles of international environmental law*', 2nd edn, Cambridge University Press at 25

¹⁸ UN Charter, San Francisco, 26 June 1945, in force 24 October 1945, 1UNTS xvi, Art, 1(3)

¹⁹ Dugard J. (2003) '*International law: a South Africa Perspective*' 2nd edn, Juta Cape Town at 26

²⁰ Glazewski J *op cit* (n 4) at 36

international environmental law, for example, it paved the way for cooperation among nations in the development of the concept of sustainable development.²¹

2.3 The 1972 United Nations Conference on the Human Environment

At the Universal level, the Stockholm Declaration on the Human Environment was adopted on 16 June 1972 by acclamation at the United Nations Conference on Human Environment. The declaration proclaims in its Preamble that '*The environment is essential tothe enjoyment of basic human rights-even the right to life itself*'. From this point Stockholm Declaration is an important instrument along the path to the recognition of environmental rights as human rights.²²

The Declaration of the 1972 Stockholm Conference on the Human Environment (UNCHE) merely referred obliquely to man's environment, adding that 'both aspects of man's environment, the natural and the man-made, are essential for his well-being and enjoyment of basic human rights'. Stockholm Conference enlarged and facilitated means toward international action, previously limited by inadequate perception of environmental issues and by restrictive concepts of national sovereignty.²³

This period marked by a proliferation of international environmental organization and greater efforts by existing institutions to address environmental issues. Boyle and Birnie identify four major initiatives resulted in 1972 Stockholm Conference; the first initiative was the adoption of the Stockholm Declaration of Principles, intended to 'inspire and guide the peoples of the world in the preservation and enhancement of the human environment; the second was the establishment of a new institution within the UN, the UN Environment Programme (UNEP). The third was the adoption of an Action Plan for the development of environmental policy, to be administered by UNEP, and the fourth was the institution, by voluntary contributions, of an Environment Fund.²⁴

²¹ Dugard J *op cit* (n 19) 36

²² Ouguergouz F (2003) '*The African Charter on Human and Peoples' Rights; a Comprehensive Agenda for Human Dignity and Sustainable Democracy in Africa*' Martinus Nijhoff 355

²³ Report of the UN Conference on the Human Environment, Stockholm 5-16 June, 1972, UN Doc. A/CONF.48/14/Rev 1: see also W. Kenett, 'The Stockholm Conference on the Human Environment; 48 International Affairs 33 (1972)

²⁴ Boyle A & Birnie P *op cit* (n 11) at 38-39

Most importantly achievement of Stockholm Declaration observed by Sands that the creation of the United Nations Environmental Program (UNEP) and the adoption of Principle 21.²⁵ UNCED adopted three non binding instruments' including the Rio Declaration on Environment and Development (the Rio Declaration).²⁶

In general, however, it may be said that Stockholm Conference emphasises on environmental responsibility than rights, 'it affirms the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being'. It also reinforces its postulate that environmental goals can be achieved through the acceptance of responsibility.²⁷

2.4 The Rio Declaration

The link between the environment and human right was reiterated at the Rio Summit in 1992. Despite the fact that the Rio Declaration on Environment and Development contains no reference to environmental rights, it indeed proclaims as first principle that '*Human beings are at the centre of concern for sustainable development*' and that they are '*entitled to a healthy and productive life in harmony with nature*'; this falls short of recognising a right to a clean and healthy environment.²⁸ In fact, that the link between environmental concerns and the need for development was acknowledged and prioritised.²⁹

Rio Declaration reflects approach to environmental and development issues. It commits all states to enact 'effective environmental legislation; although the standards, objectives and priorities' should reflect the environmental and developmental context to which they apply.³⁰ The Rio Declaration develops general principles of the international law sustainable development, endorsed the approach of the precautions and polluter pays principle.³¹

²⁵ Sands P *op cit* (n 17) at 40

²⁶ The UNCED Forest Principles and Agenda 21, two treaties were also opened for signature; the Convention on biological Diversity and the UN framework Convention on Climate Change, (A/CONF/151/6 Rev, 1,13 June 1992

²⁷ Katarina Tomaserski 'Environmental Rights', in Eide, A. et al. (eds), *Economic, Social and Cultural Rights: a Text book*, Dordrecht: Martinus Nijhoff, at 257-69

²⁸ Sands P *op cit* (n 17) at 54

²⁹ Cheadle MH, Davis DM, and Haysom NRL, (2002) '*South African Constitutional Law; the Bill of Rights*' Butterwoths Durban at 412

³⁰ Principle 11 of the Rio Declaration

³¹ Principle 15 and 16 *ibid*

Apart from the consideration mentioned above, the Rio Declaration supports the development of 'procedural; techniques for implementing international standards (including provision of, and access to information relating to environmental matters, and recognizing the need for participation of concerned citizens); supporting environmental impact assessment, and calling for notification, information exchange and consultation'.³²

However, the major weakness on Rio identified by Boyle and Birnie that the Declaration fails to give greater emphasis to human rights is indicative of continuing uncertainty and debate about the proper place of human rights law in the development of international environmental law.³³

2.5 Agenda 21

Agenda 21 is a non-binding blueprint and was conceived as a plan for the whole of the international community. It integrates environment and development concerns for 'the fulfilment of basic needs, improved living standards for all better protected and managed ecosystems and a safer, more prosperous future'.³⁴

Agenda 21 pays particular attention to national legislation and makes frequent reference to national laws, measures, plans, programs, and standards. Chapter 8 of Agenda 21 identifies limitations in legal and regulatory arrangements at the national level, and recognises that the enactment and enforcement of laws and regulations at the regional, national, state/provincial or local/municipal levels are 'essential for the implementation of most international agreements in the field of environment and development'.³⁵

2.6 Environmental Perspective to the year 2000 and beyond

In 1987 the United Nations General Assembly adopted the 'Environmental Perspective to the Year 2000 and beyond' as a framework to guide national action and international cooperation in policies and programmes.³⁶ In 1994, the United Nations developed a *Draft Declaration of*

³² Sands *P op cit* (n 17) at 320

³³ Boyle and Birnie *op cit* (n 11) at 253

³⁴ UNCED Report, A/CONF. 151/26/Rev. 1 vol.1(1993)

³⁵ Agenda 21, para 8.14

³⁶ UNGA Res. 42/186, 11 December 1987

Human Rights and the Environment, which included the principle that 'all persons have the right to a secure, healthy and ecologically sound environment.'³⁷

2.7 Regional System and Environmental Rights

2.7.1 Africa Perspective

The African Charter on Human and Peoples' Rights of 1981, adopted at Banjul, gives recognition to environmental rights. Article 24 provides that; 'all people shall have the right to a general satisfactory environment favourable to their development'. One asserts that the significance of the Charter is that it was the first international instrument to recognize the right to the environment.³⁸ The Charter proclaims environment as a collective right. It is in this respect that the African Union identifies its objectives to the promotion on Human and Peoples' Rights and other relevant human rights instrument.³⁹ The significance of Charter lies in that it was the first international instrument to recognize the right to environment.⁴⁰

2.7.2 American Convention on Human Rights

Another instrument that recognises environmental rights is the Additional Protocol to the American Convention on Human Rights in the area of economic, social and cultural rights (1980). In terms of its article 11 entitled 'Right to healthy environment', the Additional Protocol to the American Convention on Human Rights in the area of economic, social and cultural rights, adopted in San Salvador on 17 November 1998, recognizes the right to a healthy environment:

1. Everyone shall have the right to live in a healthy environment and to have access to basic public services
2. The states parties shall promote the protection, preservation and improvement of the environment

³⁷ Available at <http://www1.umn.edu/humanrts/instree/1994-dec.htm> (accessed on 13 April, 2009)

³⁸ Feris AL and Tladi ' *Environmental rights* [sd] (unpublished document) 1 at 8 available at http://www.chr.up.ac.za/centre_publications/socio/book/Chapter%208-Environment.pdf (accessed on 20 March 2009)

³⁹ Article 3 (h) of the Constitutive Act of the African Union adopted in Lomé (Togo) on 11th July 2000, See also http://www.au2002.gov.za/docs/key_oau/au_act.htm (accessed 28 July 2009)

⁴⁰ Art 24, See M Van der Linde (2002) ' *African Responses to Environmental Protection* ' 35 *Comparative and International Law Journal of Southern Africa* 99, see also M. Soveroski, 'Environment Rights versus Environmental Wrongs: Forum over Substance?', 16 *RECIEL* (2007), at 264

Under the Regional Instruments, it is important to note the differences in approach between the African Charter and the American Convention. While the African Charter proclaims that peoples have a right 'to a general satisfactory environment favourable to their developments',⁴¹ the additional Protocol to the American Convention under article 11 declares that everyone has the right to a healthy environment. Thus, the African Charter proclaims a collective right.⁴²

2.7.3 The European Convention on Human Rights

There is no express environmental right in the ECHR, 'although attempts have been made to assert existing rights under the ECHR, such as Articles 8 and 10, with regard to the environment'.⁴³ To give effect to the environmental rights, the Convention gives the Court jurisdiction concerning interpretation of human rights included. The general problems underlying the interpretive principles of the Convention are the margin of appreciation, autonomous concept and tests of the balancing of interests between an individual and the community as a whole.⁴⁴

The European Court of Human Rights has adopted the indirect approach of guaranteeing environmental rights as generally accepted human rights in *Lopez Ostra v. Spain*. In that case, the Court ruled that the right to a private life under article 8 of the European Convention on Human Rights should be interpreted to imply for individuals guarantees against environmental pollution.⁴⁵

2.8 Environmental Rights as a Human Right

The issue of legal recognition of environmental rights is perhaps most complicated under the international system since there are some questions to be answered in recognizing environmental rights as human rights. Feris and Tladi identify three questions in this regard that first, does international law recognise environmental right? Second if such right

⁴¹ African Charter, article 24

⁴² Article 3 (h) of the Constitutive Act of the African Union adopted in Lome (Togo) on 11th July 2000, see also http://www.au2002.gov.za/docs/key_oau/au_act.htm (accessed 25 August, 2009)

⁴³ Boyle A E & Anderson M R., (eds) (1998) '*Human Rights Approaches to Environmental Protection*' Oxford University Press at 109

⁴⁴ J Sweeny, 'Margins of Appreciation; Cultural Relativity and the European Court of Human Rights and the Post-Cold War Era', 54 ICLQ (2005) 459 at 459-74

⁴⁵ *Lopez Ostra v. Spain* [1995]20 EHRR 277 (9 December 1994, Series A no. 303-C, Paragraph 51, European Court of Human Rights.

recognised, in what form are they recognised? In other words, is there a general right to the environment or are environmental rights are recognised merely as derivative of other existing rights. The third question involves the beneficiaries of the right? Are future generations also beneficiaries of environmental rights? Even more difficult; are the rights reserved exclusively for human or are other species also entitled to the right? We do not propose to give comprehensive and detailed analysis of all these issues.⁴⁶

The possible link between human rights in general and the environment observed by Hancock that 'since the environmental rights become increasingly prominent in constitutions, the claim to universal environmental human rights is correspondingly strengthened'.⁴⁷ Other writers rejected the relationship, Handl, expresses doubts whether the human right to a clean environment, for example, might be derived at all from a general discourse on human rights.⁴⁸

Another area of overall consideration has been stated by Boyle and Birnie. They argue that 'in order to evaluate the place of international human rights law in the protection of the environment, it is necessary to make some preliminary points about the nature of human rights and their protection in international law'. They further state that in particular, the distinction between civil and political rights, economic and social rights, and so-called solidarity or third generation rights may have implications for the development of environmental rights.⁴⁹

2.9 Conclusion

The right to environment is recognized and protected in both International and Regional Instruments as discussed in this Chapter. Upon closer inspection, the relationship between International Law and environmental rights is not clear. This is because the regulation of environmental problems and reinstatement of environmental damage under International Law is limited. International Law provides mechanism and procedures for negotiating the

⁴⁶ Feris L. A. and Tladi D Article on '*Eight/Environmental Right*', p.250 available at http://www.chr.up.ac.za/centre_publications/socio/book/Chapter%208-Environment.pdf (accessed on 20 March 2009)

⁴⁷ Hancock Jan (2003) '*Environmental human rights: power, ethics, and law*' Ashgate at 80

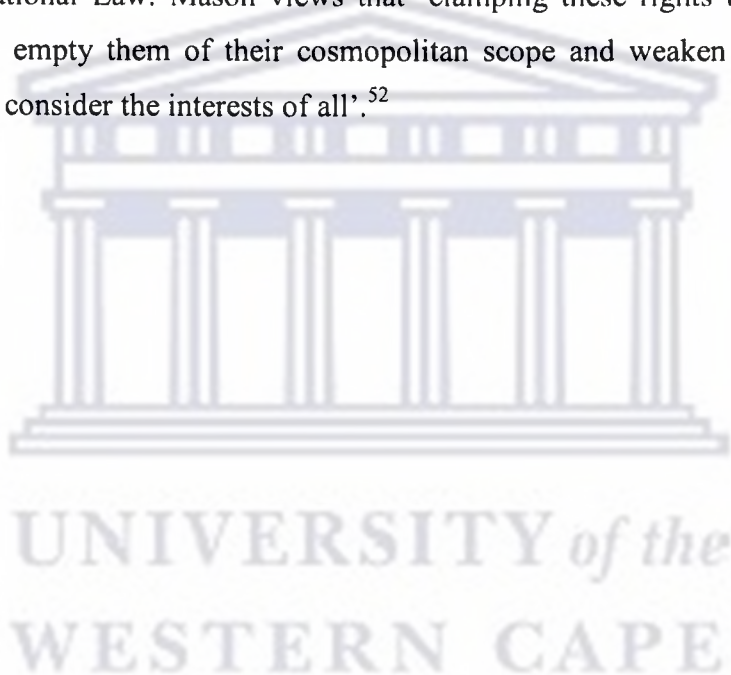
⁴⁸ Handl G '*Human Rights and Protection of the Environment*', in Eide, A. et al. (eds), *Economic, Social and Cultural Rights: a Text book* (Dordrecht: Martinus Nijhoff, 2001) at 306

⁴⁹ Boyle and Birnie *supra* (n 11) at 253

necessary rules and standards which means that only those who suffer damage can secure such redress, whether they are states or individuals.⁵⁰

The relationship between International Law and environmental rights may be conceived in two ways, first, environmental protection may be cast as a means to the end of fulfilling human rights standards; and in the second approach, the legal protection of human rights is an effective means to achieving the ends of conservation and environmental protection.⁵¹

Apart from the considerations mentioned, the duty is upon the state to make sure that all International and Regional Instruments in relation to environmental rights are protected as stipulated in International Law. Mason views that ‘clamping these rights to national legal systems, effectively empty them of their cosmopolitan scope and weaken their normative claim to respect and consider the interests of all’.⁵²



⁵⁰ *ibid* at 7

⁵¹ Boyle and Anderson *op cit* (n 43) at 3

⁵² Mason M (1999) ‘*Environmental Democracy*’ Earthscan, at 60

CHAPTER THREE

3.0 CONSTITUTIONAL ENVIRONMENTAL RIGHTS

3.1 Introduction

The law relating to the environment is a cross-divisional field of law in the sense that it incorporates norms and principles of public law, private law and international law. According to Glazewski the only current certainty is that environmental law is a young, dynamic and evolving branch of law whose parameters are not yet fixed as it is still in the process of developing its own identity.⁵³

3.2 Recognition of environmental rights in the Constitution

The movement towards the recognition of environmental rights has become more significant and debated issue. Environmental right has been given different emphasis in different constitutions, some require the government is responsible to protect natural resources and the environment and others impose duty on citizens to protect and conserve the natural environment.⁵⁴ In this sense, the concept of state responsibility should be applied in protecting environmental Rights under the Constitution. With the expression of Boyle and Birnie, state responsibility, or international liability as it is sometimes referred to, is the principle by which states may be held accountable in interstate claims under international law.⁵⁵

Environmental rights can be recognised by creating a balance between environmental rights and other rights, thus constitutional provisions guaranteeing socio-economic rights can be interpreted as embracing environmental factors.⁵⁶ In avoiding the limitation of environmental rights, Boyle and Anderson observe most human rights documents, including the European Convention, do not give absolute protection to the rights, and that in exercising environmental rights there should not be exception.⁵⁷ Cases such as Powell and Rayner show that there is considerable scope for states to argue for the 'broader community interest' and an unwillingness of courts to interfere.⁵⁸

⁵³ Glazewski (n 4) at 11

⁵⁴ Kidd at (n 2)19

⁵⁵ Boyle A & & Birnie P *op cit* (n 11) at181

⁵⁶ Thornton J & Beckwith S (2004) '*Environmental Law*' 2nd edn, Sweet and Maxwell at 389

⁵⁷ Boyle and Anderson *op cit* (n 43) at 112

⁵⁸ *Powel & Rayner v UK* 172 Eur. Court. HR. Ser. A(1990)

However the guarantee of other socio-economic rights such as right to health as recognition of environmental rights creates objection. Hancock views that in Constitutions most common is the explicit guarantee of a right to a 'healthy', 'healthful', 'safe', or 'balanced' environmental or to an environment 'sustainable for development', for his views these constitutional guarantees can be criticized for being vague and therefore difficult to legally enforce, since it is, for example it is questionable as to when a healthy environment becomes an unhealthy environment. To avoid such confusion it is necessary to state the specific criteria upon which the meaning of a healthy and environment can be established.⁵⁹

3.3 The Rationale for a Constitutional environmental protection

Environmental problems today threaten everybody and they can be serious enough to present a threat to states' security and to create new sources of interstate tension. Hayward views that 'the most general rationale for taking a constitutional approach to environmental protection, that the seriousness, extensiveness, and complexity of environmental problems are such as to prompt a need for concerted, coordinated political action aimed at protecting all members of populations on an enduring basis'.⁶⁰ The Constitution is a good instrument to be used in approaching environmental protection. It can play broader cultural and educational role in motivating environmental decision making and it can help foster citizen involvement in environmental protection measures.

More importantly providing for environmental protection at the constitutional level entrenches recognition of the importance of environmental protection; offers the possibility of unifying principles for legislation and regulation; and secures these principles against the actions of the organs of State. The important of environmental right was referred to by the Supreme Court of Appeal in *Director; Mining Development Gauteng Region and Sasol Mining (Pty) Ltd v Save the Vaal Environmental and others*⁶¹ the court held that 'Our Constitution, by including environmental rights as a fundamental justiciable human rights, by necessary implication requires that environmental consideration be accorded appropriate recognition and respect in the administrative process in our country'.⁶²

⁵⁹ Hancock J *op cit* (n 47) at 79-80

⁶⁰ Hayward T *op cit* (n 1) at 3

⁶¹ 1999 (2) SA 709 (SCA) at 719

⁶² At 719, cited in (n 7)

3.4 Interpretation and approaches to environmental rights

Interpretation of environmental rights demonstrates that constitutional right to life provisions can serve as effective tools for strengthening environmental protection. Often the constitutional right to life is the sole basis for a court's decision to extend protection or prevent damage to an environmental resource.⁶³

Three areas of consideration have been identified by Tladi and Feris that those main human rights approaches to the environment that one can take include a right to the environment as a right in and of itself. This right may be an individual right, a group right or both; second approach does not recognise specific environmental rights, but sees a potential for protecting the environment under already existing and recognised rights, such as the rights to life, health, and dignity; and a third approach involves the use of procedural rights, such as access to information.⁶⁴ Other related rights can be approached to mark the seriousness of environmental quality if compared to other economic and social rights.⁶⁵

3.4.1 Procedural Rights

Several approaches to the concept of environmental rights have been pointed out. Kidd identifies essentially two kinds of environmental rights the right of human to a safe and healthy environment, and the right of the environment itself to be degraded. He proposes that the environment ought to be accorded rights in order that it might best be protected against degradation.⁶⁶ Theron,⁶⁷ on the other hand, considers environmental rights as procedural rights, rights of future generations, human rights and right of the environment.

The right to environment and the related environmental rights are considered to be procedural in character. The procedural character of environmental rights has been underlined by other important international instruments and the court.⁶⁸ The Supreme Court of Peru recognized in its decision in 1992 that the right to environment belongs to the whole community and

⁶³ United Nations (2007) '*Constitutional Environmental Law: Giving Force to Fundamental Principles in Africa*'. Environmental Law Institute, at 49

⁶⁴ Feris L.A and Tladi L *op cit* (n 46) at p. 2-3

⁶⁵ Hayward Tim *op cit* (n 1) at 8

⁶⁶ Kidd M *op cit* (n 2) at 34, See also Stone C '*Should trees have standing?-Towards legal rights for natural objects*' (1972) Southern California Law Review 450

⁶⁷ Theron C '*Environmental rights: an overview of interpretation*' (1997) 4 SAJELP 23-44 at 23

⁶⁸ The Preamble of United Nations General Resolution on a World Charter for Nature (1982) 22 ILM 445 at 456 and Principle 2 United Nations Economic Commission for Europe Charter on Environmental Rights and Obligations adopted at the Experts Meeting in Oslo, Norway, 29-31.

referred to the 'new procedural instruments that allow access to justice to protect interests that affect undermined (classes) of persons.'⁶⁹ Accordingly, the Rio Declaration recognizes the procedural side of environmental rights, including public participation in environmental decision-making, access to information, effective access to judicial and administrative proceedings and adequate redress and remedies.⁷⁰

Another necessary condition for effective realization of procedural rights is to seek legal redress in the environmental arena and Access to justice. However prior to the Aarhus Convention, three particular problem areas were identified. One was the general slowness of many administrative and judicial appeal procedures, another obstacle is the high fees and costs, and a third obstacle concerns restrictions on legal standing to take action.⁷¹

3.4.2 Substantive Rights

The right stands together with procedural rights, and the right is accepted as a reason there should be constitutional provision for the procedural environmental rights, Hayward observes that 'because the substantive rights somehow illicitly skews outcomes, loses not only normative force, but even conceptual coherence'.⁷² He further concludes that as far as the procedural right is fundamental, there is no reason why substantive rights ought not to be.

3.4.3 Environmental Rights and Future Generation

This assertion is very important in interpreting environmental rights, it highlights the right to a healthy environmental as a generational right. The Supreme Court of Philippines recognized the right of future generations to inherit an environmentally sound world. This decision is regarded as a major step forward in environmental protection because it recognized the right to a sound environment as a self executing constitutional right and, secondly, it rendered operational the concept of intergenerational equity by recognising the right of present generations to sue on behalf of future generations.⁷³

⁶⁹ *Proterra v Ferroaleaciones San Roman SA*. See Theron C *op cit* (n 36) at 26

⁷⁰ Aguilar AB and Popovic NAF 1994, 'Lawmaking in the United Nations : The UN study on Human Rights and the Environment' 3 *RECIEL* 201 ff.

⁷¹ Hayward *op cit* (n 1) at 179

⁷² *Ibid* at 87-88

⁷³ *Minors Oposa v Secretary of the Environment* (1994) 33 *ILM* 173

Brown Weiss argues that a planetary trust for future generations to human have an obligation.⁷⁴ The idea which prevailed in the past, that ownership of land conferred the right on the owner to use his land as he pleased, is rapidly giving way in the modern world to the more responsible conception that an owner must use his land in a way which may prejudice his neighbours or the community in which he lives, and that he holds the land in trust for future generation.⁷⁵

Environmental deterioration could eventually endanger life of present and future generations. Therefore, the right to life has been used in a diversified manner in different countries to include the concept of future generation. It includes, *inter alia*, the right to survive as a species, quality of life, the right to live with dignity and the right to livelihood.⁷⁶

3.4.4 Environmental rights as human right

Environmental rights can be interpreted as human rights; they are basic rights which may not actually be recognized in a positive legal sense by a particular state or set of states, but which nevertheless have a moral authority that appeals to a common humanity.⁷⁷ To protect human life, our environmental matters deserve to be debated through a statement or assertion of existing human rights, such as the right to life, to personal security, and to health and food.⁷⁸ At this point the concept of environmental rights deserves to be understood properly to avoid the ambiguity and complexities in their interpretation.

Evidence shows that the international movement towards the protection of the environmental rights through the constitutional entrenchment of fundamental rights is growing higher. This confirms not only the fact that the environment is recognized as an essential determinant in the quality of human life, but also that human environmental interest form part of the holistic structure of civic life in which various interests have to be balanced to achieve the golden mean in peaceful human coexistence.⁷⁹

⁷⁴ Weiss B In fairness to future generations: international law; common patrimony and intergenerational equity 1989 quoted by Cheadle MH *et al op cit.* (n 29)425.

⁷⁵ King v Dykes (1971) 3 SA 540 RA at 545, See Cheadle *et al op cit* at 426

⁷⁶ Joint UNEP-OHCHR Expert Seminar on Human Rights and the Environment

⁷⁷ Mason *op cit* (n 52) at 59

⁷⁸ Theron, C *op cit* (n 67) at 30

⁷⁹ Van Reenen T P (1997) 'Constitutional protection of the environment'; fundamental (human) right or principle of state policy?' 4/2 SAJELP 269-289 at 288

CHAPTER FOUR

4.0 INTERPRETATION OF ENVIRONMENTAL RIGHTS UNDER THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA

4.1 Introduction

Generally, most of problems that exist with environmental rights under the international and regional systems are absent under domestic South African system, because 'South Africa has reached an important step in the development of environmental law jurisprudence'. There is no question as to the existence of a right, as the Constitution expressly and unequivocally provides for a distinct environmental right.⁸³ According to Feris and Tladi what is left to do is to determine the aim of the provision, to which the right applies, who is the beneficiary and finally the nature and content of the right.⁸⁴

To support environmental rights, South Africa in its Constitution includes a number of other clauses. In the wording of Glazewski, there are initial indication that apart from the environmental clause which includes the notion of integration equity, the Bill of Rights Chapter under the South African Constitution includes a number of other clauses which although do not directly refer to the environment, are related to environmental concerns.⁸⁵

4.2 Environmental Rights before the interim Constitution

The resistance to apartheid policies of the South African government left little space to reflect on alternative paths for social, economic, and political development. The Green Paper on an Environmental Policy for South Africa indicates that the colonial and apartheid systems, denied the majority of South Africans, the right to participate in democratic decision-making and access to the country's natural resources. There is a wide array of social, economic, legal and environmental ills whose legacy needs to be addressed as soon as possible but when such reflections did take place, the issue of environment was low on the agenda'.⁸⁶

⁸³ Feris Loretta A and Tladi *op cit* (n 45) at 9-10

⁸⁴ Feris and Tladi *ibid* at 9-10

⁸⁵ Glazewski J, *op cit* (n 4) at 77

⁸⁶ The Green Paper on an Environmental Policy for South Africa , October 1996 , available also at <http://www.info.gov.za/greenpapers/1996/environmental.htm>

environmental integrity. This is because it confers a right to an environment which is 'not detrimental to...health' rather than simply a right to a healthy environment.⁹⁵ Considering various criticisms stated above against the Interim Constitution, the 1996 Constitution was called to contain broader environmental right.

4.4 Environmental Rights in the 1996 Constitutions

In the 1996 Constitution, the negative phraseology and the absence of a duty to protect the environment were seen as areas for improvement.⁹⁶ The Constitution includes the right to environment in section 24 of the Bill of Right which stipulates that:-

'Everyone has the right-

- (a) To an environment that is not harmful to their health or well-being; and*
- (b) To have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that:-*
 - (i) Prevent pollution and ecological degradation;*
 - (ii) Promote conservation; and*
 - (iii) Secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development*

Compared to section 29 of the Interim Constitution, section 24 is wide enough. Early commentators pointed out that section 24 has strengthened the right since under section 29 the right remains negatively formulated⁹⁷, accordingly section 29 does not impose any duty on individuals or corporate entities to have regard for the environment itself, section 24 does reflect some improvement and it reflects the reference to intergenerational equity.⁹⁸

4.5 Interpretation of Environmental Rights, s. 24

It can be argued that section 24 has two general aims. First, subsection (a) guarantees to everyone the right to live in an environment that will not cause him or her harm. Subsection (b) places a specific mandate on the state to take certain measures in order to realise the guarantee proclaimed in the first part of the section. Second, it places obligation on the state

⁹⁵ Boyle AE & Anderson MR *op cit* (n 43) at 187

⁹⁶ Kidd M *op cit* (n 2) at 37

⁹⁷ C Loots 'The Impact of the Constitution on Environment' (1997) SAJELP 135 at 68

⁹⁸ Winstanley T 'The Final Constitution and the environment' (1997) 4 SAJELP 135-140 at 138

to abstain from measures that may cause environmental degradation or that may generally impair the right guaranteed in subsection (a).⁹⁹

The interpretation of section 24 varies greatly and ranges from judgments. With regard to substance, the majority of these cases focused on the conceptual development of the principle of sustainable development. Some cases focused on the issue of 'health and well-being', the context of pollution, and a handful addressed the issue of interaction between section 24 and other rights.¹⁰⁰ In including this broader interrelationship, the concept 'environment' can also be determined in interpreting section 24.¹⁰¹

However Mubangizi opines that the second aspect of the right created in s 24(a) is that of 'an environment that is not harmful to 'well-being''. This particular aspect is difficult to define, as its ambit is potentially limitless in the environmental context, however, the term 'well-being' relates to the mental, physical and psychological circumstances.¹⁰²

4.5.1 Concept of sustainable development

Section 24 includes the concept of sustainable development. In this sense the relationship between sustainable development and environmental rights is generally accepted.¹⁰³ Referring a separate opinion of Weeramantry J in the Gabcikovo case¹⁰⁴, sustainable development was defined as a right to development which is limited by the need to preserve the environment. The inclusion of the concept of sustainable development in section 24 brings the South African Constitution in line with the international standards in that it notes the connection between human rights, the environment and development.

The Constitutional Court gives the content to the concept of sustainable development in *Minister of Public Works & Others v Kyalami Ridge Environmental Association and*

⁹⁹ J de Waal et al The Bill of Rights handbook (1999) 390 also in Re Certification of the Constitution of South Africa 1996 10 BCLR 1253 (CC) para 78

¹⁰⁰ Paterson A (2009) 'Environmental Compliance and Enforcement in South Africa: Legal Perspectives' at 135

¹⁰¹ PD Glavovic 'Environmental rights as fundamental human rights' (1996) 3 South African Journal of Environmental Law and Policy 71 72

¹⁰² Mubangizi J (2004) 'The protection of human rights in South Africa: a legal and practical guide' Juta and Company Limited, at 128

¹⁰³ Feris and Tladi *op cit* (n 46) at 4

¹⁰⁴ Gabcikovo-Nagymaros Project [*Hungry v Slovakia*] (1998) 37 International Legal Materials 162 206

others,¹⁰⁵ after serious flood damage to homes in Alexandra Township. This was a classic case involving the conflict between development (socio-economic) and environmental rights. There was apparently on one hand, the potential for environmental degradation, but on the other hand, the social and economic plight of the flood victims was real.

The High Court granted an interim interdict and ordered the government to comply with the necessary environmental legislation. The Government then successfully appealed to the Constitutional Court, arguing that the appeal raised important constitutional considerations, including the government's constitutional obligation to provide assistance to flood victims.

In *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs*¹⁰⁶, the applicant sought the review and setting aside of a decision by the Gauteng Provincial Department of Agriculture, Conservation, Environment and Land Affairs (GDACE) to refuse the applicant's application in terms of s 22(1) of the ECA¹⁰⁷ for authorisation to develop a filling station on one of its properties. The court gives broad definition of "environment" to include all conditions and influences affecting the life and habits of man, which would also include socio-economic conditions and influences. With regard to the state's obligation under section 24(b), the court held that the department was obliged to develop an integrated environmental management programme, which took cognizance of a wide spectrum of considerations, including international conventions and approaches as a result of the broad and extensive definition of "environment" in ECA, which, *inter alia*, includes the consideration of socio-economic conditions.

Another critical element of sustainable development was explored in *In re Kranspoort Community*,¹⁰⁸ namely, the concept of intergenerational equity. The case concerned the claim for restitution of rights in land, in terms of the Restitution of Land Rights¹⁰⁹, by the Kranspoort community. The claim was disputed by the owner of the land; some of the objections raised were based on environmental concerns. It was argued that the area was environmentally sensitive and that the use of the area at that time promoted the protection of

¹⁰⁵ 2001(7) BCLR 652 (CC); 2001 (3) SA 1151 (CC)

¹⁰⁶ 2004 (5) SA 124 (W)

¹⁰⁷ ECA, Act 73 of 1989

¹⁰⁸ 2000 (2) SA 124 (LCC)

¹⁰⁹ Act 22 of 1994

the environment. It was argued, restoration would only serve to prejudice the sustainable management of the farm from an environmental perspective.

In considering the first aspects of the test, the court accepted that there were environmentally sensitive issues; it held that, if restoration would not prejudice the sustainable management of the farm from an environmental perspective, there should be no reason why the use of the Land should hold sway over restoration. The Court considered the need of future generations (without expressly referring to such needs) which relates to inter-generational equity and which can arguably be considered one of the primary components of sustainable development. The Court believed that conditions aimed at eliminating the risk of such depletion were in line with s 24 of the Constitution.¹¹⁰

The socio-economic considerations of sustainable development received more attention in a Constitutional Court judgment. In *Fuel Retailers Association of Southern Africa v Director General Environmental Management, Department of Agriculture, Conservation and Environment Mpumalanga Province*¹¹¹ the decision of the authorities to grant an environmental authorisation for the construction of a proposed filling station was challenged. As in *BP* the court stressed the inter-connected nature of environmental, social and economic considerations within the context of sustainable development and stated that:

'The Constitution recognises the interrelationship between the environment and development; indeed it recognizes the need for the protection of the environment whilst at the same time it recognizes the need for social and economic development. It envisages that environmental considerations will be balanced with socio-economic considerations through the ideal of sustainable development.'

4.5.2 The provision of health and well-being

The issue of 'health' and 'well-being' have received attention in environmental issues. It has been agreed that 'health' relates to human health and that it generally incorporates both mental and physical integrity.¹¹² It has been viewed that the concepts of 'health' and 'well-

¹¹⁰ At para 117

¹¹¹ 2007 (6) SA 4 (CC)

¹¹² Paterson A (2009) 'Environmental Compliance and Enforcement in South Africa: Legal Perspectives' at 135

being' are central to the purpose of section 24 since health clearly relates to human health and generally incorporates both mental and physical integrity.¹¹³

The right to an environment conducive to well-being also embraces a sense of stewardship; people are the custodians of environment for future generations which are specifically referred to in subsection 24(b).¹¹⁴ The terms 'health' and 'well-being' require the broad interpretation under section 24. The term 'well-being' is broad and wide enough to be interpreted by the constitutional court as including the aesthetic and spiritual dimension of the natural environment.¹¹⁵

One of the decision that referred to the concept of health was the *Minister of Health and Welfare v Woodcarb (Pty) Ltd. The Minister of Health and Welfare*¹¹⁶ brought an application for an interdict against Woodcarb under the Atmospheric Pollution Prevention Act (APPA), based on complaints received about smoke emissions from Woodcarb's sawmill plant. The Company operated without the necessary registration certificate required by APPA. The Court granted the interdict and held that the practice by Woodcarb violated s 29 of the Interim Constitution, the right to an environment that is not detrimental to health or well-being. According to Paterson unfortunately the court came to this decision without any interpretation of the concepts of health and well-being.¹¹⁷

However, the words 'well-being' are quite interesting as they, *inter alia*, pertain to the environmental livelihood of a person.¹¹⁸ In *Hichange Investments (Pty) Ltd v Cape Produce Compant (Pty) Ltd t/a Pelts Products and Others (Hichange)*,¹¹⁹ somewhat more attention was paid to these concepts. The Cape Produce Company, a semi-processing tannery produces a number of chemical waste products, including the malodorous hydrogen sulphide, a controlled substance under APPA. The applicant alleged that the noxious gases caused a foul offensive odour and the rapid, uncontrollable corrosion of metal structures, and that these

¹¹³ Feris and Tladi at 12

¹¹⁴ Mc Donald D (2004) 'Environmental Justice in South Africa' Juta and Company Limited, 2004 at 176

¹¹⁵ Boyle A E, Anderson M R. *Op cit* (n 49) at 187

¹¹⁶ 1996 (3) SA 155 (N)

¹¹⁷ Paterson A *op cit* (n 100) at 136

¹¹⁸ Kidd *op cit* (n 2) at 37

¹¹⁹ 2004 (2) SA 393 (ECD)

gases were prejudicial to the health and well-being of workers and the residents of the city. In this respect the company was violating s 28(1) of NEMA.

Hichange furthermore alleged that the government had failed, neglected or refused to take reasonable steps to stop the pollution in line with s 28 (4) of NEMA. As a result, it requested an order from the court directing Cape Produce Company to cease its pollution-causing activities. In considering the applicability of s 28(1) and (4) of NEMA, Leach J referred to the concepts of 'health and well-being' in s 24 of the Constitution, and, in assessing whether the pollution amounted to 'significant pollution as required by s 28(1), he states that:

'The assessment for what is significant involves, in my view, a considerable measure of subjective import. In any event in the light of the constitutional right a person has to an environment conducive to health and well-being. I agree with the view expressed in *Glazewski* in *Environmental Law in South Africa*....that the threshold level of significant will not be particularly high'.¹²⁰

Another observation has been pointed out by Feris who views 'well-being' as inclusive of spiritual of psychological aspects, such as the individual's need to be able to communicate with nature.¹²¹ Human 'well-being' therefore depends on conservation and the maintenance of wilderness areas and biodiversity, over and above a spiritual and psychological meaning.¹²²

Glazewski summarises and interprets the provision of subsection 24(a) on well being as includes, first it goes beyond the right to health care established by section 27 of the Bill of Rights which concerns the provision of health care services by stating that everyone has a right to an environment that is not harmful to their health. The second aspect is that section 24 elaborates on the illusive nature of an environmental right by going on to provide for a right to an environment that is not harmful to one's well-being. According to his views the substantive meaning of environmental well-being is open-ended and will have to be expanded

¹²⁰ Paterson A. *op cit* (n 100) at 136

¹²¹ Feris LA 'The Environment and the new Constitution; (1994) 1 SAJELP 3

¹²² Feris LA 'The conceptualisation of environmental justice within the context of the South African Constitution' LLD THESIS, University of Stellenbosch, 2000 at 201

on by the courts. Glazewski further argues that in the environmental context, the potential ambit of a right to 'well-being' is exciting but potentially limitless.¹²³

4.5.3 Right to individual as members of the group

In order to promote the achievement of environmental rights under section 24(b) there are two ways to understand this concept, first it can mean simply that the present and future generations have the right to have the environment protected, and the other meaning is that the section confers the right only to individuals as members of present and future generations, The last meaning appears to be grammatically more correct.¹²⁴ In other words, the group (present and future generations) does not have a distinct right independent of the individual's.¹²⁵

In supporting the meaning stated above, Gutto views that since the Constitution opens a wider scope for representative, class and public interest litigation, the rights of individuals may be exercised collectively, he further states that, section 24 of the Constitution incorporates this formulation, and add an intergenerational concept.¹²⁶

4.5.4 Interpretation of social and economic rights under section 24

Section 24 can be interpreted to include socio-economic rights. Subsection 24 (b) is framed as a directive principle and has a socio-economic character, it imposes a constitutional imperative on the state to secure the rights of individuals to have the environment protected and conserved as well as sustainability utilised and developed, while promoting economic and social development by implementing legislation and other reasonable measures.¹²⁷

Glazewski views that subsection 24(b), is more in the nature of socio-economic right implying a positive duty on the state to provide environmental quality, the provision implies that in addition all 'legislative and other measures' must comply with these criteria.¹²⁸

¹²³ Glazewski at 87

¹²⁴ Feris and Tladi *op cit* (n 46) at 11

¹²⁵ Weiss B In fairness to future generations: international law; common patrimony and intergenerational equity 1989 quoted by Cheadle MH et al '(n 29) at 425

¹²⁶ SBO Gutto 'Environmental law and rights ' in M Chaskalson et al (eds) Constitutional law of South Africa (1998) 32-1 32-2. See also Tladi Feris (n 46) at 11

¹²⁷ Glazewski J ' Environmental justice and the new South Africa democratic legal order' (1999) *Acta Juridica* 1-35 at 6

¹²⁸ Glazewski *op cit* (n 4) at 87

The position taken by the Court in *HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism and others*¹²⁹, the court stated that section 24(b) is akin to a directive principle and is 'inspirational' in form. The mandate stemming from s. 24 (b) and other socio-economic rights fall within the realm of real expectations. The Constitutional Court has taken the view that at a minimum these rights can at least be 'negatively protected from improper invasion.

The critical aspects in this issue has been discussed by Peterson who observes that the level of protection goes further than negative protection, and that the state can be obliged to ensure that it fulfils its positive duty to give effect to the right. He states that it is a position, however, that did not consider the now accepted interpretation of socio-economic rights which makes these rights subject to realisation and provides some thoughts on the judgement. In doing so, 'it explores the concept of directive principles of state, and considers whether section 24(b) is a socio-economic right and addresses the notion of 'aspiration' as suggested by the Court'.¹³⁰

4.6 Role of Judiciary in interpreting environmental rights under section 24

The judiciary has a responsibility to assess and interpret the environmental right and to give guidance on how we should apply and adhere to the right. The right under s. 24, like all other rights in Chapter 2, is first and foremost binding on the state. Section 8 regulates the application of the fundamental rights contained in the Bill of Rights to the relationship between State and subject (the public law relationship), as well as to the relationship between the individual citizens reciprocally (the private law relationship) and all organs of state are bound.¹³¹

In addition, section 24(b) places a specific duty on the state to regulate in favour of environmental protection. In this regard, the Bill of Rights adheres to the traditional view that a constitution should protect citizens against unwarranted interference by the state, and should as a result operate on the vertical plane. In determining whether a right applies on the horizontal plane, the court will have to consider the nature of the right and the nature of the

¹²⁹ 2006 (5) SA 512 (T)

¹³⁰ Paterson *op cit* (n 100) at 135

¹³¹ Ferreira GM 'Constitutional values and the application of the fundamental right to a clean and healthy environment to the private-law relationship' (1999)2 SAJELP 171-187 at 171

duty imposed by the right. It can therefore be argued that this consideration, and not whether section 8(2) confers horizontality on the Bill of Rights, falls within the discretion of the Court.¹³²

The role played by the Court in interpreting 24 was emphasised in *Fuel Retailers Association*¹³³ recently when Ngcobo J stated: 'The role of the courts is especially important in the context of the protection of the environment and giving effect to the principle of sustainable development'.¹³⁴ As noted in this case, the detailed treatment of the concept of sustainable development is especially heartening and speaks of the judiciary's willingness to engage with section 24 in a much more in-depth manner. Indeed, this type of engagement is what is now required to define section 24 in the context of the specific economic and social conditions prevalent in South Africa, including its role *vis-à-vis* competing and related rights.

In interpreting the right to environment under section 24, it is necessary to take cognisance of those procedural (and other) rights contained in the Bill for Rights that support the right to environment. First of all, one must bear in mind that the Bill of Rights which contains the right to environment and those rights related to environment (environmental rights) applies both vertically and, depending on the circumstances, horizontally as well.¹³⁵

4.7 Relationship between Section 24 and other rights

Generally in implementing environmental rights, section 24 shall be read with other provisions in the Constitution to make sure that the state act in accordance with fair procedures in its constitutional role. This regards to procedural constitutional rights, such as the rights to administrative justice and access to information and at the same time procedural requirements can be utilized to ensure that the state acts lawfully when its actions impact on the environment.¹³⁶

The relationship of environmental rights and other rights has been illustrated in a number of reported cases. For example in *Van Huyssteen NO and others v Minister of Environmental*

¹³² Cheadle and Davis 'The application of 1996 Constitution in the private sphere (1997) 13 SAJHR 44

¹³³ *Fuel Retailers Association v DG, Environmental Management, Mpumalanga* (n 111)

¹³⁴ As noted, the detailed treatment of the concept sustainable development is especially heartening and speaks of the judiciary's willingness to engage with section 24 in a much more in-depth manner.

¹³⁵ Devenish GE (2005) 'The South African Constitution' Butterworths Durban at 45

¹³⁶ Peterson *op cit* (n 100) at 114

*Affairs and Tourism and others*¹³⁷, the applicants, trustees who owned property in the vicinity of Langebaan Lagoon, a declared Ramsar site, adjoining the West Coast National Park, opposed the proposed erection of a large steel mill near the lagoon on various grounds. The Court considered a number of these other rights (under interim Constitution), including the administrative justice clause, the right to have access to information and the question whether the applicant had *locus standi* to claim the order prayed for.¹³⁸

4.7.1 Locus Standi:

Section 38 of the Final Constitution which followed section 7(4) of the interim constitution broadens the common law approach towards *locus standi* considerably. It provides that:-

‘Anyone listed in this section has the right to approach a competent court, alleging that a right in the bill of rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are:

- (a) *Anyone acting in their own interest;*
- (b) *Anyone acting on behalf of another person who may approach a court cannot act in their own name;*
- (c) *Anyone acting as a member of, or in the interest of, a group of persons;*
- (d) *Anyone acting in the public interest; and*
- (e) *An association acting in the interests of its members’.*

Apart from the environmental clause which includes the notion of intergenerational equity, as important section 38 which virtually does away with the *locus standi* rule, a requirement traditionally was a major hurdle in the way of individuals or environmental groups desiring to bring environmental actions.¹³⁹ Despite the literal meaning of s. 38, a majority of the Constitutional Court has apparently decided that the liberal *locus standi* provisions in the Constitution are not confined to situations where there has been threat or infringement of a constitutional right, but also apply to rights which are not included in the Bill of Rights.¹⁴⁰

Interesting statements on *locus standi* have been made in *Wildlife Society of Southern Africa & Others v Minister of Environmental Affairs and Tourism of the Republic of South Africa &*

¹³⁷ 1995 (9) BCLR 1191 (C)

¹³⁸ Glazewski *op cit* (n 4) at 77-78

¹³⁹ Glazewski *ibid* at 77-78

¹⁴⁰ Kidd, (n 2) at 31

others¹⁴¹, judge Pickering states that where a statute imposes the obligation on the state to protect the environment, a body such as the Wildlife society should have *locus standi* at common law to apply for an order compelling the state to comply with its obligations in terms of statute, 'there is much to be said for the view that, in circumstances where the *locus standi* afforded to persons by the Constitution is not applicable and where a statute imposes an obligation upon the state to take certain measures in order to protect the environment in the interests of the public, such as the first applicant, with its main object being to promote environmental conservation in South Africa, should have *locus standi* at common law to apply for a order compelling the state to comply with its obligations in terms of such statute.¹⁴²

4.7.2 Section 32 : Access to information

The general rule is that effective enforcement of an environmental right often requires information. In order for the public to effectively advocate environmental protection, access to relevant information is important. 'With this right to information, it might be much easier for the plaintiff to prove a wrongful act or omission, fault and causation on the side of the respondent'.¹⁴³

Rights to information under environmental law increases the transparency and openness of government structures, as it allows citizens to have access to information at states' disposal. This role can be taken advantage of in the collection of private information.¹⁴⁴ In implementing this right section 32(2) of the Promotion of Access to Information Act¹⁴⁵ has been promulgated to give effect of this section. The purpose is to promote transparency and accountability in all organs of the state, by making it obligatory for all organs of state to provide the public with timeous, accessible and accurate information, thus empowering member of the public to participate in government decision-making that affects them.

¹⁴¹ 1996 (3) SA 1095 (Tk)

¹⁴² At 1105 A-B

¹⁴³ Winstanley T *op cit* (n 14) at 92

¹⁴⁴ Louka Elli (2006) '*International Environmental Law: Fairness, Effectiveness and World Order*', Cambridge University Press at 30

¹⁴⁵ No. 3 of 2000

The right to access to information similarly supported in *Van Huysteen*,¹⁴⁶ the applicants relied on the environmental right and successfully sought access to state-held documents that contained information regarding the development of a proposed steel mill and its potential adverse environmental impact. Similarly, in *the Trustees for Time Being of the Biowatch Trust v The Registrar: Genetic Resources and Others*¹⁴⁷ (the applicants relied on the environmental right to support their request for access to information relating to genetically modified organisms, based on the right to access to information.

4.7.3 The Administrative Action

The general rule is that administrative action must be lawful, reasonable and procedurally fair; in implementing the rule the Promotion of Administrative Justice Act¹⁴⁸ has given effects to this right. All legislation relating to environmental management must be consistent with the Constitution, including the right to administrative justice. Section 33 (1) provides that ‘everyone has the right to administrative action that is lawful reasonable and procedurally fair’, which is codification, and may be an extension of the existing common law. According to section 33(2) ‘Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons’.

Although environmental law draws from virtually all branches of South African law, administrative law is possibly the most important in so far as its practical application is concerned as far as the exercise of administrative discretion inevitably results in environmental transformation or even degradation in one form or another.¹⁴⁹ In *administrator, Transvaal and the Firs Investment (Pty) Ltd v Johannesburg City Council*,¹⁵⁰ the court reviewed the Administrator’s decision to approve a shopping complex development in northern Johannesburg suburb. It held that while the proposal apparently contradicted sound town-planning principles, this did not amount to gross unreasonableness and the decision could not be set aside on this ground.¹⁵¹

¹⁴⁶ *Van Huysteen v Minister of Environmental Affairs and Tourism*, 1996 (1) SA 283 (C) 300B-F

¹⁴⁷ 2005 (4) SA 111(T)

¹⁴⁸ No. 3 of 2000

¹⁴⁹ Boyle A E & Anderson M R. *Supra* (n 43) at 190

¹⁵⁰ 1971 (1) SA 56 AD

¹⁵¹ At 79H

4.8 Implementation of environmental rights

Environmental laws can be implemented through criminal sanctions, administrative measure and common law remedies.¹⁵² Despite the fact that South Africa has made significant progress in the area of environmental management in the past decade, there is increasing pressures on [South Africa's] resource base and some aspects of the environment have been deteriorated.¹⁵³

The implementation of environmental rights is firmly in the hands of the government in three spheres of government (the department of Environmental Affairs and Tourism, Department of Water Affairs and Forestry, Department, Department of Minerals and Energy. Department of Land Affairs, Department of Health and Department of Labour,¹⁵⁴ Government Institutions (e.g Minister, Premier, Director –General, Head of Department, Officials and Committees, and other Institutions who performs the functions in terms of environmental legislations. The Committee for Environmental Co-ordination, established by section 7 of NEMA, is responsible for environmental implementation plans and environmental management plans and to make sure that each provincial department must ensure that municipalities adhere to the relevant environmental implementation and management plans in the preparation of any policy.¹⁵⁵

4.8.1 Criminal sanctions

The application of criminal sanctions as a primary sanction means that the environmentally harmful activity is outlawed directly, while its application as a subsidiary sanction occurs where reliance in the first place is based on administrative measures.¹⁵⁶

Various criminal sanctions are set out in section 34 of NEMA. Provision is made for the Court, at the written request of the Minister or other organ of State in the presence of the convicted person, to enquire summarily and without pleadings into the amount of loss or damage which has been caused to the organ of State or other person, including the costs incurred or likely to be incurred by an organ of State or other person in rehabilitating the environment or preventing damage to the environment and for the court to then give

¹⁵² Glazewski *supra* (n 4) at 143

¹⁵³ South Africa Environment Outlook (2006), A Report on the State of the Environment published by the Department of Environmental Affairs and Tourism 2006, available on <http://www.deat.gov.za>.

¹⁵⁴ section 11(2), Schedule 2 of NEMA

¹⁵⁵ s 16 (4) (a) and (b) of NEMA

¹⁵⁶ Kidd M. 'Environmental Crime-A time for a rethink in South Africa?' (1998) 5 SAJELP 181

judgment therefore in favour of the organ of State or other person concerned against the convicted person. Such judgment has the same force and effect and is executable as if it had been given in a civil action duly instituted before a competent court.¹⁵⁷

Furthermore, the court may summarily enquire into and assess the monetary value of any advantage gained or likely to be gained by such person in consequence of the offence committed and, in addition to any other punishment imposed in respect of that offence, the court may order an award of damages or compensation or a fine equal to the amount so assessed.¹⁵⁸

A further provision is that the court convicting a person who has committed a Schedule 3 offence, may upon the application of the prosecutor or other organ of State, order such person to pay the reasonable cost incurred by the Public Prosecutor and the organ of State concerned in the investigation and prosecution of the offence. There are furthermore provisions contained in Section 34 for an employer to be guilty of an offence committed by a manager, agent or employee under certain circumstances¹⁵⁹ and for the manager, agent or employee to be convicted as if he or she were the employer under certain circumstances.¹⁶⁰

The problems in implementation of criminal sanctions have been observed by Kidd who identifies the cost and time involved in criminal prosecutions, the fact that it is reactive rather than preventative in nature, the problems of proof and the obstacles presented by “due process” safeguards as weaknesses in that respect.¹⁶¹

4.8.1.1 Strict Liability

The mental element is often problematic to prove generally, as well as in environmental crimes.¹⁶² In *R v Canestra*,¹⁶³ the question was whether *mens rea* is a requirement for an offence created under regulations made under the Sea Fisheries Legislation applicable at that time. The pertinent regulation provided that no person shall be in possession of certain fish

¹⁵⁷ NEMA Sections 34(1) and (2)

¹⁵⁸ NEMA Section 34(3). Here too the provision relates only to an offence listed in Schedule 3 to the Act.

¹⁵⁹ NEMA Section 34(5)

¹⁶⁰ NEMA Section 34(6)

¹⁶¹ Kidd *supra* (n 2) at 211-213

¹⁶² Glazewski *supra* (n 4) at 145

¹⁶³ 1951 (2) SA 317 (A)

less than a specified size. The appellant had been trek-netting legally in Langebaan Lagoon but their catch had inadvertently included undersize fish of a certain species. The appellants defence was based on the claim that they lacked the necessary *mens rea*. The appeal failed as they knew that in trek-netting fish they were likely to also catch a by-catch of undersize fish. The court found that for this offence *mens rea* was an element and that the appellants had failed to prove lack of *mens rea* on their part.¹⁶⁴

4.8.1.2 Private prosecution

This aspect prescribed under NEMA, in the section headed 'Private Prosecution'; the provisions build on general provisions of Criminal Procedure Act.¹⁶⁵ It provides that 'any person may, in the public interest or in the interest of protecting the environment, institute and conduct a prosecution in respect of any breach or threatened breach of any duty, other than a public duty resting on an organ of the state, where that duty is concerned with the protection of the environment and the breach of that duty is an offence'.¹⁶⁶ One of the conditions is that this only applies if the person prosecuting privately does so through an attorney or advocate entitled to practise in South Africa and if written notice of the intended prosecution has been given to the appropriate private prosecutor.¹⁶⁷

In implementing this measure, Kidd points out that the average member of the public who is concerned about environmental issues and breach of environmental legislation would make use of the private prosecution provision, since his or her goals would probably be more than adequately served by interdict proceedings.¹⁶⁸

4.8.1.3 Statutory presumption

Statutory presumptions can be linked with the issue of strict liability where the onus is shifted to the accused to disprove an element of a crime, rather than for the state to prove it.¹⁶⁹ In the environmental context the constitutionality of a specific presumption in an environmental case, albeit under the Interim Constitution, was considered in *S v Mumba*¹⁷⁰ The accused had

¹⁶⁴ At 322

¹⁶⁵ 51 of 1977

¹⁶⁶ S 33(1)

¹⁶⁷ s 32 (2) (c)

¹⁶⁸ Kidd *supra* (n 2) at 228

¹⁶⁹ Glazewski (n 4) at 146

¹⁷⁰ 1997 (1) SA 854 (WLD)

been found in possession of ivory and had been convicted under the Nature Conservation Ordinance,¹⁷¹ which applies in Gauteng Province. The Court considered the validity of the presumption under the limitations clause of the Interim Constitution and concluded that the presumption was not reasonably necessary and that the justification for the deeming provision had not been established.

4.8.2 Administrative remedies

The main administrative measures are the issuing of permits and licences for various activities and the issuing of directives for failure to comply therewith or for failing to comply with the provisions of the relevant statutes. Environmental Legislations make it an offence for a person or entity to engage in an activity without the necessary permit, right or licence. The effect of such penalties is to render the incurrance thereof to be simply an expense incurred in the conduct of the business.¹⁷²

Numerous environmental statutes require obtaining a licence or permit before a particular activity can be carried out. A relevant question according to Glazewski is whether the lack of permit, or breach of its conditions, can be relied on by an affected third party.¹⁷³ The object of this system of issuing permits, licences and rights is to ensure that prior to the granting thereof, the impact of the relevant activities on the environment is considered, investigated and properly assessed prior to the competent authority issuing an environmental authorisation, a license or a right. In *Vanstappen v Port Edward Town Board and others*¹⁷⁴ the appellant sought an interdict preventing the local authority dumping waste into a disused quarry adjoining her property on the ground that the local authority had not obtained the requisite permit to dump waste under the Environmental Conservation Act.¹⁷⁵

4.8.2.1 Permit and licences

Chapter 8 of NEMA deals with environmental management co-operation agreements, section 35 states that the Minister and every MEC and municipality, may enter into environmental

¹⁷¹ 12 of 1983 (T)

¹⁷² Richard J Lazarus, "Assimilating environmental protection into legal rules and the problem with environmental crime: (1994) 27 *Loyola LA LR* 867 at 880 quoted in Michael Kidd, "Environmental Crime – Time for a rethink in South Africa?" (1998) 5 *SAJELP* 186.

¹⁷³ Glazewski (n 4) at 152

¹⁷⁴ 1994 (3) SA 569 (D)

¹⁷⁵ 73 of 1989

management co-operation agreements with any person or community for the purpose of promoting compliance with the principles laid down in the Act.

The potential impacts on the environment of the listed activities under NEMA must be considered, investigated, assessed and reported on to the competent authority who must then grant an environmental authorization¹⁷⁶. Every such environmental authorisation must as a minimum ensure that adequate provision is made for the ongoing management and monitoring of the impacts of the activity on the environment throughout the life cycle of the activity.¹⁷⁷

Similarly, provisions are contained in a number of other laws for the obtaining of permits, rights and licences prior to the use or activity in question being carried out. The object of this system of issuing permits, licences and rights is to ensure that prior to the granting thereof, the impact of the relevant activities on the environment is considered, investigated and properly assessed prior to the competent authority issuing an environmental authorisation, a license or a right.¹⁷⁸

Under NEMA, the potential impacts on the environment of the listed activities must be considered, investigated, assessed and reported on to the competent authority who must then grant an environmental authorisation.¹⁷⁹ Every such environmental authorisation must as a minimum ensure that adequate provision is made for the ongoing management and monitoring of the impacts of the activity on the environment throughout the life cycle of the activity.¹⁸⁰ Similarly, provisions are contained in a number of other laws for the obtaining of permits, rights and licences prior to the use or activity in question being carried out.¹⁸¹

¹⁷⁶ NEMA Section 24(1)

¹⁷⁷ NEMA Section 24(E).

¹⁷⁸ The Environment Conservation Act 73 of 1989 and Regulations R 1182 to R 1184 in Government Gazette No. 18261 of 5 September 1997 are also applicable

¹⁷⁹ NEMA Section 24(1)

¹⁸⁰ NEMA section 24 E

¹⁸¹ example, chapter 4 of the National Water Act 36 of 1998 (NWA) which provides for water uses and the regulation thereof and for the issue of general authorisations and water use licences; the provisions of chapter 4 of the Mineral and Petroleum Resources Development Act 28 of 2002 (MPRDA) in regard to the issuing of prospecting and mining rights; chapter 6 of the MPRDA in regard to the issue of exploration and production rights for offshore petroleum and gas; chapter 3 of the Marine Living Resources Act 18 of 1998 in regard to the granting of various categories of fishing rights; the issue of a registration certificate to carry on a scheduled process in terms of the Atmospheric Pollution Prevention Act 45 of 1965 which will be replaced by a system of licensing in terms of the National Environmental Management : Air Quality Act 39 of 2004.

The difficulty with the system of permitting and licensing is lack of capacity, severe backlogs have been formed. It was recently reported that the National Department of Environmental Affairs and Tourism has a backlog of 1,075 applications awaiting environmental impact assessment (EIA) decisions. According to the Department, it did not know how far the backlogs dated to and attributed the backlogs to a national shortage of EIA officers.¹⁸²

4.8.2.2 Settlement of Disputes

Chapter 4 of NEMA headed 'Fair decision-making and conflict management' provides for conciliation mechanisms to be used. It is provided that any Minister, MEC or Municipal Council may, before reaching a decision.¹⁸³ S 17(1)(b)(i) provides that, where such a decision-maker considers conciliation appropriate, he or she *must* (own emphasis) either refer the matter to the Director-General for conciliation under this Act;¹⁸⁴ or appoint a conciliator on the conditions, including time-limits that may be determined;¹⁸⁵ or where a conciliation or mediation process is provided for under any other relevant law administered by such Minister, MEC or Municipal Council, refer the matter for mediation or conciliation under such other law.¹⁸⁶ It is only where the decision-maker considers conciliation inappropriate or if conciliation has failed that it can make a decision.¹⁸⁷

Another way in which conciliation might happen is that, per *NEMA*: Anyone may request the Minister, a MEC or Municipal Council to appoint a facilitator to call and conduct meetings of interested and affected parties with the purpose of reaching agreement to refer a difference or disagreement to conciliation in terms of this Act, and the Minister, MEC or Municipal Council may, subject to section 22, appoint a facilitator and determine the manner in which the facilitator must carry out his or her tasks, including time limits.¹⁸⁸ The Director-General

¹⁸² Article entitled "State grapples with EIA backlog" available on <http://www.busrep.co.za/general> published on 23rd August, 2007 (Accessed on 26 September, 2009)

¹⁸³ [W]here a difference or disagreement arises concerning the exercise of any of its functions which may significantly affect the environment; (s 17(1)(a)) or before whom an appeal arising from a difference or disagreement regarding the protection of the environment is brought under any law.

¹⁸⁴ S 17(1)(b)(i)(aa)

¹⁸⁵ S 17(1)(b)(i)(bb)

¹⁸⁶ S 17(1)(b)(i)(cc)

¹⁸⁷ S 17(1)(b)(ii).

¹⁸⁸ 81 S 17(2). *NEMA* directs also that: "A court or tribunal hearing a dispute regarding the protection of the environment may order the parties to submit the dispute to a conciliator appointed by the Director-general in terms of this Act and suspend the proceedings pending the outcome of the conciliation." (S 17(3).)

may, on the conditions, including time-limits, that he or she may determine, appoint a conciliator acceptable to the parties to assist in resolving a difference or disagreement.¹⁸⁹

4.8.2.3 Directives

This procedure empowers certain administrative bodies to serve a notice or directives stopping the offender, within a specific time, to perform any activity which is detrimental to environment. Environmental Legislations may provide for the power of an official to direct an individual (offender) to take specified steps in order to comply with the law. Such directive powers may include the so-called abatement notice.¹⁹⁰ In *Evans and Others v Llandudno/Hout Bay Transitional Metropolitan Substructure and Another*,¹⁹¹ the court held that before being issued with a section 31A directive, the applicants were entitled to be given notice of the respondent council's intention to issue a directive under section 31A and be given an opportunity of being heard and to make representations thereon to the respondent council.¹⁹²

Another decision applicable is of SCA in *HTF Developers (Pty) Ltd v The Minister of Environmental Affairs and Tourism and Others*,¹⁹³ the court held that before a direction under section 31A could be issued, the issuing authority had to comply with the provisions of section 32 which provides, *inter alia*, that before a directive is issued, the authority concerned must first publish in the Government or Provincial Gazette a draft notice. The enforcement of environmental law by Government departments is seen as a huge problem in South Africa as Government officials are incapacitated by a lack of human resources and skills.¹⁹⁴

¹⁸⁹ 83 S 18(1). Provided that if the parties to the difference or disagreement do not reach agreement on the person to be appointed, the Director-General may appoint a person who has adequate experience in or knowledge of conciliation of environmental disputes. A conciliator appointed in terms of this Act must attempt to resolve the matter (s 18(2)) –

(a) by obtaining such information whether documentary or oral as is relevant to the resolution of the difference or disagreement; [It is the assumptions and insights that go into *generating* this information that are the key ... With water resources it is not a case of *obtaining* but a case of *generating* in an acceptable manner.]

(b) by mediating the difference or disagreement;

(c) by making recommendations to the parties to the difference or disagreement; or

(d) in any other manner that he or she considers appropriate.

¹⁹⁰ Kidd *op cit* (n 2) at 219

¹⁹¹ 2001 (2) SA 342 (C)

¹⁹² At 355 D – E

¹⁹³ See (n129)

¹⁹⁴ Willemien du Plessis, *Hichange – A new direction in environmental matters? – Hichange Investments (Pty) Limited v Cape Produce Company (Pty) Limited t/a Pelts Products & Others* 2004 (11) SAJELP 135

4.8.3 Judicial Measures

4.8.3.1 Legal Standing

Generally in implementation and enforcement of environmental rights, laws require the legal standing, which referred to as the '*locus standi*'. South African laws, as well as many foreign legal systems, has traditionally required that in order to have legal standing to challenge administrative unlawfulness an individual must show that he or she has some degree of personal interest in the administrative action under challenge.¹⁹⁵

The impact of legal standing requirement by the new constitution in the environmental context has been illustrated in *Minister of Health & Welfare v Woodcarb (Pty) Ltd and Others*,¹⁹⁶ the respondent took the point that the applicant lacked the necessary *locus standi* on the grounds, *inter alia*, that the Atmospheric Pollution Prevention Act 45 of 1965, provided for criminal sanctions and not for civil remedies as was the case before the court. Judge Hurt considered the question of *locus standi* at some length and held the whole purpose of the legislation was to control the installation and use of scheduled process generally, and that the applicant was implicitly entitled to bring this particular interdict application. More specifically is held that the applicant could rely on the public interest clause in the interim Constitution for *locus standi* to apply to the court for an interdict.¹⁹⁷

However, a different attitude was evident in *Society for Prevention of Cruelty to animals, Standerton v Nel and others*¹⁹⁸, the court dismissed the argument that the appellant, the SPGA, lacked *locus standi* to bring an interdict to prevent the holding of a rodeo which was to include a bull-riding competition. It held that '...it would be an anomalous situation if the law required that the SPCA had to stand idly by and wait for an act of cruelty to be performed before being entitled to take any steps in the matter'¹⁹⁹

Section 32 of NEMA provides *locus standi* for anyone seeking relief in respect of a breach or threatened of 'any statutory provision concerned with the protection of the environment or the use of natural resources' Section goes further that Not only *has locus standi* been an

¹⁹⁵ Van Reenen '*Locus Standi* in South African Environmental law: a reappraisal in International and Comparative Perspective' (1995) 2 SAJELP 121

¹⁹⁶ cited (n 116)

¹⁹⁷ s 7(4) of the Interim Constitution at 164 G

¹⁹⁸ 1988 (4) SA 42(W)

¹⁹⁹ At 47 D-E

obstacle to environmental litigation, but possibility of paying the costs of the opposing party is one loses has also served as an important disincentive to go to court.²⁰⁰

Therefore, because of the Constitutional right which everybody enjoys to have an environment that is not harmful to their health or wellbeing, it is not difficult to imagine that the classes of persons now endowed with *locus standi*, both Constitutionally and under NEMA, will effectively get past the previous hurdles in this regard.²⁰¹

4.8.3.2 Judicial Review

This appears to be an important instrument regarding decisions in environmental issues.²⁰² Administrative environmental decisions or actions taken by relevant officials or bodies are subject to judicial review before the High Court. Section 33 of the Constitution offers great challenge to administrative decisions, the requirement of lawful, reasonable and procedurally fair administrative action are set out and given effect. The Act determines the judicial review and identifies the Courts responsible for that review.²⁰³

In interpreting this provision, Kidd observes that a review of administrative actions must contain a possibility of, for example, tribunal review, which at the first step also re-examines the merits of the case, and at the second step, a review, for example by court, which at least examines the lawfulness and procedural fairness of the action.²⁰⁴

4.8.4 Common Law Principles and Remedies

The common law of delict has general accepted essential elements of an actionable delict under South African environmental law. In order to apply common law of delict there must have been an act or omission, The act or omission must have been wrongful or fault, in the form of either intention or negligence, has to be present, harm to person or property must have been suffered in the form of quantifiable monetary damages, referred to a patrimonial loss (although sometimes pure economic loss is also recoverable), and there must have been causation, in that the act or omission of the defendant must have caused the harm, this must

²⁰⁰ S. 32(2)

²⁰¹ Act 108 of 1996 Section 24

²⁰² Glazewski *supra* (n.88) at 123

²⁰³ sections 6 and 7 of PAJA

²⁰⁴ Kidd *supra* (n 2) at 41

be present in both the factual and legal sense, the latter usually referred to as the issue of remoteness.²⁰⁵

An act or omission which violates a statutory provision and causes the plaintiff damage is prima facie wrongful. In *Vestrappen v Port Edward Town Board and others*, the Court held that the local authority's action of dumping the town's waste into a disused quarry adjoining the applicant's property without the necessary permit under the ECA was unlawful conduct and thus wrongful.²⁰⁶

4.8.4.1 Interdict

An interdict is an order of court which enjoins a respondent to refrain from doing something or orders a respondent to do something. Accordingly, it is not a remedy for past conduct, but for present and future conduct.²⁰⁷ It is also a valuable implementation mechanism in the hands of the concerned environmental citizen.²⁰⁸ Kidd opines that an interdict is potentially a very useful enforcement tool because it can be used to put a stop to harmful activity and often at an early stage, allowing proactive intervention. An interdict can be sought by anybody, given the wide *locus standi* provisions in NEMA.²⁰⁹

In *Verstrappen's* case for example the Court had to consider the balance of convenience between a private citizen and a public. The facts briefly were as follows: the applicant was the co-owner of certain immovable property which abutted a worked-out quarry which the first respondent (the Port Edward Town Board) had commenced using as a waste disposal site. The Court found that this conduct on the part of the first respondent was unlawful. The Court, *inter alia*, was called upon to determine whether the first respondent should be interdicted from continuing to operate the waste disposal site pending the hearing by oral evidence of the nuisance created by the waste disposal site. The Court referred to the decision in *Olympic Passenger Service (Pty) Ltd v Ramlagan*,²¹⁰ where it was held that 'a Court will not grant an interdict if the effects of the order upon the respondent or the general public

²⁰⁵ Glazewski J, *supra* (n 88) at 538-40

²⁰⁶ Cited (n 181)

²⁰⁷ The Law of South Africa [LAWSA], First Reissue, Vol. 11 Durban, Butterworths at para 303

²⁰⁸ Glazweski (n 4) at 151

²⁰⁹ Michael Kidd, "Alternatives to the Criminal Sanction in the Enforcement of Environmental Law" (2002) 9

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²¹⁰ 1957 (2) SA 382 (D)

welfare would be cause greater harm or inconvenience from that which the applicant complains of. The Court went on to hold that ‘Where, as in this case, the wider general public is affected, the convenience of the public must take into account any assessment of the balance of convenience...In my opinion, if the interests of the other rate payers living in the (first) respondents local authority are taken into account, the balance of convenience in this matter is overwhelming against the grant of any interim relief to the applicant’.

4.8.4.2 Negligence

Negligence refers to state of mind of someone who acted wrongfully and can take the form of either intention (*dolus*) or negligence (*culpa*). The formula was set in *Kruger v Coetzee* where it stated that: if one would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and would take reasonable steps to guard against such occurrence.

The extent to which South Africa Common Law accommodates strict liability is controversial, and depends on the disputed question as to the extent that the English law of nuisance which allows for strict liability. In *Regal v African Superslate (Pty) Ltd*,²¹¹ the Appellate Division rendered the matter controversial, suggesting that we should revert to the Roman Dutch law. Strict liability may however be provided for in statute and the fault requirement is usually not required in interdict proceedings. Further in *Cambridge Water v Eastern Leather Plc*, the court found that the defendant liable even though the harm was not foreseeable, on the basis that the defendant had collected things on his land which were likely to do mischief if they escaped.²¹²

4.8.4.3 Nuisance and the law of neighbours

The Roman law maxim (use your property in a way which does harm another) is applicable to law of neighbours. In *Gibbons v SA Railway and Harbours*²¹³ the plaintiff property adjoined the defendants, SA Railway and Harbour, where the railway operated a locomotive yard and running shed. The Plaintiff sued for damages, alleging that the discharge of smoke and soot on to his property constituted a nuisance and materially diminished the property’s value as well as the comfort and enjoyment derived from it. The Court held that the activity

²¹¹ 1963 (1) SA 102(A)

²¹² Glazewski J, *op cit* (n 88) at 540

²¹³ 1933 CPD 521

constituted a nuisance and awarded the plaintiff damages, as the defendant railways had not established that at the time of the erection of the sheds, it had taken due consideration to the protection of neighbourhood property.

In *Wright & Another v Cockin & Others*,²¹⁴ the respondents had stocked their conservancy, which was adjacent to the applicants' cattle farm, with blue wildebeest (which was not endemic to the Eastern Cape), the applicants applied for an interdict prohibiting the respondents from allowing any of the wildebeest to come within 1000 metres of the applicants' property because the wildebeest had transmitted, and would continue to transmit, a fatal virus, known colloquially as 'snotsiekte'. The respondents had argued that an adequate alternative remedy available to the applicants was an action for damages. The Court rejected this argument, pointing out that the applicants were faced with a continuous and ongoing situation.

As long as the respondents' wildebeest were allowed to run near to the boundary separating their respective properties, it was inevitable that the applicants' cattle would be infected from time to time. The harm was accordingly an ongoing one and there was no way of knowing what the scale of the applicants' losses might be if the mischief was not removed. The Court therefore concluded that the applicants had satisfied all the requirements for a final interdict.

In *Fose v Minister of Safety and Security*,²¹⁵ Ackermann J stated as follows : I have no doubt that this Court has a particular duty to ensure that, within the bounds of the Constitution, effective relief be granted for the infringement of any of the rights entrenched in it. In our context, an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the Courts, it is essential that on those occasions when the legal process does establish that an infringement of an entrenched right has occurred, it be effectively vindicated.

Surely the Courts are, in the words of Ackermann J in *Fose*, enjoined to forge new tools and shape innovative remedies and develop the balance of convenience element of an interim

²¹⁴ 2004 (4) SA 207 (E)

²¹⁵ 1997 (3) SA 786 (CC)

interdict differently when it involves environmental issues in the private vs. public arena? Not to do so would effectively exclude the common law interim interdict as an effective remedy, as suggested by Ackermann J was needed when granting relief for an infringement of an entrenched Constitutional right. As indicated above, pollution in various forms on the part of a landowner can cause a nuisance to his neighbour's ability to use and enjoy his property.

On the law of nuisance in South Africa, various nuisances are listed in the nuisance section of LAWSA Vol. 19²¹⁶ including odours, noise, smoke, the keeping of animals in circumstances where they can cause a material interference with the physical comfort of the occupant of neighbouring land, and water pollution. These have all been held to constitute nuisances which can be effectively stopped by the obtaining of an interdict. Public nuisances are set out in paragraph 211, which denotes a nuisance of which the harmful effect is so extensive as to affect the general public at large or at least a distinct class of persons within its field of operation.

In *Gien's* case,²¹⁷ the respondent had erected a scaring apparatus on his farm to chase away baboons and other wild animals from his vegetable garden and a building that was used as a store. The apparatus made loud explosive noises at regular intervals and the apparatus was set so as to work night and day. The applicant's farm joined that of the respondent and the farms were situated in a quiet, rural and well wooded area where cattle farming were mainly carried on. People in the applicant's house during the daytime as well as the night found the explosive noises disturbing and it interrupted their sleep. Applicant's cattle became restless and the noise affected one of the applicant's horses, which was normally tame, to the extent that it threw its rider and could only be calmed down with difficulty. The applicant applied for an interdict against the use of the apparatus in a way that it caused a nuisance on the applicant's property and the Court granted an interdict in the applicant's favour.

In *Dell v The Town Council of Cape Town*,²¹⁸ the traffic manager of the Railway applied for an interdict to restrain the defendants from throwing rubbish and other refuse of the Cape

²¹⁶ LAWSA, First Reissue, Vol. 11 at para 309; LAWSA Second Edition Vol. 19 at para 201; Johan Meyer, *Interdicts and Related Orders*, 1993, at 59; Prest, op cit at 42 and LAWSA, First Reissue, Vol. 11 at para 316; LAWSA Second Edition, Vol. 19 at para 200;

²¹⁷ *Gien v Gien* 1979 (2) SA 1113 (T) at 1121 B-D

²¹⁸ (1879) 9 Buch 2.

Town streets upon the beach of Table Bay in the immediate neighbourhood of the city. De Villiers C J stated that '[t]here can be no doubt ... that the deposit of this rubbish is a nuisance to the persons in whose neighbourhood it is thrown'. In response to the argument by the defendants that the applicant did not expressly state that his health was likely to suffer from the rubbish being deposited in the neighbourhood of the railway station, the judge indicated that the applicant had stated that he was employed by the Government as a traffic manager and that accordingly the Court could draw the conclusion that his duties would compel him to go to both the passenger and goods stations and that going to the latter his health would be liable to be affected by the stench on the beach. The judge found that it would be absurd to say that the applicant was to wait until his health was affected by the nuisance before approaching the Court.²¹⁹

The learned judge stated further that –If [the applicant] shows to the Court that the probable effect of this nuisance would be to injure his health, and if his duties compel him to be in the neighbourhood of the nuisance, then I think he has made out a case to justify the Court in granting an interdict to restrain the respondents from throwing rubbish in his immediate neighbourhood. Moreover, if this is a nuisance, it is a nuisance to the public of Cape Town at large, and Mr Dell, as one of the public, according to the authority quoted from *Voet*, is entitled to make this application to restrain the nuisance in any public place in the town, and upon any part of this beach in the neighbourhood of the town. ...[I]t does not follow ..., that a private party would not be justified in coming to the Court for an interdict to restrain the nuisance.²²⁰

In *Rainbow Chicken Farm (Pty) Limited v Mediterranean Woollen Mills (Pty) Limited*²²¹ the Court was dealing with a situation where factory effluent had been discharged into a stream causing pollution. The Court held that where the producer of effluent discharges it from his factory into a public stream, and the effluent thus discharged into the stream pollutes it both in the sense that it does not conform to the standards laid down in terms of the governing statute (in this instance, the 1956 Water Act) and in the sense that it amounts to pollution at common law, an injured third party may elect whether to proceed against the producer for

²¹⁹ At 5

²²⁰ At 6

²²¹ 1963 (1) SA 201 (N)

breach of the statutory duties laid upon him or under the common law.²²² The Court also found that even if the statutory provisions were applicable the victim may still proceed against the producer of the effluent under the common law and that it would be far-fetched to suggest that a Court could not interdict the producer of the effluent from poisoning the public stream.²²³

The Court was dealing on the return day of a rule nisi the effect of which was an interim interdict but by the time the parties were back in Court, the pollution which had caused the initial application had ceased to exist and the Court was only dealing with the issue of costs. Here too the Court long before the advent of South Africa's environmental laws indicated unequivocally that at common law, pollution of a public stream could effectively be stopped by interdicting the producer of the effluent from discharging the effluent into the public stream.

4.9 Conclusion

In Constitution arrangement, states must, of course, often strike a balance between competing rights. An examination of South African Constitution highlights some of the issues involved in balancing environmental rights against other considerations. The way in which these rights have been formulated has attracted criticism on the basis that the list of measures at para (b) is incomplete and is qualified by the concepts of 'reasonableness' and 'justifiable economic and social development'²²⁴. Such concerns illustrate the inherent difficulty that rights concerning the environment generally cannot be accorded absolute status. The questions of whether and when such rights can be enjoyed will inevitably involve questions of balance and reasonableness.

Another criticism was pointed out by Thornton J that the use of the somewhat vague term 'well-being', in para (a), illustrates another problem; if 'environmental rights' are taken to guarantee health and physical welfare, to what extent does this imply that they can be taken to guarantee aesthetic and spiritual welfare.²²⁵ It can thus be seen that in regard to the

²²² At 205 B

²²³ At 205 D

²²⁴ Winstanley *op cit* (n 14)

²²⁵ Thornton J & Beckwith S *op cit* (n 57) 390

requirement for both the final and interim Constitution, whether a person's right to environment, or was threatened to be, negatively affected. The cases analysed thus far certainly show that on the facts presented therein, the Courts unhesitatingly recognized the effectiveness of environmental rights in either preventing or stopping environmental degradation.



CHAPTER FIVE

5.0 INTERPRETATION OF ENVIRONMENTAL RIGHTS UNDER THE CONSTITUTION OF ZANZIBAR

5.1 Introduction

Environmental problems today can be serious enough to present a threat to states' security and to create new sources of interstate tension. In this case there is the need to create environmental clause in the Constitution. The rationale for taking a constitutional approach to environmental protection, therefore, is that the seriousness, extensiveness, and complexity of environmental problems are such as to prompt a need for concerted, coordinated political action aimed at protecting all members of populations on an enduring basis.²²⁶

5.2 Status under the Constitution of United Republic of Tanzania

The Constitution of the Republic of Tanzania²²⁷ was amended in 1984 to provide for the Bill of Rights. Article 14 of the Bill of Rights stipulates that every person has a right to life and to the protection of life by society. The High Court in a landmark ruling case of *Festo Balegele v. Dar es Salaam City Council*²²⁸ interpreted this Article to mean that persons are entitled to a healthy environment, and held that the City's decision to locate the garbage dump near residential areas violated plaintiffs' constitutional rights to a healthy environment.

In addition, Article 9 of the Constitution requires the Government to ensure that national resources are harnessed, preserved, and applied toward the common good. Although this Article is part of the non-judicial 'fundamental objective and directive principles of the state policy' provisions of the Constitution, it portrays the commitment of the Government to ensure sustainable development. Zanzibar Courts had to grapple with legal principles in the process of construing the Articles of the Constitution of the United Republic of Tanzania to justify their rulings in favour of the right to a clean and healthy environment in the absence of the express provisions in the Constitution.²²⁹

²²⁶ Tim Hayward *supra* (n 1) at 5

²²⁷ The Constitution of the United Republic of Tanzania, 1977 (as amended)

²²⁸ Misc. Civil Case No. 90, 1991

²²⁹ Hamudi I. Majamba: 'An Assessment of the Framework Environmental Law of Zanzibar' available at <http://www.lead-journal.org/content/05018.pdf> (accessed 12 Aug 2009) at i0

5.3 Environmental Rights before the 1984 Zanzibar Constitution

The Zanzibar Government had not any Constitution before till 24th June 1963, when it became an internally self governing territory.²³⁰ The Zanzibar Revolution of 1964 abrogated the 1963 constitution. The Constitutional Government and Rule of Law Decree vested legislative power in the Revolutionary Council. The concept of separation of powers was abolished and, in its place, the Revolutionary Council, which had judicial, legislative and executive powers, introduced. The period 1964-1979 heralded 15 years of autocratic leadership with neither a written Constitution nor elections. The Revolutionary Council was the centre of each and everything and the people of Zanzibar were recipients of its policies and directives.²³¹

A political event influenced and shaped the Constitution of 1979 which did not include the Bill of Rights Chapter. This constitution functioned until 1984 when the demand for a new constitution was accepted by the government and the Constitution of Zanzibar of 1984 was adopted. This constitution opened a new era of constitutionalism in Zanzibar. The constitution did not only repeal the 1979 constitution, but also re-enacted the Bill of Rights.²³²

5.4 Environmental Rights under the 1984 Constitution

The Constitution of Zanzibar 1984 marks an important stage in political and legal evolution of Zanzibar but did not open the door to the introduction of any specific environmental clause. This develops the subsequent flowering of the Bill of Rights in the popular consciousness as well as in the creative judgments of the Courts.²³³ The inclusion of the Bill of Rights provides for provisions such as; equality of people, equality before the law, right to life, right to privacy and personal security, the freedom of expression, duty to abide by the laws of the land, duty to safeguard public property and defence of the nation; and institution of suits which all can be interpreted to include environmental rights.

²³⁰ Kituo cha Katiba: (Eastern African Centre for Constitutional Development); Zanzibar: Key Historical and Constitutional Development available at: <http://www.kituoachakatiba.co.ug/zanz%20const.htm> (accessed 12 August 2009)

²³¹ Maalim M J. (2004) '*The State of Constitutionalism in Zanzibar*': available at <http://www.kituoachakatiba.co.ug/Constm%20ZN%202004.pdf> (last accessed 10 August 2009) at 2-3

²³² Maalim M J. *ibid*

²³³ Legum C, G. Mmari R. V. (1995) '*Mwalimu: the influence of Nyerere*' James Currey Publishers, at 114

At National level, the rights to life and property, the right to a fair trial, and freedom of information, are well established in existing instruments. Not only of these rights define a social space in which political activism may occur, but the rights to life and property are themselves substantive standards regarding human relationships in the natural world.²³⁴

Interpretation of environmental clause includes both tradition and fundamental rights.²³⁵ Since there are provisions which mirror the pattern of the Bill of Rights as a whole such as equality clause, the right to dignity and the right to life, as well as socio-economic rights, those provisions can be interpreted to include environmental rights. However in analysing the Zanzibar Constitution provisions, the focus will be on the aim of the provision (rationale), to whom the rights applies, and who are the beneficiaries of those rights.

5.5 Interpretation of environmental rights

There are some views which define environmental rights as a mixture of civil and political and socio-economic, and cultural rights²³⁶, therefore the inclusion of environmental rights under the Zanzibar Constitution can be interpreted through the socio, political and economic rights provided for under the Constitution. The realization of such rights goes a long way toward enabling concerned group to voice their objection to environmental damage. The guarantee of these provisions is necessary preconditions for mobilizing around environmental issues and making effective claims to environmental protection.²³⁷

5.5.1 Duty to protect natural resources- Article 23

Under section 23 state and citizens have the duty or obligation to provide for the protection of the environment under conditions determined by the legislation. It stipulates that:

23(2) Every person has the duty to protect the natural resources of Zanzibar, the property of the state Authority, all property collectively owned by the people and also to respect another person's property.

²³⁴ Boyle A E. , Anderson M R. *Supra* (n 43) at 5

²³⁵ Glazewski J '*supra* (n 4) at 85

²³⁶ Handl G. , 'Human Rights and Protection of the Environment', in A. Eide et al (eds), *Economic, Social and Cultural Rights: A text book* (2001), 303, at 303-28, Hancock J, *supra* (n 47) at 1-22

²³⁷ Tim Hayward *op cit* (n 1) at 12

(3) All persons shall be required by law to safeguard the property of Zanzibar and collectively to combat all forms of waste and squander, and to manage the economy of Zanzibar assiduously with the attitude of people who are masters of the destiny of their nation.

The Brundtland Report asserts that states have a duty to protect the environment not only for current inhabitants of the planet, but for future generations. The idea of holding the world in trust for future generations is frequently found in international environmental instruments.²³⁸ The reference to future generations is in line with the notion of intergenerational equity, it is contended that the state acts as a guarantor on behalf of the present generation to fulfil planetary obligations to future generations.

Article 23 of the Constitution requires the Government to ensure that national resources are preserved, and applied toward the common good. Although this Article is part of the non-judicial ‘fundamental objective and directive principles of the state policy’ provisions of the Constitution, it portrays the commitment of the Government to ensure sustainable development.

In addition, the article requires citizens to combat all forms of waste. This provision is very important as far as Agenda 21 is concerned.²³⁹ In the Chapter headed ‘Environmentally sound management of solid wastes and sewerage-related issues’ it states that ‘Environmentally sound waste management must go beyond the mere safe disposal or recovery of wastes that generated and seek to address the root cause of the problem by attempting to change unsustainable patterns of production and consumption.’²⁴⁰ Future generations will benefit to the extent that these regimes are successful, and the record of actual practice will doubtless demonstrate the level of commitment to any theory of inter-generational equity.²⁴¹

5.5.2 Right to life, Article 13

Article 13 of the Constitution expressly provides a right to live and to the protection of life. It provides:

²³⁸ Thornton (n 57) at 47

²³⁹ UNCED, Agenda 21 Chapter 21

²⁴⁰ S 21(4)

²⁴¹ Boyle and Birnie *op cit* (n 11) at 90

13. (1) *Every person has the right to the preservation of his life.*

(2) *Every person has the right to live and to the protection of his life by the society in accordance with the law.*

In developing jurisprudence on environmental protection, right to life is tendered to feature and apply in environmental issues.²⁴² In India for example, the right to life in that country's Constitution has been extensively invoked in a number of environmental cases. The right to life for example, may be deemed to be infringed where the state fails to abate the emission of highly toxic products into suppliers of drinking water. If enforcement bodies explicitly recognize such links, then environmental criteria may be incorporated overtly into the monitoring and enforcement of the right to life.²⁴³

In addition serious environmental hazards may threaten the lives of large groups of people directly, the connection between the right to life and the right to environment is an obvious one, and the focus should be on environmental hazards which involve direct risks of immediate loss of life if the hazardous is not removed.²⁴⁴

Under the European Convention for example Art 8 of the Convention which provides for the right agreed to be wide enough to cover not only direct measures taken against a person's home but also 'indirect intrusions which were unavoidable consequences of measures not at all directed against private individuals.'²⁴⁵ In *Powel & Rayner v UK*,²⁴⁶ Constitution was prewash prepared to find a breach of Article 8 because- '...the quality of the applicant's private life and the scope for enjoying the amenities of his home had been adversely affected by the noise generated by aircraft using Heathrow Airport'.

In implementation of this right, the courts have to play major role, as viewed by Thornton and Beckwith that the court in interpreting this right, tendered to adopt a restrictive interpretation of the right to life, confining its role to a review of the circumstances, rather than taking a wider view of the right which might encompass protection of 'quality of life'²⁴⁷ They give the

²⁴² Glazewski J *op cit* (n 4) at 121

²⁴³ Boyle A E. , Anderson M R. *op cit*, (n 43) at 7

²⁴⁴ Ramcharan B. G. (1985) 'The Right to life in international law', Vol 3, Nijhoff Publishers at 13

²⁴⁵ Thornton J & Beckwith S, *op cit* (n 57) at 392

²⁴⁶ 172 ECHR. Ser. A(n 59)

²⁴⁷ Thornton J & Beckwith S *op cit* (n 57) at 395

example of *Öneryildiz v Turkey*²⁴⁸ the Court held that Turkey had violated Art 2 of the EC failing to take necessary measures to prevent the loss of life. It was stated further that ‘a violation of the right to life can be envisaged in relation to environmental issues’, and that, in this regard, it should be reiterated that the recent development of European Standards merely confirmed an increased awareness of the duties incumbent on national public authorities in the environmental field, particularly in relation to installations for the storage of household waste and the risks inherent in operating them.²⁴⁹

5.6 Interpretation of other socio-economic rights under Constitution

5.6.1 The Right to Health, Article 10

Article 10(6) of the Zanzibar Constitution provides for political objective, under sub article 6 the State is responsible for Health, educational and cultural objectives. It provides

For the purposes of promoting unity and development of the people and social welfare in the country it shall be the responsibility of the Revolutionary Government of Zanzibar to ensure:

- (6) *Shall direct its policy toward ensuring that every person has access to adequate health care, equal opportunity to adequate education for all and that Zanzibar culture is protected enhanced and promoted.*

Right to health is a fundamental right in relation to health and well-being. Different commentators observe that there is the relationship between environmental rights and rights to health since a particular environment may be damaging to peoples’ health. Given the serious health consequences of air and water pollution, the siting of waste disposal sites and so on, health is unarguably a component of environmental concerns.²⁵⁰ Tim views that ‘every constitutional democracy ought (among other things) to guarantee fundamental human rights as a fundamental rights in its constitution; therefore every constitutional democracy ought to guarantee this right as a fundamental right in its constitution’.²⁵¹

²⁴⁸ ECHR App. No. 48939 of 1999

²⁴⁹ Thornton J & Beckwith S, *op cit* (n 57) at 395

²⁵⁰ Glazewski *op cit* (n 4) at 85

²⁵¹ Tim Hayward *op cit* (n 1) at 3

The right to a clean environment is closely connected to the right to health. In the case of *Minister of Health v Drums and Pails Reconditioning CC t/a Village Drums and Pails*,²⁵² the applicant applied for an interdict prohibiting the respondent from carrying on with a chemical waste incineration process in contravention of the Atmospheric Pollution Prevention Act (APPA)²⁵³. The respondent had erected an incinerator on its premises prior to making an application for a provisional registration certificate for the incinerator as was required in terms of APPA. Even though the respondent was not issued with the requisite registration certificate, it used the incinerator on occasions. The drums which were incinerated contained various substances such as residues of paint and chemicals which, when subjected to the incineration process, caused chemical oxidation resulting in the emission of noxious and offensive gasses as defined in Schedule 2 to APPA.

5.6.2 Equality of the people Article 11

In interpreting this Article, an important question regarding the relationship between equality and environment has been raised by Glazewski as to whether the equality clause includes the full and equal enjoyment of all rights and freedoms, and whether it could be invoked in the environmental clause.²⁵⁴

The equality right has substantive standard regarding environmental right. Thornton and Beckwith observe that under this right there shall be no interference by a public authority with the exercise of this right except such as is in accordance with the; law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country.²⁵⁵

One element of the equality right is that the right of the other should not be infringed. In *Bristow v Coleman*²⁵⁶ the Court was dealing with an application for an interdict by the owner of a ranch to prevent the respondent, a professional hunter and safari operator, who had leased the hunting rights on the farm from the owner, from issuing hunting rights during the closed season. The Court having found that the applicant had established a clear right and that

²⁵² 1997 (3) SA 857 (N)

²⁵³ No. 45 of 1965

²⁵⁴ Glazewski J, *supra* (n 4) at 118

²⁵⁵ Thornton J & Beckwith S, (2004) *op cit* (n 198) at 390

²⁵⁶ 1976 (2) SA 252 (R)

the right was being infringed by the admitted hunting during the closed season considered whether there was any alternative relief available to the applicant other than an interdict. The Court held that the applicant ‘... is entitled to immediate relief. An interdict is a more suitable remedy because otherwise the [applicant] will have to wait until his rights have been infringed and he has probably suffered loss before, in each case, attempting to institute a prosecution. Accordingly, the Court found that the requirement of proving no suitable alternative remedy had been established by the applicant and granted a final interdict.

Obligation of the state in this case has been discussed in *Hatton v UK*²⁵⁷ The Court held that Article 8 of the EC may apply in environmental cases whether the pollution is caused directly by an action of the state, or whether the state’s role in causing it is less direct, and arises from the state’s failure properly to regulate private industry, from either perspective, the principles to be applied were broadly similar –in both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole.

5.6.3 The Right to information, Article 18(2)

Article 18(2) of the Zanzibar Constitution provides that

(2) Every citizen has the right to be informed at all times of various events in the country and in the world at large which are of importance to the lives and activities of the people and also of issues of importance to society.

This provision is very important in environmental context, as much governmental decision-making has direct or indirect consequences on the environment. The inclusion of a right of access to information in the Bill of Rights is in conformity with International law trends as well as regional and national tendencies to foster accountable and participatory government.²⁵⁸

In relation to Article 10 of the EC, this Article seeks to strike a balance between freedom of expression and the preservation of public order. In *Steel v UK*²⁵⁹ the Court held that the

²⁵⁷ App.36022/97(2003)37 E.H.R.28

²⁵⁸ Joannessen ‘Freedom of Expression and Information in the South African Constitution and its Compatibility with International Standards; (1994) 10 SAJHR 216 at 235

²⁵⁹ 67/1997/851/1058, ECHR, The times October 1, 1998

actions of all five protesters, including the two who physically impeded the activities of which they disapproved, constituted expressions of opinion within the meaning of Article 10. The detention of three of the protesters was deemed to be disproportionate, because their protest had been entirely peaceful. 'Article 10 guarantees a right to receive information as well as to impart it'.

Right to information can be taken by government or private companies regarding environmental projects usually directly or indirectly affect people's rights. The case of *Van Huysteen v Minister of Environmental Affairs and Tourism*²⁶⁰ is related to administrative action in the enforcement of environmental rights. Another relevant case is *LBC v UK*²⁶¹ concerning exposure of servicemen to radiation following the nuclear test at Christmas Island in the 1950s, the Court was prepared to concede that, had the UK authorities been in possession of, information about the risk posed to the applicant, the state might have been under a duty to provide such information to the applicant as part of the protection afforded to the right to life.

The access of environmental information is closely related with the individual's well-being and affect of private and family life adversely. In *Guerra v Italy*,²⁶² the complainants lived in the vicinity of a factory which they suspected of being involved in potentially dangerous activities. The problem was, however, that the government did not respond to questions for information and clarification with respect to the potentially hazardous impact. The Court approached this issue from the perspective of Article 8 the Convention of Human Rights; drafted in context of Council of European and reasoned that information of this kind is relevant in order for people to be able to take reasoned decisions with respect to their private life.

5.6.4 Right to property (Article 17)

The reference to 'civil rights and obligations' has been interpreted by the Court to mean private law rights and obligations including property rights and obligations arising from commercial activities.²⁶³ Under Common Law, 'a typical question which arises is the extent

²⁶⁰ Cited (n 146)

²⁶¹ (1998)4 BHRC 447

²⁶² ECtHR, 19 February, 1998, Reports 1998-1

²⁶³ *Sporrong & Lonnorth v Sweden* (1992) 5 EHRR 35

to which an owner or occupier of land may be liable for environmental or other damage for activities or substances on such land which cause pollution or waste.²⁶⁴ The link between property rights, or more especially land ownership, and environmental concern is fundamental. The tension between private property rights and the public interest has always been present in laws, but can be brought into sharper focus by the inclusion of a property right alongside the environmental rights in the Constitution.²⁶⁵

In *Paola v Jeeva NO and Others*²⁶⁶, the applicant appealed against a decision taken in terms of the National Building Regulations and Building Standards Act²⁶⁷ and argues that proposed alterations to his neighbour's property would obstruct the enjoyment of his own property, a legal object that warranted legal protection. The Court, however, rejected this argument and held that it would be irrational to bar his neighbours from constructing a house similar to that of the applicant and that it 'would result in chaos and create great confusion in the development world'. The Supreme Court of Appeal reversed this decision and accepted that the loss of view is a factor that should be taken into account when determining the loss of property value. It accepted that the proposed development would 'significantly diminish the value of the applicant's adjoining property' and was therefore contrary to the applicable legislation.

5.7 Implementation of environmental rights

Legislation usually depends on effectiveness on enforcement and implementation by the state. Since most of environmental law comprises legislation, the state's role in the implementation of environmental law is vital.²⁶⁸

Implementation of environmental laws in Zanzibar requires citizens and the state to take into account environmental consideration, The Environmental Management for Sustainable Development Act, 1996²⁶⁹ (referred to as EMSDA) enact the Constitution requirement under section 23(2) and (3) by imposing upon every citizen of Zanzibar a duty to ensure that the

²⁶⁴ Glazewski J, *supra* (n 4) at 680

²⁶⁵ Glazewski J *supra* (n 4) at 90

²⁶⁶ 2002 (2) SA 406 (D), reversed on appeal 2004 (1) SA 393 (SCA)

²⁶⁷ Act 103 of 1977

²⁶⁸ Kidd *supra* (n 2) at 207

²⁶⁹ Act No. 2 of 1996

environment and natural resources of the island are not depleted.²⁷⁰ The law also places an obligation on the part of the government to take into account environmental considerations in providing services to the public.²⁷¹ Section 3 and 32 (2) b of the Act express very clearly that citizens can compel government institutions charged with protecting the environment to enforce the provisions of the Act.

5.7.1 Criminal sanctions

Kidd outlines two ways in which the criminal sanction can be imposed either as a primary or independent sanction or as a subsidiary or support sanction.²⁷² In Zanzibar both sanctions are used however the use of subsidiary sanction is preferable due to the ease of proving an offence conducted. Under this sanction compliance with legislation is sought to be secured primarily by means of administrative controls and when the administrative control fails, a criminal sanction is imposed.²⁷³

Section 33(2) of EMSDA empowers any person to petition the Director of the institutions responsible for the environment upon identifying a problem that requires the preparation of a local environmental action plan.²⁷⁴ The administration and final decision-making authority on environmental matters in Zanzibar has been vested onto the Special Committee of the Revolutionary Council on Environment (the Committee)²⁷⁵ headed by the Chief Minister, members of the Committee are to be appointed by the President.²⁷⁶ The Committee's main role includes, among other things, resolving conflicts over environmental issues, empowers to conduct investigations, initiate inquiries and resolve conflicts related to implementation of the provisions of the Act.²⁷⁷

Other criminal sanctions provided for under the Forest Resources Management and Conservation Act No. 10 of 1996,²⁷⁸ Regulation for Burning Plastic Bags, under Regulations 3 and 4 prohibits the manufacture, import, storage, supply, discharge, use or disposal of any bags

²⁷⁰ s 4 and 6(2)

²⁷¹ s 5

²⁷² Kidd (n 2) at 210

²⁷³ Kidd *ibid* at 210

²⁷⁴ s 33(3) and 35(8)b respectively

²⁷⁵ s 9

²⁷⁶ ss 10-13

²⁷⁷ s 13

²⁷⁸ Part XII, ss 88-97

within Zanzibar, it is an offence under, for person contravening regulation 3 of the fine of five thousand Tanzania Shillings of imprisonment for six months.²⁷⁹

5.7.1.1 Provision of State Attorney responsible for environmental matters

One of the functions of the State Attorney responsible for the environment is to represent the interest of the public as a party to all law suits concerning a violation of the provisions of the Act.²⁸⁰ The State Attorney under section 117 has given powers under the Act to compel government institution to comply under with the provisions of the Act by commencing a process, which would lead to withholding of monies due to the violating institution from its budget.

This aspect viewed to be different in most Commonwealth Jurisdiction where State Attorneys represent the interests of the state rather than those of the public, usually against public claims.²⁸¹ Majamba argues further the Act in this case makes an effort to depart from the common law trend introducing a ‘unique’ relationship between individuals and the State, where the State takes a position to defend the public court.

5.7.2 Institution of suits

This Article 25 A of the Constitution introduced under the Constitution amendment Act²⁸² provides that ‘Any person may institute a suit in the High Court if he sees that the Constitution is violated or is being violated or is likely to be violated’, and sub article 2 (b) guarantees the duty to declare and order that this Constitution has been violated, being violated or likely to be violated, and the High Court may give order to the officer or government organ concerned.²⁸³

This section examines the development under the following cornerstones of administrative law which are particularly relevant to environmental concern. First, procedural fairness which includes administrative actions affecting the public at large; secondly, the right to reasons for administrative decisions; and thirdly, the standard of Judicial Review; and finally the

²⁷⁹ L.N 49 of 2008

²⁸⁰ S 116(a)

²⁸¹ Majamba H *op cit* (n 229) at 15

²⁸² Constitution Amendment Act No.2 of 2002 S.15

²⁸³ Article 25 A(1) of the Zanzibar Constitution

enforcement of statutory duties.²⁸⁴ In *Wildlife Society of Southern Africa and others v Minister of Environmental Affairs and Tourism of the Republic of South Africa*²⁸⁵, the applicant succeeded in its application for an order compelling the Minister of Environment Affairs to give effect to the Transkei Environmental Decree.

One of the case that illustrate this concept is *Director: Mineral Development, Gauteng Region and SASOL Mining (Pty) Ltd v Save the Vaal Environment and others*.²⁸⁶ An environmental group challenged the decision of the authorities to issue a mining licence to SASOL Mining without applying the appropriate administrative justice procedures, namely the *audi alteram partem* rule. The environmental group had specific environmental objections relating to mining in this area, but was not heard, and subsequently argued that in this specific context giving effect to the *audi alteram partem* rule would give effect to its s 24 right. The Supreme Court of Appeal found that the *audi alteram partem* rule in fact applied to the dispute and stated:

‘Our Constitution by including environmental rights as fundamental, justiciable human rights, by necessary implication requires that environmental considerations be accorded appropriate recognition and respect in the administrative process in our country. Together with the change in the ideological climate must also come a change in our legal and administrative approach to environmental concerns’.²⁸⁷

5.7.3 Administrative Remedies

5.7.3.1 Compounding of Offences

In implementation of environmental rights, applicable legislations provide for powers to compound offence. The Director of Institution responsible for Environment may compound the offence where people admit, in writing, to having committed an offence under the Act and accept to be compounded²⁸⁸ and under the Forest Resources Management and Conservation Act, the powers vested to the Forest Administrator under section 98 of the Act.

²⁸⁴ Glazewski J *op cit* at 98-99

²⁸⁵ See (n 143)

²⁸⁶ See (n 7)

²⁸⁷ at para 19

²⁸⁸ s 105

The Compounding of offence under this section shall be a bar to any further penal proceedings against that person in respect to that offence.²⁸⁹

5.7.3.2 Permit and licences

The issuance of licences and permits has been provided under Part V of EMSDA. For easy implementation, the Act lumped together all activities relating to the EIA under the 'institution responsible for the environment'. The guiding provisions on the EIA under the framework environmental law ought to be read with the Environmental Performance Bond Regulations, 2002 and the Environment Impact Assessment (Procedures) Regulations, 2003.²⁹⁰ The institution responsible for reviewing project briefs or proposals and the EIS, approving or disapproving the activity, issuing EIA certificates, monitoring compliance with EIA certificate conditions and, in collaboration with relevant persons to carry out periodic environmental audits for each activity to ensure that conditions are fulfilled.²⁹¹

Another licences issued under then Forest Act where the powers vested to the licencing officer authorized under s. 2 of the Act. The licences issued to fell or extract timber; take other forest produce; erect buildings or livestock enclosures; allow domestic animals to enter; plant crops or trees; construct roads, paths or waterways; hunt or fish; and other activities for which the granting of a license has been specifically authorized by regulations; fell or extract timber; take other forest produce; erect buildings or livestock enclosures; allow domestic animals to enter; plant crops or trees; construct roads, paths or waterways; hunt or fish; and other activities for which the granting of a license has been specifically authorized by regulations.²⁹²

In *Hoffman v City of Cape Town & Another*, the Court by agreement between the parties, declared that the first respondent (the City of Cape Town) was not operating its solid waste disposal facility at Vissershok (the City's largest and most important solid waste disposal facility) in compliance with the requirements of the permit issued to it in terms of Section 20 of the ECA and that its conduct was unlawful. The Court also ordered the first respondent to

²⁸⁹ 98(3)

²⁹⁰ L.N No 18 and 19 respectively of 2002

²⁹¹ East African Sub-regional Project (1999) 'Development and Harmonization of Environmental Laws, The East African Sub -Regional Project, Volume 3 UNEP/Earth print at 53

²⁹² s 68

bring its operation of the facility into substantial compliance with the permit by 1 September 2006. In fact, in earlier litigation concerning the first respondent's operation of the facility, it transpired during December 2004 that the land on which the facility was being operated had not been zoned for the purpose of operating a solid waste disposal facility.

5.7.4 Judicial Measures

5.7.4.1 Locus Standi

This is another feature in Zanzibar Legislations; EMSDA contains provisions providing citizens with rights to petition relevant authorities to protect the environment.²⁹³ the EMSDA addresses unequivocal recognition of *locus standi* of various interest groups or persons seeking to invoke the jurisdiction of a court in environmental litigation.²⁹⁴ The move also enhances the enforceability of the constitutional provisions that place a duty on every citizen to protect the natural resources of Zanzibar.²⁹⁵

Section 33(3) and 37(4) of the EMSDA provide the right to citizens to petition relevant authority. The Act also expresses that citizens can compel government institutions to enforce the provisions of the Act. The recognition of this right is a significant in Zanzibar judicial measures. This is because environmental problems may not be easily enforceable in the absence of relevant provisions. In *R v State for Industry and Trade ex-parte Duddridge*,²⁹⁶ where the court refused to apply the precautionary principle on, among other grounds, that there was no express provision of the law requiring the Secretary of State to apply the principle.

5.7.4.2 Judicial Review

Judicial review is a specialised remedy in public law by which the High Court exercises a supervisory jurisdiction over inferior courts, tribunals or other public bodies²⁹⁷ The Court is concerned with evaluating fairness as Lord Hilsham L. C. ably puts it in *Chief Constable of North Wales Police v. Evans*²⁹⁸

²⁹³ s 33(3) and 37(4)

²⁹⁴ s 109

²⁹⁵ Article 13 of the Zanzibar Constitution, 1984 as amended

²⁹⁶ 7/2 JEL 224

²⁹⁷ Richard G Q. (1996) 'Judicial Review: Law and Procedure', 2nd Edn. Sweet & Maxwell at 1

²⁹⁸ [1982] 1 W. L. R. 1155 at 1160

“It is important to remember in every case that the purpose ... is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of individual judges for that authority constituted by law to decide the matters in question.”

The environmental case which has been under judicial review in Tanzania is *Festo Barege and 794 others v Dar es Salaam City Council*,²⁹⁹ the applicants were residents of a suburb of Dar es Salaam where the City Council dumped waste which attracted swarms of flies. When the rubbish was set on fire, a lot of smoke and foul smell was produced and inconvenienced the neighbourhood. The applicants applied for orders of certiorari to quash the decision of the City Council of dumping waste; prohibition, to stop the City Council from continuing that nuisance; and mandamus, to compel the respondent to discharge its functions properly by establishing and using an appropriate site.

The application was granted by the High Court. A number of findings were made; first, the City Council's action was *ultra vires* the Local Government (Urban Authorities Act, 1982); second, the action was contrary to the City's Master plan; third, it was not a statutory duty of the respondent to create nuisance but to stop it and avoid to endanger the residents' health; and fourth, Article 14 of the Constitution, which guarantees the right to life and its protection by the society, was breached.

Another case which has been reviewed in Zanzibar is *Palm Beach Inn Ltd and Another v Commission for Tourism and Two Others*,³⁰⁰ the second applicant, Ms. Naila Majid Jiddawy, was operating a tourist hotel, on the eastern coast of the Island of Zanzibar. The first respondent's employees ordered the closure of the hotel, cancelled her business licence, and ordered her to vacate the premises for good.

The applicants challenged those three orders in the High Court of Zanzibar which made a number of findings: One, the respondents exceeded their powers in closing the hotel and revoking the applicants' licence. Two, the respondents' actions were *ultra vires*. Three, the

²⁹⁹ cited in (n 228)

³⁰⁰ Civil Application No.30 of 1994 of the High Court of Zanzibar (unreported)

deportation order served on the second applicant deprived her of freedom of movement. Four, the applicants were denied the right of a hearing in spite of their demands to know what were their faults. Orders of certiorari were granted to quash the 2nd respondent's decisions to close the hotel and cancelling the licence. A prohibition order was also issued to restrain the 2nd respondent from purporting to act as the Commission for Tourism while no commissioners had been appointed.

5.7.5 Common Law Principles and Remedies

Apart from statutes, the principles of Common Law as received in Tanzania; also address the questions of environment. The most important common law principles that are relevant to environment in Tanzania and Zanzibar in particular are the torts of negligence, nuisance and the rule in *Rylands v. Fletcher*. Environmental torts have been defined more extensively in the common law of other countries. In Tanzania, the common law rules that are applicable are those developed by the Tanzanian courts, both colonial and post-colonial, as well as those that were in force in England on 22 July 1920.³⁰¹

Common Law system outside Tanzania would constitute authorities to Tanzania courts on similar matters as 'persuasive authority' to the courts. In *B. Venkatappa v B Lovis*,³⁰² the Andhra Pradesh High Court upheld that lower court's mandatory injunction directing the defendant to close the holes in a chimney facing the plaintiff's property. The Court authorised the plaintiff to seal the holes at the defendant's cost if the defendant failed to do so. The High Court stated that the smoke and fumes that materially interfered with ordinary comfort were enough to constitute an actionable nuisance and that actual injury to health need not be proved.

Under Common Law, it is not necessary to show actual harm to one's health and wellbeing if the potential to affect one's health and wellbeing is demonstrated. In *Rainbow Chicken Farm (Pty) Limited v Mediterranean Woollen Mills (Pty) Limited*³⁰³ the Court was dealing with a situation where factory effluent had been discharged into a stream causing pollution. The Court held that where the producer of effluent discharges it from his factory into a public stream, and the effluent thus discharged into the stream pollutes it both in the sense that it

³⁰¹ By virtue of the Judicature and Application of Laws Ordinance, Cap. 453

³⁰² AIR 1986 AP 239

³⁰³ 1963 (1) SA 201 (N)

does not conform to the standards laid down in terms of the governing statute (in this instance, the 1956 Water Act) and in the sense that it amounts to pollution at common law, an injured third party may elect whether to proceed against the producer for breach of the statutory duties laid upon him or under the common law.

One of the weakest points in the legal regime of environmental protection in Tanzania is its enforcement mechanisms of common law. Remedies provided by the common law torts of negligence, nuisance and the rule in *Rylands v. Fletcher* are only enforceable by an individual claiming damages for infringement of private property.³⁰⁴

5.7.5.1 Application of the Rule in Ryland v Fletcher

In *Ballard v Tomlinson*,³⁰⁵ Cotton LJ spoke of the plaintiff's right to abstract percolating water beneath his land as '... a natural right incident to the ownership of his own land...'. In the present context, however, this means no more than the owner of land can, without a grant, lawfully abstract water which percolates beneath his land, his right to do so being protected by the law of tort, by means of an action for an injunction or for damages for nuisance....There is no natural right to percolating water, as there may be to water running in a definite channel',

That *Ballard v Tomlinson* decided that, where a nuisance is an interference with natural right incident to ownership then the liability is a strict one. In this case the defendant was liable to the plaintiff in tort for the contamination of the source of water supplying the plaintiff's well, on the basis of the rule in *Ryland v Fletcher*, by reason of interference with the plaintiff's use and enjoyment of his land, including his right to exact water percolating beneath his land.

5.7.5.2 Interdict

These developments in the traditional law of nuisance, would, arguably, find application in the environmental context and it is argued should be used to develop our common law interdict remedy. In *Factortame Ltd & Others v Secretary of State for Transport*³⁰⁶ the House of Lords (HL) was confronted with the quandary of not being able to grant an

³⁰⁴ Environmental Law Handbook, available at <http://www.lead.or.tz/publications/env.handbook/2.7.public.interest.lit.php> (accessed 28 September, 2009)

³⁰⁵ (1885) 29 Ch D 115, 124

³⁰⁶ [1991] 1 All ER 70

injunction against an organ of State according to UK law. The HL referred to the European Court of Justice which held that when a national court of a member country, in considering a matter concerning the rights of an individual protected by a Community law, considers that the sole obstacle which precludes it from granting interim relief was a rule of the national law like the one in the UK in terms of which a State organ could not be interdicted, then such rule must be set aside.

Lord Goff of Chieveley said

*'Turning then to the balance of convenience, it is necessary in cases in which a party is a public authority performing duties to the public that 'one must look at the balance of convenience more widely, and take into account the interests of the public in general to whom these duties are owed.' ... In this context, particular stress should be placed on the importance of upholding the law of the land, in the public interest, bearing in mind the need for stability in our society, and a duty placed on certain authorities to enforce the law in the public interest. This is of itself an important factor to be weighed in the balance when assessing the balance of convenience.'*³⁰⁷

In *Wright & Another v Cockin & Others*,³⁰⁸ the respondents had stocked their conservancy, which was adjacent to the applicants' cattle farm, with blue wildebeest (which was not endemic to the Eastern Cape), the applicants applied for an interdict prohibiting the respondents from allowing any of the wildebeest to come within 1000 metres of the applicants' property because the wildebeest had transmitted, and would continue to transmit, a fatal virus, known colloquially as 'snotsiekte'. The respondents had argued that an adequate alternative remedy available to the applicants was an action for damages. The Court rejected this argument, pointing out that the applicants were faced with a continuous and ongoing situation.

5.7.5.3 Nuisance and Law of Neighbours

In *Dobson v Thames Water Utilities Ltd*³⁰⁹, the rule of Nuisance discussed as it requires some interest in the property affected. The first instance decision in the TCC reported in BLR confirmed that claims of odours and insects arising from a sewage works could only be

³⁰⁷ At 119 g-j

³⁰⁸ 2004 (4) SA 207 (E)

³⁰⁹ [2009] BLR 287 and [2009] 122 Con LR 32 CA

brought neither under the Water Industry Act and not in nuisance nor under the Human Rights Act. A nuisance claim would only apply to insects on a works site rather than a water facility. The CA decision covered specific points on damages for the limited nuisance claim. A child could not recover, as nuisance requires some interest in the property affected; damages cannot be recovered on behalf of others. They might recover under the Human Rights Act, although a person recovering in nuisance would be unlikely to get anything additional through this route.

In *Three Rivers Ratepayers Association and Others v Northern Metropolitan*,³¹⁰ the applicants applied for an interdict directing the first respondent to remove a group of squatters from a piece of land belonging to the first respondent. The Court, referring to the decision in *Regal v African Superslate (Pty) Limited*,³¹¹ stated that when a nuisance is created by third parties such as the group of squatters, an interdict is only competent if the respondent has knowledge of the nuisance and has failed to take reasonably practical measures to prevent the harm. The Court found that the consideration by the first respondent municipality of other available land for the second respondent group of squatters was a display of reasonableness vis-à-vis the second respondent, whereas the law required the measures to be reasonably practical vis - à-vis the applicants in an attempt to avert the interference with their rights.

In *Miller & Another v Jackson & Another*,³¹² the Court of appeal considered the granting of an interdict in a matter involving the common law of nuisance and called upon to balance the interest of the public with those of a private individual. The three Law Lords who heard the appeal had to balance the right of the club to continue playing cricket on their cricket ground against the right of the adjoining property owner not to have his right to his peaceful enjoyment of his property interfered with. Lord Denning MR found that -

'On taking the balance, I would give priority to the right of the cricket club to continue playing cricket on the ground, as they have done for the last 70 years. It takes precedence over the right of the newcomer to sit in his garden undisturbed. He also said the following – This case is new. It should be approached on principles applicable to modern conditions. There is a contest here between the interest of the public at large and the interest of a private individual. As between their conflicting

³¹⁰ 2000(4) SA 377 (W)

³¹¹ 1963 (1) SA 102 (A)

³¹² [1977] 3 All ER 338

interests, I am of the opinion that the public interest should prevail over the private interest. The cricket club should not be driven out. In my opinion, the right exercise of discretion is to refuse an injunction; and, of course, to refuse damages in lieu of an injunction.'

5.8 Conclusion

The rights under the Zanzibar Constitution and the framework environmental law reflect the government of Zanzibar's commitment to implement international obligations in general, they represent a shift in environmental rights jurisprudence, especially with regard to the coverage on arrange of important international law principles and sustainable development.³¹³

The main challenge faced by the Zanzibar Constitution is to implement and enforce the environmental rights effectively in the context of socio- and economic rights provided for under the Constitution. Boyle and Anderson were in the view that at some level environmental matters should be approached through human rights and consider how human rights approaches add to existing arrangements for environmental protection through mobilizing existing rights, reinterpreting existing rights to achieve environmental ends; and creating new rights of an explicitly environmental character.³¹⁴

Finally, the recognition of a right to environment will never fully come , unless it is encompassed in broader strategy including entrenchment of environmental rights in national constitution.

³¹³ Majamba *op cit* (n229) at 16

³¹⁴ Boyle A E. & Anderson Ml R. (1998) *op cit* (n 49)at 4

CHAPTER SIX

6.0 COMPARATIVE ANALYSIS

6.1 Constitution provisions

Generally the South African Constitution has introduced a particular regime in environmental rights which is far more than Zanzibar Constitution. This may seem in the light of the fact that Zanzibar does not introduce any environmental provision under the Constitution. Article 23 of the Constitution which imposes upon the state and citizen's duty or obligation to provide for the protection of the environment under conditions determined by the legislation is not wide to cover the concept of environmental rights as discussed in Chapter Two and Three of this research. From this point, the Constitution has been very controversial and has raised concerns and the ability of Zanzibar citizens to engage in environmental degradation.

The South African Constitution notes the fact that environment has a clear dimension and is a problem which clearly justifies the need to protect environment, the Zanzibar Constitution disfavours the introduction of specific regime which is limited to environmental issues only.

6.2 Interpretation

Comparatively the interpretation of environmental rights in South Africa includes criteria of environmental law principles because the concepts of 'sustainable development', 'health' and 'well-being' covered under section 24 of the Constitution. As viewed by the Environmental Rights Report, recognizing environmental rights under the Constitution is very important since environmental harms adversely affect various individual and community rights.³¹⁵ Inclusion of environmental law principles is very important, because when a nation lacks both an express constitutional right to a healthy environment and alternatively, lacks adequate remedies under those systems, the constitutional right to life becomes more important.³¹⁶

³¹⁵ Environmental Rights Report, 2008: Human Rights and the Environment available at: <http://www.earthjustice.org/library/reports/2008-environmental-rights-report.pdf> at 6

³¹⁶ United Nations (2007) '*Constitutional Environmental Law: Giving Force to Fundamental Principles in Africa*'. Environmental Law Institute at 49

Zanzibar Constitution has no specific environmental provision as South Africa; however the Constitution can be interpreted to include environmental rights. This has been observed by Glazewski that 'the environmental right, like all other rights in the Constitution, cannot be interpreted in isolation', for the example on the idea that the right to just administrative action (s. 33 of the constitution) when raised in the environmental matter, must be interpreted in the context of the environmental right.³¹⁷

6.3 Implementation

Implementation of environmental rights is also a problem in Zanzibar, which gives rise to complex jurisdictional issues. There is no clear separation of powers of executive and judiciary in implementing those rights. In South Africa for example the implementation of environmental rights is firmly in the hands of the government in three spheres of government, while in Zanzibar the Special Committee of the Revolutionary Council on Environment established under s. 9 of the EMSDA has so many discretionary powers.

One of the features of Special Committee is that it comprises a multiple of members including those without background on environmental issues. The EMSDA does neither provide for the number of members who can be appointed by President nor does it lay down maximum number of members who would comprise the committee. This will defeat some good ideas of the legislation especially with regard to community and public participation, and limit the guarantee of public and local community interests and representation.³¹⁸

The functions and duties of the Committee under sections 12 and 13 of the Act, include resolve conflicts over environmental matters among Government and other institutions; and make final decisions regarding all environmental matters referred to it under this Act; initiate inquiries and investigations about any allegation related to the environment and the implementation or violation of the provisions of this Act; resolve conflicts among Government institutions about their respective functions, duties, mandates, obligations or activities under this Act.

³¹⁷ Paterson *op cit* (n 100) at 114

³¹⁸ Majamba *op cit* (n 229) at 12

One commentator observes that having a considerable body of environmental legislation as Zanzibar did, cannot enforce the rights, there is the need to use other legal procedures to protect environment due to the increase of threats to environment.³¹⁹ For my view the powers of the judiciary and other bodies should not exercised by the Committee, because this will lead to a situation in which governmental institutions (which are part of the executives) not to be committed or fail to take their responsibilities under the Act.

6.4 Dispute Settlement

NEMA provides the procedures for fair decisions and conflict management under Chapter Four of the Act. Importantly, to give effect to NEMA, a limited number of environmental tribunals have been established, for example in The National Water Act³²⁰ and the Development Facilitation Act establishes special development tribunals.³²¹

In Zanzibar the EMSDA does not establish any tribunal or body to deal with fair decision. Contrary the Act vets powers to the Special Committee of the Revolutionary Government. The Committee has a power to make final decisions regarding all environmental matters referred to it under this Act and resolve conflicts over environmental matters among Government and other institutions.³²² This for my views will leave a major gap in the enforcement of environmental rights in Zanzibar.

6.5 Environmental Information

South Africa under the Promotion of Access to Information Act No. 3 of 2000³²³ promotes transparency and accountability in all organs of the state, by making it obligatory for all organs of state to provide the public with timeous, accessible and accurate information, thus empowering member of the public to participate in government decision-making that affects them.

Unlike South Africa, in Zanzibar Constitution, there are a number of legal and other barriers that limit the access to environmental information and allow the government to withhold

³¹⁹ Cheryl Loots, "Making Environmental Law Effective" (1994) 1 *South African Journal of Environmental Law and Policy (SAJELP)* 17.

³²⁰ Chapter 15, sections 146-150

³²¹ sections 15-26

³²² Section 12 and 13 of the Act

³²³ Section 32(2)

information from the public. For example, while the constitution provides the basis for freedom of information, it also limits that freedom in the form of "claw back" clauses that subordinate its provisions to other inferior laws. Article 18(1) of the constitution contains the qualifying phrase "subject to the laws of the land". This type of subjugation makes the rights and obligations of the constitution open to interpretation and modification by subsequent legislation.

More recently, a 1997 decision by the Tanzanian High Court in the case of *Adam Mwaibabile v. Republic*³²⁴ reinforces the notion that the government should not be permitted to classify documents to deny citizens access to information. In lower court, Mwaibabile, a journalist, was alleged to have violated the National Security Act by assessing a classified government document a directive from a regional commissioner to the Regional Trade Officer to deny the renewal of Mwaibabile's journalist's license. The High Court held that the directive was not a government document as defined in the Act on the grounds that it is not the duty of the government to refuse the granting of business licenses to citizens.

6.6 Conclusion

Most of the rules applicable in South Africa such as rule of interpretations, implementations, administrative and common law remedies are relevant to Zanzibar Legal system. To give effective remedies and implementation of environmental rights in Zanzibar, the Constitution should be amended to provide a wider concept of environmental right.

As a comparative Constitutional approach, I can argue that Zanzibar can look to the progressive constitutional dispensation in South Africa and the environmental jurisprudence that have been developed around the 1996 Constitution, to create a room for public interests environmental law organs and to effectively enforce those rights.

³²⁴ High Court of Tanzania, 1997 unreported

CHAPTER SEVEN

7.0 CHALLENGES, CONCLUSION AND RECOMMENDATIONS

7.1 Challenges

7.1.1 Challenge for the Zanzibar

7.1.1.1 The incomplete nature of environmental rights under the Constitution

Despite the fact that right to environment is related to socio-economic rights as discussed in Chapter Five of this Research, the Zanzibar Government must set up the appropriate machinery by including the environment rights in the Bill of Rights Chapter. To address and include the right in wide, the following issues should be addressed:-

(a) Concept of environment Right

To enforce environmental rights Zanzibar Constitution should include specific environmental right. The environmental right is a right above all other rights which can also attached to non human species.³²⁵ However having environmental right incorporated in Constitution is not guarantee that the putative holder will be success in every dispute but certainly creates a situation in which the reasons should be needed for denying it effect.³²⁶

Through environmental rights, it is easy to imagine situation in which environmental conditions may be bound with the life of community. As viewed by Hancock that Environmental human right also could be as an instrument of praxis by protecting the interests of future generations.³²⁷

(b) Concept of health and well-being

Right to environment is a human –centred right; it considers the environment only under the aspect of its contribution to human health and well-being.³²⁸ ‘Health’ and ‘well-being’ forms the effective application of human rights in environmental protection. Katarina views that because environmental has an impact to human health and well-being, there is the need to

³²⁵ Miller *C op cit* (n 13) at 6

³²⁶ Boyle and Anderson *supra* (n 43) at 27

³²⁷ Hancock *supra* (n47) at 51

³²⁸ Tim Hayward *supra* (n 1) at 32

identify the environmental hazards that have direct and detrimental bearing on human health.³²⁹

(c) Principle of sustainable development

The substantive development elements are mainly set out in Principles 3-8 and 16 of the Rio Declaration. The relationship between sustainable development and environmental rights is generally accepted, in a separate opinion of *Gabcikovo* case, that sustainable development is defined as a right to development which is limited by the need to preserve the environment.³³⁰ The term has a legal function and both a procedural/temporal aspect and a substantive.³³¹

Reference to sustainable development introduces consideration beyond environmental concerns, and also beyond feasibly justiciable individual rights.³³² The notion was to some extent captured in MacDonald's statement in *King v Dykes*³³³, in which he states

'.....the idea which prevailed in the past that ownership of land conferred the right on the owner to use his land as he pleases is rapidly giving way in the modern world to the more responsible conception that an owner must not use his land in a way which may prejudice his neighbours or the community in which he lives, and that he holds the land in trust for future generation'

(d) Intergenerational equity principle

When enforcing environmental rights, the terms intergenerational equity should be considered. The need for this concept has elaborated in the *Minors Oposa case*³³⁴ arose from a challenge to the astonishing rapidity and scale of the destruction of the Philippine rain forests. The Court gave a clearer indication of what the content of the duty might be '*Leave some forests for future generation*' is a serviceable paraphrase of the content of the duty.

In *Oposa* case, the content of that duty was derived from the Philippine Constitution. It might be said that the corresponding international law principle of intergenerational equity, even if

³²⁹ Katarina *op cit* (n 27) at 267

³³⁰ Cited in n 105

³³¹ P. Sands *supra* (n 17) at 254-255

³³² Hayward *supra* (n 1) at 28

³³³ 1971 (3) SA 540 (RA), 545

³³⁴ 33 ILM (1994)

it does not create rights, similarly imposes duties upon states exercising rights and liberties that they enjoy under International Law.³³⁵

7.1.1.2 Environmental Information

In order to know whether the rights are being infringed, people need information. Since public participation is required before the taking of certain decisions that may affect the environment, such participation cannot be possible without sufficient information being made available.³³⁶ The Zanzibar Constitution should be amended to remove the legal and other barriers that limit the access to environmental information and allow the government to withhold information from the public.

7.1.1.3 Restructuring of Environmental Institutions

The government should restructure environmental institutions to provide clear roles and authority for the implementation and enforcement of environmental rights. The Act under section 14 is not clear of the Administrative powers of the Minister because Minister's power's has been limited directives only.

The Structure of the Committee under s. 9, defeats some good ideas, however there is no guarantee that interests of the public and local communities, which seem to have been adequately addressed by some of the provisions of the Act, would be protected. There is no guarantee of representation, by law, for local community and the public in the only organ empowered to approve national environmental action plans.³³⁷ The Committee seems to be against the Rules of Natural Justice, since it provides the powers of final decision to the Committee.

7.1.1.4 Inclusion of the concept of Cooperative Governance

This is very important in the administration of environmental laws, under the cooperative Governance the respective powers of national, provincial and local spheres of government clearly identified.³³⁸

³³⁵ Minors Oposa (1994) 33 ILM 173

³³⁶ Mubangizi *op cit* (n 103) at 130

³³⁷ Majamba *op cit* at 12

³³⁸ Glazewski *supra* (n 4) at 127

The principle of co-operative governance considered in the premier of the *Province of the Western Cape v President of the RSA*³³⁹ where Judge President Chaskalson pointed out that the subsectionis concerned with the way power is exercised, not whether or not a power exists. That is determined by provisions of the Constitution..and...although the circumstances in which section 41(1)(g) can be exercised to defeat the exercise of a lawful power are not entirely clear, the purpose of the section seems to be to prevent one sphere of government using its powers in ways which would undermine other spheres of government, and prevent them from functioning effectively.³⁴⁰

7.1.1.5 Extend Public Education

The Zanzibar government should conduct and encourage private institutions to conduct a broad public education and outreach efforts regarding citizen environmental rights. Few civil society organizations are playing this role in coastal, forest and natural reserve areas. Through education, the general public can understand their rights and enhance compliance and enforcement of environmental legislations

7.1.1.6 Challenges to South African

7.1.1.7 Education

Education is essential supports people's dignity and self confidence, and is basic human right, on which the realization of many other rights depend³⁴¹To enable environmental rights to be enforced, environmental protection should also be established as an educational goal; mandatory environmental education will foster a public environmental consciousness and facilitate the establishment of a framework of social norms that inculcate respect for the environment.³⁴²

7.1.1.8 Content on right to environment

The implication of section 24 has been viewed by different writers. The effect of well being has the effect of widening the right to include aspects of the environment such as

³³⁹ Unreported judgment dated 29 march 1999

³⁴⁰ at para 57-58

³⁴¹ Devenish GE *op cit* at 153

³⁴² Van Reenen TP 'Constitutional protection of the environment: fundamental (human) right or principle of state policy?' (1997) 4/2 SAJELP 269-289 at 288

biodiversity, the degradation of which would not threaten health.³⁴³ Other views that the implication of section 24 on 'well-being' is little more difficult to grasp., while harm to well-being may include harm to physical or mental health, it is clearly denotes something broader than only that.³⁴⁴

7.1.1.9 Guarantee of effective cooperative governance

In implementation of environmental rights in South Africa, co-operative governance remains a problem. Glazewski views that this includes a number of items relevant to environmental concerns.³⁴⁵ He quoted the opinion of Judge Ngcobo in *Executive Council of the Western Cape v Minister for Provincial Affairs and Constitutional Development of the Republic of South Africa and others*³⁴⁶ who considered the concurrency argument presented on behalf of the national government in some detail. The majority in this case held that the role of national government was limited to determining criteria for evaluating different categories of municipality and that certain sections of the LGMSA had infringed the powers of both provincial and local government.

7.2 Conclusion

Compared to Zanzibar Constitution, The South Africa has reached an important step in the development of environmental law jurisprudence due to the inclusion of an environmental clause in the Bill of Rights Chapter of South African Constitution. Apart from the environmental clause which includes the notion of integration equity, the Bill of Rights chapter includes a number of other clauses which although do not directly refer to the environment, are nevertheless pertinent to environmental concerns.

Further, Zanzibar should review the incomplete nature of its environmental rights under the Constitution to address all environmental concerns for a better life for all. The introduction of these rights in the constitution should also be accompanied by enforcement measures and the political willingness of all organs of state and entities to respect the environmental rights.

³⁴³ Weiss EB 'Our rights and obligations to future generations for the environment; (1990) 84 American Journal of International Law 207

³⁴⁴ Feris and Tladi *supra* at 12

³⁴⁵ Glazewski *supra* at 132

³⁴⁶ 1999 (12) BCLR 1360 (CC) at para 26-29

Constitutional provisions can promote the coordination of environmental protection measures within a jurisdiction, allow and encourage greater citizen participation in environmental decision making process; and also play a broader cultural and educational role in motivating that participation.³⁴⁷

7.3 Recommendation

To face these challenges Zanzibar Constitution should provide specific provision on environmental right. Providing for environmental protection at the constitutional level has a number of potential advantage, it entrenches a recognition of the importance of environmental protection; offers the possibility of unifying principles for legislation and regulation; secures these principles against the vicissitudes of routine politics, while at the same time enhancing possibilities of democratic participation in environmental decision-making process.³⁴⁸

The Zanzibar Constitution should be revised to remove claw back clauses, make the public's right of access to information more explicit and include specific environment and natural resource provisions. Although the constitution contains favorable language pertaining to the right of access to information, it can be strengthened by clarifying and specifying this right and by eliminating legal opportunities for the government to effectively override these provisions.

As environmental protection and socio-economic rights are important, this will give a positive obligation on the state to ensure the protection of the environment by way of legislative and other means. South Africa succeeds in this regard. In *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs* it was held that '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. In my view Zanzibar should include the same in guaranteeing the Constitutional environmental rights.

³⁴⁷ Hayward *supra* (n 1) at 5-9

³⁴⁸ Hayward *op cit* (n 1) at 7

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