

**THE CONCEPTUALISATION OF ENVIRONMENTAL
JUSTICE WITHIN THE CONTEXT OF THE SOUTH
AFRICAN CONSTITUTION**

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I the undersigned hereby declare that the work contained in this dissertation is my own original work and that I have not previously in its entirety or in part submitted it at any university for a degree.

In memory of my father and his love for the earth.....

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ABSTRACT

The aim of this dissertation is to conceptualise the principle of “environmental justice”. In doing so it attempts to determine its meaning, assess its possible use for the protection of environmental rights in the light of the South African Bill of Rights, and draw, in a comparative manner, on examples from two other jurisdictions, namely the United States of America (USA) and India.

In the first part of the study “environmental justice” is defined and thereafter the ways in which the idea of “environmental justice” has found expression in the USA and Indian jurisprudence as well as in legislative and administrative practices in these two countries are analysed comparatively. In reviewing the US experience the study concludes that the courts have shown a conspicuous measure of self-restraint in the conceptualisation of environmental justice. Due to its non-activist and formalistic approach, the judiciary has failed to address systemic environmental inequities, and to carve out remedies whereby environmental injustice could have been dealt with in an effective and meaningful way.

The more activist approach of the Indian judiciary, on the other hand, has led to more effective protection of the environment and of people adversely affected by environmental degradation. The judiciary has imposed positive obligations on the state to carry out its social duties as laid down in the Directive Principles of the Indian Constitution. Although India does not have a constitutionally entrenched environmental right, the courts have interpreted the right to life proactively so as to include quality of life.

The study concludes by examining possible applications of the principle of environmental justice for the protection of environmental rights in South Africa, assessing the law as it stands and exploring new avenues in the light of the Bill of Rights.

In this respect the following guidelines are proposed by this study:

- Environmental problems in South Africa must be placed within their specific historical and political context. Consequently environmental injustice must be understood as a form of inequity that impacts on people disproportionately on the basis of race and socio-economic status.

- The concept “environment” can therefore not be narrowly understood, whether it is being dealt with in the Constitution, legislation or common law. It must be recognised that the concept goes beyond ecosystems and that it includes a multiplicity of relationships, in many of which humans are the focal point.
- Environmental justice claims in South Africa may best be framed as constitutional claims. Regard should be had not only to the environmental right in section 24 of the Constitution, but also to other rights that support the notion of environmental justice, such as the rights to life, equality and dignity.
- Judicial activism is a key to the promotion of environmental justice. The judiciary plays an important role in ensuring that the state and other actors fulfil their obligation to respect, protect, promote and fulfil the rights in the Bill of Rights. Transformation requires a judiciary that is prepared to reconsider the traditional boundaries of the doctrine of separation of powers and to lay down directives for other branches of government, in particular the executive.

OPSOMMING

Die doel van hierdie proefskrif is om die beginsel “omgewingsgeregtigheid” te konsepsualiseer. Die studie poog dus om die betekenis van hierdie beginsel, sowel as die moontlike gebruik daarvan in die beskerming van omgewingsregte vas te stel in die lig van die Suid Afrikaanse Handves van Regte. Verder poog die studie om deur middel van regsvergeljking insigte te bekom uit voorbeelde in twee jurisdiksies, die Verenigde State van Amerika en Indië.

“Omgewingsgeregtigheid” word in die eerste deel van die proefskrif gedefinieer. In die tweede deel word die wyse waarop omgewingsgeregtigheid uitdrukking vind in Amerikaanse en Indiese reg, sowel as in statutêre en administratiewe praktyk vergelykend geanaliseer. In die beoordeling van die Amerikaanse ervaring word tot die slotsom gekom dat die howe ‘n ooglopende mate van selfbeheersing toon in die konsepsualisering van omgewingsgeregtigheid. As gevolg van die regsbank se nie-aktivistiese en formalistiese benadering, het dit in gebreke gebly om sistemiese omgewingsongelykhede aan te spreek, en om remedies te ontwikkel wat omgewingsgeregtigheid op ‘n effektiewe en betekenisvolle wyse aanspreek.

Die aktivistiese benadering van die Indiese regsbank aan die ander kant, lei tot meer effektiewe beskerming van die omgewing en diegene wat nadelig geaffekteer word deur omgewingsbeskadiging. Die regsbank plaas positiewe verpligtinge op die staat sodat die staat sy sosiale pligte kan nakom soos bepaal in die Direktiewe Beginsels in die Indiese Grondwet. Alhoewel Indië nie oor ‘n grondwetlik verskanste omgewingsreg beskik nie, het die howe die reg op lewe pro-aktief geïnterpreteer sodat dit ook die reg op lewenskwaliteit insluit.

Die studie ondersoek verder die moontlike toepassings van die beginsel van omgewingsgeregtigheid vir die beskerming van omgewingsregte in Suid Afrika. Dit beoordeel die huidige reg en ondersoek nuwe rigtings in die lig van die Handves van Regte.

In hierdie opsig word die volgende riglyne neergelê in hierdie studie:

- Omgewingsprobleme in Suid Afrika moet binne ‘n spesifieke historiese en politieke raamwerk geplaas word. Gevolglik moet omgewingsongeregtigheid

verstaan word as 'n vorm van onbillikheid wat mense op grond van ras en sosio-ekonomiese status benadeel.

- Die konsep “omgewing” behoort dus nie beperkend geïnterpreteer te word nie, hetsy dit gebruik word in die grondwet, wetgewing of die gemene reg. Erkenning moet gegee word daaraan dat die begrip wyer is as ekosisteme en dat dit 'n veelvoud van verhoudings insluit, baie waarvan mense die middelpunt vorm.
- Eise rakende omgewingsgeregtigheid in Suid Afrika moet beskou word as grondwetlike eise. Nie net kom die omgewingsreg vervat in artikel 24 van die Grondwet ter sprake nie, maar ook aan ander regte soos die reg op lewe, gelykheid en menswaardigheid wat omgewingsgeregtigheid ondersteun.
- Regterlike aktivisme is die sleutel tot die bevordering van omgewingsgeregtigheid. Die regsbank speel 'n belangrike rol deurdat dit moet verseker dat die staat en ander rolspelers hul plig nakom om die regte in die Handves van Regte te respekteer, te beskerm en te bevorder. Transformasie vereis dus 'n regsbank wat bereid is om die tradisionele grense van die beginsel van magskeiding te heroorweeg en om riglyne neer te lê vir ander takke van die regering, spesifiek die uitvoerende gesag.

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CHAPTER ONE

INTRODUCTION

1 1 AIM

The aim of this thesis is to conceptualise the principle of “environmental justice”:-

- determining its meaning;
- assessing its possible use for the protection of environmental rights, in the light of the South African Bill of Rights, and
- drawing, in a comparative manner, on examples from two other jurisdictions, namely
 - the United States of America (USA), where the notion of “environmental justice” originated, and
 - India, where a right to a healthy environment has been derived from other fundamental rights entrenched in the Constitution.

1 2 VALUE OF STUDY

Although the principle of environmental justice has been debated at various levels and in many forums all over the world, it has never been thoroughly analysed in and with reference to the South African context. Discussions of the subject have thus far taken place in the absence of any proper theoretical and contextual framework. The present study will seek to provide such a framework. The South African Constitution does provide for an environmental right, but South African courts have not as yet been required to interpret this right. The framework that will be proposed could assist the courts in analysing the value and meaning of the said right.

1 3 BACKGROUND¹

Poverty is an inescapable reality in the life of the average South African. Literally millions of South Africans still do not have formal housing, electricity,

¹ Chapter 6 of the dissertation describes the South African history of environmental justice in more detail.

running water or sanitation. Poor people moreover constitute the largest section of blue-collar workers in South Africa and are therefore likely to have hazardous jobs and to be particularly vulnerable to occupational injury, both in terms of its likelihood and its possible consequences. In addition poor people often live close to their places of employment, which further exposes them to the threat of a damaging environment.² The exposure of poor and marginalised communities to environmental degradation can be ascribed to, amongst others, the following factors and occurs in the following situations:

- (i) Although there has been a decline in mining activities in South Africa, mining still remains central to the economy. It is also a major source of environmental degradation.³ Not only is mining as such a dangerous occupation, but mining waste accounts for three-quarters of all solid waste in the country. This waste is often left topside, where it is blown away by the wind and where it runs off into rivers or leaches into groundwater.⁴ Since mineworkers live in compounds near the mines, they are exposed to these open dumps on a daily basis.
- (ii) During and as a result of apartheid, whole families were removed to townships close to industrial areas. This was part of the government's policy to situate a cheap workforce close to industrial areas and at the same time keep black people out of the cities. These people were therefore forcibly removed to the said areas. Settled on the outskirts of cities in townships that were yet to be developed, these predominantly black communities were exposed to an array of environmental hazards brought about by a lack of the most rudimentary facilities.⁵
- (iii) The manufacturing and service industries, which are primary sources of pollution in South Africa, also create a hazardous environment.⁶ Not only are

² Butler & Hallows "Environment and Poverty" *CASE: Speak out on Poverty Briefing Paper* March 1998 13.

³ Ibid.

⁴ Ibid. Quoting Durning "Apartheid's Environmental Toll" *World Watch Paper* 95 May 1990.

⁵ Ibid.

⁶ Butler & Hallows "Environment and Poverty" 13.

workers often exposed to unsafe conditions, but adjacent communities are also exposed to hazardous practices. In 1993, for example, two workers died of mercury poisoning after exposure at an incinerator.⁷ They had been employed by Thor, a British company that imported mercury containing waste from the United Kingdom (UK), Italy and the USA for “recycling” in South Africa. The company essentially ran an unsafe operation (it was found that 28% of its workers were poisoned) and it furthermore released hazardous effluents into a river that was a major source of drinking water and fishing for the nearby community. The levels of mercury detected in the river were found to be 1000 times the safe level proposed by the World Health Organisation for drinking water.⁸

- (iv) Environmental degradation does not only occur near industries or mines, but also in the townships where people live. During the winter Soweto, a township on the outskirts of Johannesburg, is enveloped in a heavy cloud of smoke emanating from burning coal stoves. Since few households have electricity, Soweto has levels of smoke pollution 2.5 times higher than anywhere else in the country.⁹ As a result children in Soweto suffer from more asthma and chest colds, and take longer to recover from respiratory diseases, than children elsewhere in the country.¹⁰ In addition, many people die every year due to the inhalation of noxious fumes from burning coal.
- (v) On farms conditions are equally detrimental to people’s health. Farmers have exploited their workers for decades, paying them low wages, evicting life-long workers from farms when they become too old to work and providing alcohol in lieu of wages. The Cape Winelands, for example, are notorious for turning farm labourers into life-long alcoholics. Large commercial farms also use huge quantities of pesticides and farmers often fail to take the necessary

⁷ Butler “Lessons from Thor Chemicals – the Link between Health, Safety and Environmental Protection” in Bethlehem & Goldblatt (Eds.) *The Bottom Line: Industry and the Environment in South Africa* (1997) 194 195.

⁸ Ibid.

⁹ Kidd “The Pursuit of Environmental Justice in South Africa” (1999) *Acta Juridica* 152.

¹⁰ Ibid.

precautions to protect workers. Hundreds of workers are consequently poisoned every year.¹¹ The problem is compounded by the fact that many workers are illiterate and cannot read warning labels. Yet they are required to mix and spray extremely dangerous substances.

As appears from the examples above, environmental injustice to a large extent stems from apartheid and is a result of policies of forced removal and the economic destabilisation and submission of the majority of the population. However, vestiges of apartheid have persisted since the advent of democracy in South Africa in 1994. Workers and poor communities have remained subject to environmentally detrimental policies and practices of both government and private actors, and they will therefore continue to depend on action such as environmental lobbying, community activism and litigation for protection. The most potent measures of protection are potentially derivable from the entrenchment of an environmental right in section 24 of the Constitution of the Republic of South Africa.¹² To protect all South African citizens against environmental degradation, it is crucial that this right be interpreted in a way that will give the fullest possible effect to the principle of environmental justice. In order to assay the potential for such an “activist” interpretation, the following questions will be dealt with in this thesis:

- What are the implications of the principle of environmental justice for the interpretation of the environmental clause in the South African Bill of Rights?
- What can be learnt from the way in which, in the United States that does not have an environmental clause in its Bill of Rights, environmental justice has been understood and invoked in practice?
- What can be gained from the experience of India, a developing country like South Africa that has specifically gone the route of protecting the environment through its Constitution?

1 4 THE ORIGINS OF ENVIRONMENTAL JUSTICE

¹¹ Butler & Hallowes "Environment and Poverty" 14.

¹² Act 108 of 1996.

The term “environmental justice” was first coined in 1992¹³ to verbalise concerns about the disproportionate effect of environmental degradation on minority communities that these minorities had started voicing in the USA in the 1960s. In essence the message was that development seemed to have had a mainly negative rather than positive impact on these communities.

It has in the meantime become apparent that the problem is not confined to lower income areas. Even middle-class neighbourhoods populated by minorities are disproportionately subject to the siting of waste facilities.¹⁴ Various studies on the siting of waste facilities¹⁵ have shown a correlation between the geographic location of these facilities and the proximity of communities consisting of a majority of people of colour or belonging to other ethnic minorities. Similarly, studies have demonstrated that minority communities are exposed to higher levels of pollution than white communities¹⁶ and that non-white fishermen and their families are more likely to consume toxic fish from polluted rivers than white fishermen and their families.¹⁷

It seems empirically plausible that there may in fact be a link between environmental degradation and minority status. If social justice¹⁸ demands that people share the benefits and burdens of society proportionally, this link denotes a form of social injustice against which citizens should be protected. White areas are not likely to be subject to the same environmental hazards threatening areas in which

¹³ It was used during the First National People of Colour Environmental Leadership Summit in 1992.

¹⁴ Mohai & Bryant "Environmental Racism: Reviewing the Evidence" in Mohai & Bryant (Eds.) *Race and the Incidence of Environmental Hazards, A Time for Discourse* (1992) 61.

¹⁵ Ibid. United Church of Christ Commission on Racial Justice *Toxic Wastes and Race in the United States: A National Report on the Racial and Socio-economic Characteristics of Communities with Hazardous Waste Sites* (1987) 57; Gerrard *Whose Backyard Whose Risk: Fear and Fairness in Toxic and Nuclear Waste Siting* (1994) 94.

¹⁶ Freeman "The Distribution of Environmental Quality" in Kneese & Bower (Eds.) *Environmental Quality Analysis* (1972) 33; Gelobter *The Distribution of Outdoor Air Pollution by Income and Race: 1970 - 1984* Masters Thesis Berkely (1987) 23.

¹⁷ West, Fly Larkin & Marans *Minority Anglers and Toxic Fish Consumption: Evidence from a State-wide Survey of Michigan* (1992) 24.

¹⁸ See Chapter 3 for a discussion of the concept of social justice.

minorities find themselves. The different experiences of the groups must therefore be indicative of the need for environmental justice since this principle seeks to guarantee equal protection from environmental impact for all citizens.

The United States Bill of Rights has no environmental clause. For constitutional protection against environmental degradation, a citizen in that country must rely either on what the Fourteenth Amendment to the Constitution might have in store or on civil rights law, both of which were designed to prevent unfair discrimination. Efforts to frame disproportionate environmental impact as an equal protection issue have, however, by and large not been successful. In order to prove discrimination in the United States, discriminatory intent has to be proved. This is not easy since environmental discrimination manifests itself in effect rather than in intent. In consequence not a single case has successfully been litigated on this basis. The United States government therefore proceeded to adopt regulatory measures designed to realise environmental justice. These measures have addressed the problem to some degree, but they do not carry the weight of a constitutionally entrenched right. I shall nevertheless analyse the development of the principle of environmental justice in the United States in order to try and glean from it information that could be of help to South African jurists called upon to construe section 24 of our Constitution that still stands to be considered by our courts.

India's social and economic conditions are closer to those of South Africa and the situation there, also in respect of environmental issues, differs radically from that in the United States. In India, environmental injustice is not manifested along racial lines. It is tribe, caste and class that constitute the discriminatory divides. Environmental injustice also mostly occurs in poorer communities and among the lower castes and is closely linked to the need for development. The increasing impoverishment of the rural poor in India is accompanied by systematic erosion of what they need most basically for subsistence, namely the environment or, more specifically, land, water and forests.¹⁹

¹⁹ Jaid "Poverty, Environment, Development; A View from Ghandi's Window" *Economic and Political Weekly* February 13 1988 311 as quoted in Rosencranz, Divan & Noble *Environmental Law and Policy in India: Cases, Materials and Statutes* (1995) 18.

Although there has been significant development in India in recent years, the way in which it has taken place has had a negative impact on the rural poor and on poorer castes and classes in particular. Extensive mining has, for instance, led to deforestation, the destruction of valuable croplands and the depopulation of villages.²⁰ It is also estimated that seventy percent of all the water available in India has been polluted.²¹

India also does not have an environmental clause in its Bill of Rights, but a right to life is explicitly entrenched, and an activist judiciary has at times used this right to promote environmental justice. In several instances communities approached the court complaining of exposure to disproportionate environmental degradation, their main argument being that this infringes their right to life. Generally speaking, Indian courts have adopted a broad interpretation of the right to life clause. Not only have they extended this right to include quality of life -- which, in turn, implies the right to a healthy environment -- but they have also explicitly recognised an environmental dimension to the right to life. The situation in India will therefore also be analysed and scrutinised for guidelines that could stand the interpretation of section 24 in South Africa in good stead.

In 1994, a constitutional democracy was established in South Africa.²² This led to the adoption of the final Constitution in 1996. One advantage of acquiring a constitutional order at this late stage has been that South Africa could benefit from learning both the successes and the mistakes of other constitutions. The present Constitution is both modern and progressive and contains the previously referred to environmental clause (section 24) in its Bill of Rights. This section 24 guarantees for everyone "the right to an environment that is not detrimental to their health and wellbeing." This right together with other rights in the Constitution constitutes a framework for the realisation of environmental justice in South Africa.

Other jurisdictions that could, for comparative purposes, have qualified for inclusion in the present study are, for instance, Canada and Australia. However,

²⁰ Ibid.

²¹ Ibid.

²² By virtue of the (interim or transitional) Constitution of the Republic of South Africa, Act 200 of 1993.

although in both of these countries some research on environmental justice has been conducted, the principle has not established itself with reference to a justiciable constitution. Socio-economic conditions in these countries furthermore differ from those in South Africa and are similar to those in the United States that has been selected for inclusion in this study, among others because the notion of environmental justice was coined in that country. Environmental rights are constitutionally guaranteed in countries such as Spain, Ecuador, Poland and Peru, but their legal systems are of a civil law as opposed to a common law origin. Their inclusion in this study for comparative purposes would therefore have complicated matters unduly. The South African legal system, especially in the area of public law, is to a large extent imbued with common law principles and practices, such as extensive reliance on precedent for purposes of developing the law.

1 5 RATIONALE FOR PROTECTING THE RIGHT TO A HEALTHY ENVIRONMENT IN A BILL OF RIGHTS

There are arguments for and against entrenching the right to a healthy environment (“the environmental right”) in a Bill of Rights. The following have been noted as the main advantages of including this right:

- Its potential to be a distributional, conflict-resolving mechanism elevates this right to the level of other fundamental (especially socio-economic) rights. The environmental right at any rate functions directly within the ambit of, for example, the ubiquitous rights to life and physical integrity.
- Inclusion of the environmental right in a Bill of Rights establishes and fosters “control by public participation” of decision-making in the state. Apart from recognising the primary role of the individual in initiating judicial review of administrative decisions, acts and omissions, inclusion of this right also contributes to the economic efficiency of protection of the environment.
- Depending on its formulation and the nature of available enforcement mechanisms, inclusion of the environmental right in a constitution introduces and promotes the notion of intergenerational equality, thereby enjoining law- and policy-makers to consciously consider the interests of future generations. It also serves to broaden the legal standing of agents seeking to invoke the said right on

behalf of future generations, thereby reminding the state of its obligations to hold the environment in trust for such generations.²³

The main disadvantages of including the environmental right in a constitution are said to be the following:

- In contrast to other fundamental rights, it awards power to a (democratic) majority against a polluting minority, instead of focusing on the minority nature of fundamental rights.
- The environmental right is often criticised for its inherent proneness to vague formulation and definition that impedes its subsequent implementation in the absence of complementary legislation. This criticism is inspired by the classically liberal idea of “negative” fundamental rights as defence mechanisms with state inaction or restraint (instead of positive action and intervention) as principal objective.
- Formulations of fundamental rights are, in addition, said to be typically ambiguous because entitlements are couched in unduly expansive and open-ended terms. This lack of precision in formulating the environmental right does not make for the measure of certainty and predictability required in constitutional law.
- The inclusion of the environmental right in constitutions that include fundamental rights already catering for the legal interests pertinent to the protection of the environment, is regarded as redundant.
- Since the environmental right, almost without exception, affords citizens an expanded standing to seek legal redress of environmental wrongs, its inclusion in a constitution could open the door to an abuse of judicial processes to the detriment of the executive branch of government.
- Constitutional provision for the environmental right may undermine the separation of powers in the state, since this right could displace the powers of the legislature and the executive with regard to environmental matters and transfer these powers to the judiciary instead. Courts are then charged with the atypically judicial

²³ Van Reenen “Constitution Protection of the Environment: Fundamental (Human) Right or Principle of State Policy?” (1997) *SAJELP* Vol.4 279 281.

responsibility and policy-making power to determine appropriate standards for environmental protection.

- The concern has been raised that constitutional entrenchment of an environmental right that sets too high a standard of environmental protection, may pose a political threat to the legal system as a whole. This could result in the unconstitutionality of undesirably vast tracts of existing legislation as well as the imposition of positive duties far beyond the capacity of the state.²⁴

In addressing the first point of critique, Van Reenen notes²⁵ that the argument of minority vulnerability is rather absurd. He points out that the environmental right as a fundamental right is not structurally different to any other fundamental right primarily (but not exclusively) directed not at fellow individuals, but against the state. The general object is protection against unduly gratuitous state action. Although individuals perpetrating pollution (and often licensed to do so under permit from the state) will ultimately be affected by the constitutionalisation of the environmental right, the state, and not the individual polluters, remains the entity against whom the right is asserted. Van Reenen's comment was made with reference to the interim Constitution that did not make express provision for horizontal application. The final Constitution, which differs in this regard, could arguably be used directly against private persons.²⁶ It is important to note, as White points out,²⁷ that the victim of environmental degradation is in most instances an individual, whilst the polluter is mostly a multinational enterprise. A constitutionally entrenched environmental right could thus limit the ability of powerful multinationals to cause environmental damage.

In light of an increasing tendency to define and thereby delimit environmental concepts in international documents, the critique that environmental concepts and terms are inherently vague, stands open to challenge. These documents are available for consultation in interpreting the allegedly “vague” concepts in a national context. With reference to the critique on standing, Van Reenen notes that the political and

²⁴ Ibid.

²⁵ Ibid.

²⁶ See discussion in Chapter 7, para 7 2 10.

²⁷ White “The Teeth Need Sharpening” in Cock & Koch (Eds.) (1991) *Going Green: People, Politics and the Environment in South Africa* 245.

social costs potentially avoided by early citizen involvement in legal processes, contributes to the quality of participatory democracy, which, in turn, makes state administration more effective.²⁸

While the ideal of a strict separation of powers may be a noble one, it is unattainable in a modern democracy in an absolute form and it is also not necessarily desirable. The emphasis should rather be on developing an appropriate system of checks and balances to ensure accountability, responsibility and transparency as well as an interaction among the different organs of the state.²⁹ Constitutions charge judiciaries, as guardians of the Bill of Rights, with a variety of duties. The South African Constitution, for example, does not only require the rights it entrenches to be respected, but also to be *protected, promoted and fulfilled*.³⁰ The courts are thus also required to safeguard and facilitate these “active” duties assigned to the state. This necessarily entails an expansion of the powers of the judiciary and enhances its influence in political matters. As will be shown in Chapter 5, the Indian Supreme Court has, to this end, assumed an activist role.

Finally, there is the argument that a constitutionally entrenched environmental right could impose duties on the state far beyond its (material) capacities. But is it not true, one may ask, that the very notion of a democratic state premised on a supreme constitution which includes a Bill of Rights, at any rate alludes to some measure of activism on the part of the state in order to effectively guarantee (other) fundamental rights? Traditional civil and political rights, such as the right to vote, also require positive state action and make budgetary demands so as to ensure their fulfilment. Social justice may demand a particularly activist state in order to fulfil the basic needs of citizens. But then, on the other hand, basic freedom rights such as the rights to privacy or freedom of expression can only make sense for citizens whose basic (material) needs have been met.

The South African Constitution is undoubtedly in line with international documents providing for an environmental right. International law was expanded to

²⁸ Van Reenen “Constitution Protection of the Environment” 283.

²⁹ Liebenberg “Socio-economic Rights” in Chaskalson et al (Eds.) (1998) *Constitutional Law of South Africa* 41-8.

³⁰ Section 7(2).

provide for the protection of the environmental right as a so-called third-generation right.³¹ The International Covenant on Economic, Social and Cultural Rights (ICESCR) provides for “the right to an adequate standard of living ...and to the continuous improvement of living conditions.”³² Article 12(1) specifically entitles everyone to the “enjoyment of the highest attainable standard of physical and mental health – the attainment of which is subject to the improvement of all aspects of environmental and industrial hygiene.” These provisions clearly emphasise environmental health as a major element in the protection of life. The highest standard of physical and mental health, as envisaged by the ICESCR, can hardly be attained if environmental degradation is not mitigated or preferably avoided with reliance on, amongst others, a constitutionalised environmental right.³³

Quite a number of significant international declarations and resolutions containing standards and principles pertinent to the protection of the environment have been adopted under the auspices of the United Nations. The United Nations Conference on the Human Environment, for instance, adopted a Declaration and Action Plan for the Human Environment (the Stockholm Declaration) in 1972. The Stockholm Declaration embodies twenty-six principles that have played a significant role as guidelines to environmental protection. One of the most important functions of the Stockholm principles is to establish a link between human rights, the environment and development. Principle 1, for instance, states 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

³¹ In the aftermath of the Second World War international legal instruments embodied the notion of universal human rights. The first set of rights that were recognised in the Universal Declaration of Human Rights (1948) and later in the United Nations Covenant on Civil and Political Rights (1966) were the so-called first generations rights, namely civil and political rights. More recently the so-called second and third generation rights, namely socio-economic rights and environmental rights were recognised in the United Nations Covenant on Economic, Social and Cultural Rights.

³² Article 11(1).

³³ Mekete & Ojwang “The Right to a Healthy Environment: Possible Juridical Bases” (1996) *SAJELP* Vol. 3 155 159.

dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.”

In 1983 the World Commission on Environment and Development (the Brundtland Commission) was created in an effort to implement the Stockholm Principles at an international level.³⁴ One of the Brundtland Commission’s working groups, the Experts’ Group on Environmental Law, adopted a proposal entitled *Legal Principles for Environmental Protection and Sustainable Development*.³⁵ The first of these legal principles recognises the right to a healthy environment as a fundamental right.³⁶ The Commission also devised a legal principle that guided states towards the conservation of environmental resources for the benefit of present and future generations.³⁷

A further significant item on the international agenda for the environment was the Rio Declaration on Environment and Development and Programme of Action (Agenda 21) adopted by the United Nations Conference on Environment and Development (UNCED) in 1992. Just like the Stockholm Conference, UNCED adopted a set of environmental principles.³⁸ These principles once again affirmed environmental rights to the end of social and economic development. The first principle maintains that “human beings are at the centre of concern for sustainable development.³⁹ They are entitled to a healthy environment and productive life in harmony with nature.” The Declaration also asserts the principles of inter-governmental equity and sustainability in realising the right to development.⁴⁰

A fundamental environmental right has also been recognised in some regional human rights treaties. The African Charter on Human and Peoples’ Rights (1986)

³⁴ WCED *Our Common Future* (1987) 348.

³⁵ Ibid.

³⁶ Ibid.

³⁷ Ibid.

³⁸ See in general Robinson (Ed.) *Agenda 21 & the UNCED Proceedings* (1992).

³⁹ Ibid., quoted at cx.

⁴⁰ Ibid. Principles three and four quoted at cxi.

recognises the right of “all peoples ... to a generally satisfactory environment favourable to their development.”⁴¹ At face value the provision only recognises a collective right – the right of peoples. Mekete and Ojwang,⁴² however, argue that in the context of third-generation human rights, the term “peoples” may have varied meanings, ranging from groups of people to humankind as a whole. In the traditional African traditional society “people” may even include the individual. It is believed that the life of an individual is so inextricably linked to community life that an individual could express this identity through community.⁴³ A more specifically individualist approach is adopted in the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights.⁴⁴ This protocol recognises the right of “everyone to live in a healthy environment and to have access to basic public services”. It furthermore places a duty on state parties to “promote the protection, preservation and improvement of the environment”.⁴⁵

It is clear that the last two decades saw a rise in international concern for the preservation of the environment, both for present and future generations. The trend has been to recognise every person’s right to a healthy environment, but with the contention that the environment cannot be separated from the need for development and that accordingly a middle-ground for giving effect to both of these needs must be established.

To date, the South African courts have had limited opportunity to interpret the environmental right entrenched in section 24 of the South African Constitution. Since it appears that the poor and the marginalised are disproportionately affected by environmental degradation, it will be important to persuade the courts to interpret this section in a manner that will afford disadvantaged communities ample protection. In this respect, South African judges may draw guidelines from the way in which environmental law has been understood and applied in the United States and in India in the light of the principle of environmental justice. Environmental justice in South

⁴¹ Article 24.

⁴² Mekete & Ojwang “The Right to a Healthy Environment” 160.

⁴³ Ibid.

⁴⁴ 1988 – not yet in force.

⁴⁵ Article 11.

Africa should be placed against the background of social and economical development and within the wider context of other rights in the Bill of Rights such as the rights to equality,⁴⁶ human dignity,⁴⁷ life,⁴⁸ just administrative action⁴⁹ and access to information.⁵⁰ If the environmental right is going to be interpreted holistically with reference to other relevant rights, it could help constitute a constitutional framework for the realisation of environmental justice in South Africa.

1 6 METHODODOLOGY

The present study will review literature on the principle of environmental justice. This principle will be offset against other approaches to the protection of the environment, namely conservationism and deep ecology. To gain a clear perspective of the issues involved, the development of the environmental justice movement in the United States will be investigated. The unique way in which India has treated the disparate effect of environmental degradation will also be examined. With a view to determining how South Africa can best approach issues of environmental justice, past and present manifestations of environmental injustice will be exposed in comparison with the situations in the United States and India. Conclusions will, more specifically, be drawn as to how, in South Africa, optimal effect can be given to section 24 of the Constitution, which constitutionalises the environmental right to the advantage of all South Africans. Guidelines for constitutional interpretation in the field of environmental protection will also be advanced.

1 7 CHAPTER SEQUENCE

Chapter 2 will review the evolution and multifarious manifestations of the concept “environment”. In Chapter 3 the idea of justice in relation to environmental issues will be examined. Chapter 4 will review and critically assess the literature and case law on environmental justice in the United States while chapter 5 will do the same in respect of India. Chapter 6 will elaborate on past and still existing instances

⁴⁶ Section 9.

⁴⁷ Section 10.

⁴⁸ Section 11.

⁴⁹ Section 32.

⁵⁰ Section 33.

of environmental injustice in South Africa and the inadequacies of the law in addressing these. In Chapter 7 the environmental right in the Constitution as well as other relevant provisions in the Bill of Rights will be examined and construed with reference to the evolution of the principle of environmental justice in the USA and in India. The final chapter, Chapter 8 will be used to summarise the findings of the present study and to make recommendations.

CHAPTER TWO

PERSPECTIVES ON ENVIRONMENTALISM AND THE ENVIRONMENT

2.1 INTRODUCTION

“Environmentalism is an heir to antislavery and temperance movements and thus a part of the ongoing saga of evangelical reform that has characterised American history. Indeed it is not so far off the mark to say that environmentalism is the temperance movement of our time. We know it wants to save the earth. But we forget just how much, in the spirit of its predecessor, it seeks to save us from ourselves”.¹

It has been said that environmentalism is as much a state of being as a mode of conduct.² It is more than the desire to protect ecosystems or conserve resources. At its heart environmentalism preaches a philosophy of human conduct founded on deeply rooted values³. The central viewpoint is that human abuse and development have led to the destruction of the environment, and different theories on cause and effect have been developed over the past few decades.

The beginning of the environmental movement is hard to pinpoint. The earliest environmental debates focused on local issues, such as hunting and deforestation. These concerns have led to national movements and, more recently, to an international movement.⁴ Environmental issues have emerged differently

¹ Rubin *The Green Crusade: Rethinking the Roots of Environmentalism* (1994) 10.

² There are those that argue that environmentalism should be distinguished from ecologism in that environmentalism advocates a managerial approach to the environment, namely that environmental problems can be solved without fundamental changes in social values or patterns of production and consumption, whereas ecologism argues for an essential change in the relationships at work in the environment. See for example Dobson *Green Political Thought* (1990). Others believe that the distinction is based on different ideological and/or philosophical perspectives on the nature and parameters of environmentalism. See for example McCormick *Reclaiming Paradise: The Global Environmental Movement* (1991).

³ O’Riordan *Environmentalism* (1981) ix.

⁴ McCormick *Reclaiming Paradise* 1.

depending on the nature of development in different regions. In Europe, for example, concerns centred around industrialisation and its intersectional impact on social and economic relations. Industrialisation brought with it the notion of conquest, namely the conquest of nature by science and technology.⁵ Perhaps in response to this, an ecocentric consciousness, which supports a sense of kinship between human beings and nature and the acceptance of a moral responsibility to protect the earth from abuse, has gradually emerged.⁶ In South Africa and other former African colonies, however, conservation and protection policies have emerged as a form of political control.⁷

In the 1960s some popular books highlighted the environmental plight from dialectically opposing perspectives.⁸ Although they differed radically, these writings succeeded in popularising the argument that existing policies should be drastically altered to prevent the calamity of the earth's destruction. One advantage of this debate is that some more complex issues have become more evident: the relationship between the environment and poverty, science and technology, health, population growth, women and aid, and trade between first and third world countries, respectively. These count among the issues that will be further explored in this chapter.

The need for a definition of the "environment" stems inter alia from the need to protect the environment and to determine the position of human beings in the environment. Since different approaches to the concept environment are based on a specific view about environmental conservation and the variables governing relationships that have an influence on the environment, it is important to analyse and clarify these perspectives in order to determine the scope of this study more succinctly.

Two approaches prevail, i.e. a limited and an extensive approach or an earth-centred versus a human-centred approach. Two other terms that are used to refer to

⁵ Worster *Nature's Economy* (1977) 2.

⁶ McCormick *Reclaiming Paradise* 3.

⁷ Ibid.

⁸ Examples of these publications are Carson *Silent Spring* (1962), Goldsmith *Blueprint for Survival* (1972) and Erlich *The Population Bomb* (1968).

some of the differences between theories are deep and shallow ecology. While deep ecology represents the more traditional view of environmentalism, shallow ecology has developed more recently and is viewed more favourably by developing countries. These dualisms do not, however, correspond perfectly. Within the extensive approach, for example, a debate on a strong and weak human-centred approach in which a type of instrumentalism is considered the strong approach, has drawn a great deal of attention.

Essentially, two different arguments as to why people should care for the earth, which broadly correspond with the limited and extensive definitions of “environment”, have developed. The first argument is that the environment has intrinsic value that entitles it to an existence regardless of the interest of human beings.⁹ This viewpoint emphasises the interrelationship and interdependence of animal and plant life systems.^{10 11} Since the basic claim is that all species are equal, this notion displaces humans from the centre of creation. The other, more anthropocentric view emphasises the status of humans in the natural hierarchy regarding care for the earth. It is believed that the earth should be preserved for a variety of reasons concerning humans, such as a stockpile of genetic diversity for agricultural, medical and other purposes and as material for scientific study, recreation, aesthetic enjoyment and spiritual inspiration.¹² These broad philosophies are discussed below in more detail.

2 2 THE LIMITED APPROACH

2 2 1 Underlying Philosophy

Deep ecology, which best represents the limited approach, views the richness and diversity of life as values in themselves and holds that human beings have no right to reduce these resources, except to satisfy their basic needs. Deep ecologists

⁹ Ibid.

¹⁰ Bookchin argues as follows: “Each species, be it in a form of bacteria or deer, is knitted together in a network of interdependence, however indirect the links may be” Bookchin *The Ecology of Freedom* (1982) 26.

¹¹ Copra “Deep Ecology: A New Paradigm” in Sessions (Ed.) *Deep Ecology for the 21st Century* 19–25.

¹² Bunyard & Morgan-Grenville *The Green Alternative* (1987) 284.

therefore perceive the need for cultural diversity and diversity in social arrangements as preconditions to the survival of the planet. An essential element in the transformation towards an equitable relationship between human beings and nature is the denunciation of dualisms, such as mind and body, culture and nature, subject and object. Conceptions of 'self and other', deep ecologists argue, when formulated in terms of interdependencies and connectedness, stimulate an acceptance of difference.¹³

Naess¹⁴ summarises the basic tenets of deep ecology as follows:

- "The well being and flourishing of human and non-human life on earth have value in themselves. These values are independent of the usefulness of the non-human world for human purposes.
- Richness and diversity of life forms contribute to the realisation of these values and are also values in themselves.
- Humans have no right to reduce this richness and diversity except to satisfy vital needs.
- The flourishing of human life requires a smaller population. The flourishing of non-human life requires a smaller population.
- Present human interference in the non-human life is excessive and the situation is rapidly worsening.
- Policies must therefore be changed. These policies affect basic economic, technological and ideological structures. The resulting state of affairs will be different from the present.
- The ideological change will be mainly that of appreciating life quality rather than adhering to increasingly higher standards of living.
- Those who ascribe to the foregoing points have an obligation directly or indirectly to implement the necessary changes."

¹³ Ibid. at 151.

¹⁴ Naess *The Deep Ecology Movement: Some Philosophical Aspects in Sessions* (Ed.) *Deep Ecology for the 21st Century* 64.

One of the strongest contentions of the limited approach is that the term environment should be restricted to the natural environment, including renewable and non-renewable resources and all forms of life.¹⁵ According to this view the term environment would refer to the natural environment, that is, water, air, soil, plants, animals and the interaction between these elements. In a broader sense it would also include non-renewable natural resources such as landscapes, natural phenomena such as habitats and biological organisms and communities. Rabie believes that this view has probably been influenced by ecological studies, the aim of which is to research the natural environment within its natural ecosystem, or alternatively, that it might stem from nature conservation.¹⁶ Deep ecology therefore espouses an ecocentric rather than a homocentric ethic. It believes that in utilising non-human nature, people have a duty to maintain the integrity of the ecosphere, not to conquer it or make it more efficient.¹⁷

One strain of the limited approach maintains that the respect and concern for the environment is based upon religion. This notion can be traced to ecocentric religions and ways of life of primal peoples around the world, to Taoism, Saint Francis of Assisi¹⁸, the Roman nature-oriented counter-revolution movement of the 19th century with its roots in Spinoza and to Zen Buddhism.¹⁹ Native American religions that stress humanity's harmony with non-human life are also quoted in support of the argument regarding a spiritual link.²⁰ Similarly, indigenous African

¹⁵ Rabie "Nature and Scope of Environmental Law" in Fuggle and Rabie (Eds.) *Environmental Management in South Africa* (1996) 86.

¹⁶ Ibid.

¹⁷ Merchant *Radical Ecology: The Search for a Liveable World* (1992) 87.

¹⁸ It is said that St Francis had a deep love of the natural world and experienced a sense of union with it. He saw nature as a living whole and all creatures as objects of God's love and significant in their own right. Barbour *Technology, Environment and Human Values* (1980) 21.

¹⁹ Theron "Environmental Rights: An Overview of Principles" (1997) 4 *SAJELP* 91 43 citing Button "Prerequisite for Peace: An International Environmental Ethos" (1991/92) 59 *Tennessee L R* 681.

²⁰ Barbour *Technology, Environment and Human Values* 18.

groups have developed a tradition of understanding nature and living in harmony with their environment.²¹

The message from these religions is one of non-violence, non-injury and reverence for life. The earth therefore deserves protection, which in turn demands that humans put a stop to development that proves harmful to the health of the earth. The argument is that this would entail less growth, less waste and less pollution.²²

The argument that the ethic of care for the environment can be traced to religion, is also supported by religions such as Christianity, Islam and Judaism which value nature in its own right, as opposed to its mere usefulness to humans. Fuggle²³, for example, notes:

“Judaism, Christianity and Islam all hold that a human being is not the Ultimate Being but is a product of God’s creation, as is the earth, and all plants and animals. All of creation – plant and animal species, the land, sea and its resources – is seen as being as much a part of God’s creation as human beings, and also subject to God’s love and concern. Human beings reside in a cosmos created by and belonging to God. They are an integral part of nature.”

In contrast, some deep ecologists see religion, in particular Western religions, as the source of all environmental problems. They cite Judeo-Christians, for example, who believe that, because humans were made in God’s image and share in God’s transcendence of nature, they were created to have dominion over nature.²⁴ Those who do not perceive environmental care as stemming from religion argue that such a

²¹ Glavovic “Environmental ‘Group’ Rights for Indigenous South Africans” (1991) *SALJ* Vol. 108 (1) 67.

²² There are, on the other hand, assertions that development does not pose such a whole-scale threat to the continued existence of the earth. According to the Gaia theory the earth has remained a comfortable place for living organisms for the whole 3.5 billion years since life began, despite a 25% increase in heat output from the sun. Lovelock Gaia, ‘The World as a Living Organism’ (1986) *New Scientist* 18 December 25.

²³ Fuggle *Environmental Management: An Introduction* in Fuggle and Rabie (Eds.) *Environmental Management in South Africa* (1996) 19.

²⁴ Atfield *The Ethics of Environmental Concern* (1983) 20.

view fails to explain how similar environmental problems have evolved in the East, where Western religions have not had such a strong impact. Despite the doubts raised by critics within the deep ecology movement, however, the call for a new ethic, linked to the spiritual beliefs of Bhuddism or the pan-psychism of St Francis, is based on the belief that Western religion is at the root of all environmental problems.

This debate has led to the notion that the development of an ecologically sound ethic is not possible within the current mode of ethical discourse, which demands that ecologists present reasons why humans should not interfere with the natural world. What is required, they suggest, is the cultivation of an alternative worldview within which people will have to justify why they should interfere with the natural world.²⁵ This, they argue, will require a paradigm shift.

2 2 2 Main Tenets

The basis of the “limits to growth’ argument as advanced by the deep ecologists is that world-wide population growth, pollution, industrial output and resource exploitation are interrelated. The adherents to this principle believe that there are natural limits to economic and population growth. The earth has a limited capacity in terms of the population it can naturally carry. It also has a limited productive capacity since there is a limit to its resources (especially non-renewable resources) and a limited absorbent capacity in terms of pollution.²⁶ Population growth and the accelerated use of non-renewable natural resources caused by an expanding global economy would sooner or later mean that the resources that provide materials for civilisation will vanish and so will civilisation itself.²⁷ As resources vanish,

²⁵ Dobson *Green Political Thought* (1990) 49.

²⁶ Ibid. at 15.

²⁷ “The Limits to Growth” report was compiled by a group of scientists from MIT, referred to as the ‘Group of Rome’. The report reached three main conclusions:

(1) If existing trends in world population, pollution, industrialisation, food production, and resource depletion continued unchanged, the limits to growth on the planet would be reached within one hundred years. The most likely result would be a sudden and uncontrollable decline in both population and industrial capacity.

(2) It is possible to alter these growth trends and to establish a condition of ecological and economic stability that is sustainable far into the future. The state of global equilibrium could

industrial output will collapse, the population will soar, food supply will dwindle and the death rate will go up.²⁸

During the 1960s the “population problem” received a great deal of attention.²⁹ The main arguments were that the world population is beginning to outgrow the resources that support it and that too many people are competing for the dwindling food and material supplies. According to some theorists technology lies at the root of the population problem, more specifically, the ways in which technology prioritises some aspects of human need whilst neglecting others. For example, advances have been made in agriculture and health, but similar progress in the field of sensible birth control is not evident.³⁰ The consequence of uncontrolled population growth is that the environment will be ever more exploited and degraded as the need to feed more mouths increases. Under these circumstances, the argument goes, the choices are that the population be limited deliberately or that famine, disease, war and civil instability be allowed to do that for us.³¹

be designed so that the basic material needs of each person on earth were satisfied and each person had an equal opportunity to realise their individual human potential.

(3) If the world’s people decided to strive for the second outcome rather than the first, the sooner they began working to attain it, the greater would be their chances of success. Meadows et al *The Limits to Growth* 29 (1977).

²⁸ Rubin *The Green Crusade* 130.

²⁹ Paul Erlich in his well-known publication *The Population Bomb* (1968) gave the following description of his “emotional insight” into the population problem during a visit to India: “The streets seemed alive with people. People eating, people washing, people sleeping. People visiting, arguing and screaming. People thrusting their hands through the taxi window, begging. People defecating and urinating. People clinging to buses. People herding animals. People, people, people, people Would we ever get to our hotel? All three of us were frankly frightened.” At 15.

³⁰ Howard “The Population Crisis is Here Now” in Metress (Ed.) *Man in Ecological Perspective* (1971) 209.

³¹ Rubin *The Green Crusade* 79.

According to the so-called “lifeboat ethics” principle, food and population policies are linked. Herdin³² advocates withholding food aid to countries that face famine, but are unwilling to control population growth. He claims that rich nations are like people in crowded lifeboats, with the poor of the world swimming outside. If they are allowed inside the boat by sharing their food with the poor, the poor will swamp the boat and it will go down. As it is, he argues, affluent countries have only a small safety factor. In some respects they have already exceeded the carrying capacity of their own countries. Sending food aid would lead to further population growth in developing countries and only postpone the final catastrophe. Eventually the lives that are saved by food aid will hasten environmental destruction.³³

The natural limits to population growth are famine, disease and conflict, and those that adhere to the “over-population” theory, believe that we should allow these inhibitors to take their natural course. A group that has been referred to as deep ecology’s political wing, Earth First!, interprets this philosophy in the extreme. They once stated “if radical environmentalists were to invent a disease to bring human population back to sanity, it would probably be something like AIDS. The possible benefits of this to the environment are staggering. Just as the Plague contributed to the demise of feudalism, AIDS has the potential to end industrialism.”³⁴ They seem to suggest that to reduce the world population, AIDS should be allowed to run its course. In this way more resources will become available and problems of scarcity will be alleviated and maybe even eliminated.

In linking over-population to environmental degradation, advocates for population control generally support the notion of birth control. Birth control has been advocated since the early part of the century and arguments on behalf of it had been many and varied. In the process people such as Erlich de-emphasise immediate human suffering in the name of preventing disasters at a later date and raises doubts that voluntary family planning could avert the dangers of over-population.³⁵

³² Herdin “Lifeboat Ethics: The Case against Helping the Poor.” *Psychology Today* (September 1974) 38 43.

³³ Ibid.

³⁴ Quoted in Dobson *Green Political Thought* 64.

³⁵ Rubin *The Green Crusade* 82.

As mentioned above, deep ecologists argue that more profound change in social thought and practice is needed, specifically change in human values and ideas of morality. One of those changes is a reduction in consumption. Resources are being depleted in order to enhance the social and economic development of human beings. Deep ecologists argue that present rates of consumption are physically unsustainable. According to them the development of technology is inextricably linked to human consumption of resources. They would prefer to sustain society through reducing consumption.³⁶ This, they believe, calls for a shift in thought where human “needs” are redefined and maybe even exchanged for a life of simplicity. There thus needs to be a new awareness of the link between human “needs” and resource depletion.³⁷ Specious satisfactions of consumption should be replaced by satisfaction of a non-material or social kind. They therefore seriously oppose technological solutions to problems of consumption.

In conclusion, the ‘limits to growth’ thesis³⁸ produced three principles that can be linked to sustainability:

- Technological solutions may create an acceleration of environmental degradation rather than sustain development. For example, new technology such as incineration may create even more pollution.³⁹
- Rapid rates of growth aimed for by industrialised and industrialising societies have an exponential character, that is, dangerous substances stored up over a relatively long period of time may not only prevent development, but have a

³⁶ Irvine & Ponton *A Green Manifesto: Policies for a Green Future*. (1988) 125. The authors suggest that an attitude of “enough” must replace that of “more”.

³⁷ It is argued that our awareness of this link is reduced by factors such as advertising on behalf of manufacturers of goods, the geographical distance between food’s origins and its consumption and the lack of attention to the North’s responsibility for poverty in the South. The media may give attention to the relationship between eating habits and nutrition, but it is the nutrition of the affluent that is the object of attention. What really needs attention is the nutrition of the starving people in the South whose land use is dictated by production and marketing strategies in the developed North. Redclift *Development and the Environmental Crisis, Red or Green Alternatives?* (1991) 22.

³⁸ Op cit fn 27 supra.

³⁹ Dobson *Green Political Thought* 76.

catastrophic effect. The accumulation of waste may, for example, eventually lead to dangerously high levels of pollution.⁴⁰

- Since environmental problems are interrelated, some solutions may exacerbate environmental problems rather than solve them. While nuclear power may replace forms of power that produce acid rain, for example, it contributes significantly to global warming.⁴¹

2 3 THE EXTENSIVE APPROACH

2 3 1 Definition

Proponents of the extensive approach contend for an all-embracing definition of “environment”, i.e. that the environment includes everything with which we are surrounded. This coincides with the following dictionary definition: “surrounding, surrounding objects, region, or conditions, especially circumstances of life of person or society”.⁴² Rabie describes this extensive approach as including:

- the natural environment, i.e. renewable and non-renewable resources, such as air, land, water, soil, plants, animals, etc.;
- the spatial environment, i.e. areas created by humans such as towns and cities, as well as specific landscapes such as mountains, wetlands, etc.;
- the sociological or social environment, i.e. other people such as the family, group, society, etc.; and
- the economic environment, cultural-historical environment, built environment, political environment and labour or work environment.⁴³

An overview of legislation shows that a wider view to the concept “environment” is preferred.⁴⁴ Canadian legislation⁴⁵, for example, also takes a wide approach, defining environment as:

⁴⁰ Ibid. at 77.

⁴¹ Ibid.

⁴² *The Concise Oxford Dictionary* 7 ed. (1982).

⁴³ Rabie *Nature and Scope of Environmental Law* in Fuggle & Rabie (Eds.) *Environmental Management in South Africa* (1996) 83 84.

“Air land or water; plant and animal life, including man; social, economic and cultural conditions that influence the life of man or a community; any building, structure, machine or other device or thing made by man; any solid, liquid, gas, odour, heat, sound, vibration, or radiation resulting directly or indirectly from the activities of man; or any part or combination of the foregoing and the interrelationships between any two or more of them.”

The New Zealand Resource Management Act⁴⁶ contains the following definition:

“environment includes:

- a) ecosystems and their constituent parts, including people and communities; and
- b) all natural and physical resources; and
- c) amenity values; and
- d) the social, economic, aesthetic and cultural conditions which affect the matters stated in paras (a) to (c) of this definition or which are affected by those matters.”

“Amenity values” are “those natural or physical qualities and characteristics of an area that contributes to people’s appreciation of its pleasantness, aesthetic coherence, and cultural and recreational attributes.”⁴⁷

According to the Environment Protection Act of 1986 of India, “environment” includes: “water, air, land and the interrelationship which exists among and between water, air and land, and human beings, other living creatures, plants, micro-organisms and property.”

⁴⁴ There is of course legislation with a more narrow focus, such as the United Kingdom’s Environmental Protection Act of 1990 that defines the environment as consisting of “all, or any, of the following media, namely air, water and land.” (Section 1).

⁴⁵ Quoted in Kidd *Environmental Law – A South African Guide* (1997) 2.

⁴⁶ Section 1 of Act 69 of 1991.

⁴⁷ Kidd *Environmental Law* 2.

The South African Environmental Conservation Act⁴⁸ defines “environment” extensively as “the aggregate of surrounding objects, conditions and influences that influence the life and habits of man or any other organism or collection of organisms”.⁴⁹ The more recent National Environmental Management Act⁵⁰ (NEMA) describes “environment” as “the surroundings within which humans exist and that are made up of - (i) the land, water and atmosphere of the earth; (ii) micro-organisms, plant and animal life; (iii) any part or combination of (i) and (ii) and the interrelationships among and between them; and (iv) the physical, chemical, aesthetic and cultural properties and conditions of the foregoing that influence human health and well-being”.⁵¹ Although the definition contained in NEMA seems to be a more limiting one, it is clear that both definitions take an extensive view of “environment”.

In short, the extensive view of the environment defines the environment as interrelated with humans rather than as separate from humans, as deep ecologists argue.

2 3 2 Underlying Philosophy

An extensive approach to the environment focuses on the interconnectedness between humans and the environment and the important role that humans fulfil in nature. Two main approaches can be distinguished in the way in which “environment” is conceptualised⁵²:

- an instrumental or strongly anthropocentric approach, which holds that the earth should be viewed as a source of (mainly economic) resources that should be conserved with the specific aim of maintaining its usefulness for humans;
- a weak anthropocentric position, which does recognise the central locale that humans adopt in nature and the ways in which humans find value in the utility

⁴⁸ Act 73 of 1989.

⁴⁹ Section 1.

⁵⁰ Act 107 of 1998.

⁵¹ Section 1.

⁵² See e.g. McCormick *Reclaiming Paradise: The Global Environmental Movement* (1991).

of the earth, but also recognises the value of the environment independent of its usefulness for human purposes.

The foremost proponents of a wide approach to the environment are social ecologists. Murray Bookchin, one of the best-known social ecologists, believes that social ecology is rooted in the balance of nature, process, diversity, spontaneity, freedom and wholeness.⁵³ Social ecologists reject the mechanistic, instrumental outlook that nature is a resource for humans and humans are a resource for the economy.⁵⁴ They also reject the domination of humans over nature and of humans over other humans. Instead, social ecology emphasises the human interdependence with the non-human nature. This view challenges the notion of hierarchy in nature that places humans at the top of the pyramid and holds that each species is equal to and interconnected with other species. It does, however, recognise that humans have the ability to transform nature. This human capacity is not considered to be unlimited, but is counteracted by nature's ability to transform humans, which demonstrates the interdependence between humans and nature.

Because social ecologists have a commitment to social justice, they view social issues such as population, race, class, and sex as environmental issues. They believe, for instance, that the global population problem cannot be viewed independently from the impact of economic growth, especially capitalist growth on, among others, indigenous people, marginalised rural and urban people, people of colour and women. They therefore take issue with involuntary methods of population control, the Malthusian idea that famine, disease and war are positive checks on population expansion and the policy that the immigration of southern and eastern hemisphere people into northern countries should be tightly restricted. Instead they support an ecologically based development policy that uses resources in a sustainable way while raising the quality of life and redistributing the means of fulfilling basic needs.⁵⁵

Like deep ecologists, social ecologists favour a reduction in population growth. Porritt maintains, for example, that "in terms of reducing overall

⁵³ See Bookchin *The Ecology of Freedom* (1982) for a detailed analysis of social ecology.

⁵⁴ Merchant *Radical Ecology* 144.

⁵⁵ Ibid.

consumption, there is nothing more effective than reducing the number of people doing the consuming".⁵⁶ The reasoning is that if fewer people consume resources the chances of sustaining the earth for future (smaller in number) generations are substantially increased. This decreases the need for the development of new technology, which, in turn, may lead to a reduction in waste and pollution.

Social ecology also focuses on the implication of systems of economic production for both humans and the environment. It criticises both capitalism and state socialism for their capacity to disrupt nature. It argues for a world in which basic human needs are fulfilled through an economic restructuring that is environmentally sustainable.⁵⁷ It supports the stabilisation of the world's population, therefore, but does not agree with programmes that result in genocide, racism or disregard for human rights. Instead, it supports economic programmes that provide for basic needs in order to bring about the equalisation of quality of life in developed as well as developing countries.

Like deep ecologists, therefore, social ecologists are calling for a major transformation of people's views and of governmental policies towards the environment. In contrast with the more limited perspective of deep ecologists, they see the solution to environmental problems as rooted in sustainable development and social justice. Their emphasis is on the human condition as a basis for transformation as opposed to the deep ecologists' goal of transforming the worldview and reclaiming spiritual connections to the earth.

2 4 CRITICAL ANALYSIS OF THE DIFFERENT APPROACHES

2 4 1 Relationship between Humans and the Environment

Social ecology is criticised by deep ecologists for its outdated Marxist roots, for its failure to offer any analysis of an ecological self and for its lack of scientific alternatives based on dialectics.⁵⁸ It is also criticised for the fact that it has not given adequate attention to environmental ethics and has not shown how a basically

⁵⁶ Porrit *Seeing Green* (1986) 190.

⁵⁷ Ibid.

⁵⁸ Ibid.

homocentric attitude oriented on social justice can also be informed by ecological principles.

It is the deep ecologists therefore who draw a distinction between 'deep' and 'shallow' ecology. While the central idea in deep ecology is biocentric equality, that is, that all organisms and entities in the ecosphere are equal in intrinsic worth, deep ecologists criticise shallow ecology for being concerned only with pollution and resource depletion as these problems detrimentally affect human beings. Deep ecologists believe that the 'crisis of human domination' is a result of the nature of Western culture. Their critique of anthropocentrism therefore becomes their point of departure. They argue that an anthropocentric view necessarily entails the domination, conquest, and management of nature to serve human needs. This dominating position, they hold, alienates human beings from the environment on which their survival depends. When human beings ignore natural processes, their antagonistic attitude towards nature leads not only to the destruction of the environment, but also to self-destruction.⁵⁹

The deep ecology movement, however, oversimplifies the notion of biocentric equality. An opposite view underpins this thesis. It is believed that the power that humans have to dominate the environment can be used to the advantage of the human population. It is, in fact, argued that environmental equity is dependent on human intervention. In this respect the extensive approach to the concept "environment" is followed. As shown above,⁶⁰ the extensive approach extends beyond concerns regarding pollution. Although both the limited and the extensive approaches acknowledge the interrelatedness of humans with the non-human environment and believe in the equity of species, it is only the extensive approach that recognises the ability of humans to manipulate the environment to the *sustained* advantage of humans. This provides a different dimension to the relationship between humans and the environment.

One advantage of placing less emphasis on humans is that it actually underscores the importance of the value of the environment in and of itself. It also

⁵⁹ Braidotti et al *Women, the Environment and Sustainable Development: Towards a Theoretical Synthesis* (1994) 149.

⁶⁰ At para 2 3 2.

reminds human beings that they are but one entity in a sophisticated and integrated ecosystem and that the natural environment should be preserved because of its value outside of the human equation. The reality is, however, that very little of the environment remains in its original state. It has been significantly modified through various human impacts such as the development of towns and cities, deforestation and mining. Any definition of the environment should therefore take cognisance of the effect of human behaviour on the environment. This is not acknowledged in the limited approach.

Humans have reformed the natural environment in order to benefit from it. Through their efforts to modify their environment, however, they have caused extensive damage to the natural environment - damage to which they too are vulnerable. It is consequently important to acknowledge the effect of environmental degradation on people. This, a limited approach is unable to do.

A realistic view of environment will acknowledge both the effect of human behaviour on the environment and the vulnerability of humans to environmental damage. A realistic environmental theory will therefore have to account for the human condition in the future. For this purpose, relationships that feature in the environment, such as those between humans and the environment or between the state or large corporations and individuals in the environment, need to be specified. Since the way in which human relationships are structured may impact on the environment, human relationships may consequently determine who benefits from the environment and who is burdened by environmental degradation. In an attempt to illustrate how the theory of environmental justice may bring about a more equitable state of affairs, therefore, this study considers the nature of some of these relationships throughout.

An extensive approach takes cognisance of all of the above. It acknowledges all the various relationships that exist in and also outside of nature. A wide definition will therefore include human interaction within a social, political and economic sphere. Such a definition of the environment serves two purposes. First, it provides an inclusive and holistic insight into a phenomenon that can be used as a tool for further inquiry to delineate the ways in which the relationships between different entities in the environment converge. Second, it highlights the importance of human beings as situated or functioning within the environment. Proceeding from an extended point of view allows one to understand more clearly how aspects of our

social, cultural, economic, and political activities impact on the natural environment. In this regard, Redcliff emphasises that “environment” is socially constructed:

“The environment used by ramblers in the English peak district, or hunters and gatherers in the Brazilian Amazon, is not merely located in different places; it means different things to those who use it. The environment is transformed by economic growth in a material sense, but it is also continually transformed existentially, although we – the environment users - often remain unconscious of the fact.”⁶¹

Against this background it becomes clear that human beings are probably unique in being the only species that has succeeded in changing the natural environment to a point at which serious efforts need to be made to ensure its continued existence. It is through adaptation - cultural, social, political and economic - that the natural environment has become threatened. As a result, considerable effort is needed to conserve the natural environment for present and future generations. It is therefore argued that the concept of environmental justice can only be conceptualised within the scope of a network of environmental relationships.

Humans can only benefit from the environment if we ensure the sustainability of the earth’s resources whilst reducing and eliminating unsustainable patterns of reproduction and consumption. The underlying guiding principle is that of equity – equity between groups, nations and generations. Deep ecologists would prefer to place humans outside the realm of relationships that operate in nature. Such a view is not only unrealistic, but also incapable of providing an equitable solution to environmental problems. It is in the achievement of environmental equity that environmental law becomes important. As has been noted, this study proposes that if environmental law includes principles of environmental justice, many of the degradation problems experienced today may be remedied.

2 4 2 The Concept “Value”

A further criticism of the argument that underpins the deep ecology movement concerns the term “value”. Deep ecologists argue that the environment should be protected and preserved because it has intrinsic value. In this respect, however, the

⁶¹ Redcliff *Sustainable Development: Exploring the Contradictions* (1992) 3.

concept “value” needs to be explored. Baier and Rescher define value as “a general characteristic of an object or state of affairs that a person views with favour, believes is beneficial and is disposed to act to promote”.⁶²

While it may be true that the environment will benefit from a new and more profound environmental consciousness, to argue that the earth has intrinsic value is to suggest that it could be valued independently of any awareness of or appreciation for the environment on the part of humans.⁶³ The reality is, however, that only humans are consciously able to appreciate the ability of the earth to sustain life, with the result that they cannot avoid interacting with nature to fulfil their needs.

Maslow⁶⁴ has identified the following ranking order of values that coincides with human needs:

- survival: physical needs such as food, health and shelter.
- security: safety needs, i.e. protection from danger.
- belonging: social needs such as friendship, acceptance and love.
- self-esteem: ego needs such as self-respect, recognition and status
- self-actualisation: fulfilment needs such as creativity and realisation of individual potential.

Human beings therefore find value in seeing an elephant striding through the vast landscape of a nature reserve because it makes them feel one with nature. As a result nature reserves are proclaimed in order to safeguard the elephant for future generations. But humans also value the financial rewards that arise from the exploitation of the earth’s rich natural resources.

The question that arises in this regard is whether the earth’s resources are used in an environmentally sound manner, in other words, whether the conduct of human beings conform to a “care for the earth” standard. The anthropocentric approach takes the reality of human nature into account and allows environmentalists to shift their focus from “a state of being” to a “state of conduct”. Since human action is one of the

⁶² Baier & Rescher *Values and the Future* (1969) 1 – 2.

⁶³ Attfield *The Ethics of Environmental Concern* (1983) 146.

⁶⁴ Maslow *Towards a Psychology of Being* (1968).

principal forces operating on ecosystems, the accelerated interaction between humans and the natural environment makes it impossible to return to an ideal state of nature. Although a strong accent should be placed on creating a paradigm shift in human consciousness, reality demands that an even stronger emphasis be placed on a shift in conduct towards a new ethical basis for environmentalism. For this purpose ecosystems must be managed and regulated. It is in this regard that environmental law plays an important role.

2 4 3 Population and Consumption

The argument of deep ecologists that reducing the world population is a way to save the earth is based on a flawed understanding of the reasons for population growth. In contrast, it could be argued that population growth is caused not by technology, but mainly as a result of poverty and underdevelopment. A lack of development leads to famine and disease and thus high rates of infant mortality,⁶⁵ which in turn leads to women having more children to increase the chances of actually raising a family.

Herdin's lifeboat theory⁶⁶ also fails to consider the fact that starvation may lead to higher birth rates as parents seek to offset higher infant mortality. The theory is misleading in that it suggests that the only solution to the population problem would be the denial of food aid to the developing world in order to starve them to death. It also remains silent about issues of development and does not consider how the lack of technological advances in agriculture or the skewed power relations favouring developed nations in global markets may impact on food production in developing countries. In addition, it fails to consider that environmental degradation is often actually worse in developed countries than in developing countries.

Feminists criticise the "lifeboat theory" in particular, arguing that population questions need to be looked at in relation to women and development. Alston, for example, declares that population growth concerns women's rights.

"It relates to women's access to education, to credit, to being able to make their own choice about their lives, to information about all

⁶⁵ Attfeld *The Ethics of Environmental Concern* 11.

⁶⁶ See para. 2 2 2.

methods of birth control. It relates to decreasing infant mortality so that women feel secure that their children will survive.”⁶⁷

In line with this perspective, ecofeminists⁶⁸ view the arguments that overpopulation and the destruction of resources are a threat to our survival as a manifestation of the male system. They note that it illustrates the way in which patriarchy demands control over women’s lives and force decisions about reproduction onto them. They therefore see birth control as a gender issue in that it empowers women to take control of their reproductive health, which ensures a better quality of life for them. What is really needed, they maintain, is a view that takes into account the link between population and poverty. In a world where poor people have access to economic resources, they will have real choices, including the choice of limiting the size of their families.

The fact is that affluent countries are guilty of excessive consumption resulting in immense waste.⁶⁹ They also bear the responsibility for past and, in some ways, present disparities in development. For example, poor countries that are required to use their resources to service foreign debts often cannot feed their populations. Developed countries, on the other hand, are in a position to ensure a more even distribution of resources to fulfil the nutritional needs of everyone.⁷⁰ What needs to be taken into account, therefore, is that we live in an interdependent world. Since the famine, disease and conflict that befall the developing nations will affect affluent nations sooner or later, it is in the interest of the developed world to address the consequences of underdevelopment in developing countries. As Barboir states:

⁶⁷ Alston “Environment and Development: An issue of Justice” in Hallows (Ed.) *Hidden Faces – Environment, Development, Justice: South Africa and the Global Context*. (1993) 187 190.

⁶⁸ A French feminist, François d’Eaubonne, introduced the term ‘ecofeminism’ in the mid-1970s. It refers to the interconnections between feminism and ecological concerns. Within ecofeminism there is a range of theoretical positions which rest on the assumption that there are critical connections between the domination of nature and women. See, for example Caldecott and Leland (Eds.) *Reclaim the Earth: Women Speak Out for Life on Earth* (1983), Plant (Ed.) *Healing the Wounds: The Promise of Ecofeminism* (1989) and Diamond and Orenstein (Eds.) *Reweaving the World: On the Emergence of Ecofeminism* (1990).

⁶⁹ Barbour *Technology, Environment and Human Values* 261.

⁷⁰ Ibid.

‘Lifeboats are independent. If one sinks the others will not be affected. However, we live in an interdependent world. It is more like the Titanic, if it goes down we all go down together.’⁷¹

It is in this respect that the philosophy underpinning this study differs significantly from that of the deep ecologists. Whilst it acknowledges that over-population and over-consumption poses a global threat to the environment, it also argues that the “population problem” cannot be viewed in isolation. It is linked to issues of poverty and development. These issues affect developed and developing nations alike and should be addressed in environmentally sound and equitable ways. While it is accepted that humans have brought about a great deal of destruction, their ability to manipulate nature for the good of human beings is appreciated. Human ability and effort should therefore be utilised to ensure the sustainable management of the environment.

2 5 ENVIRONMENTAL JUSTICE AND SUSTAINABLE DEVELOPMENT

2 5 1 Environment and Development

During the 1970s a “new environmentalism” emerged. The main argument was based on the notion that development is pivotal to the sustainability of the environment.⁷²

Okidi⁷³ describes development as:

“the process by which a country provides for its entire population all basic needs of life such as health, nutrition, education and shelter and to provide every one of its population with the opportunities to contribute to that process through gainful employment as well as scientific and technological construction. Secondly, it is the process by

⁷¹ Ibid. at 260.

⁷² “A new generation of environmentalists had turned toward a policy of compromise, of using political, economical, and social systems to achieve change.” United Nations Environment Programme, *In Defense of the Earth: the Basic Texts on Environment: Founex, Stockholm, Cocoyoc* (Nairobi: UNEP 1981).

⁷³ Okidi “International Perspectives on the Environment and Constitutions” (1996) *SAJELP* Vol. 3 39 42.

which the national government facilitates the construction and maintenance of the mechanism and infrastructure which diversifies and perpetuates the productive base of the country, such as agriculture and industries so as to ensure that the society overcomes pressures and necessities of the national and related economic systems for the present and future times.”

In contrast to the “limits to growth”⁷⁴ argument, economic growth is viewed as a prerequisite for development.⁷⁵ However, if growth results in the degradation of the environment and either endangers health or jeopardises the sustainable utilisation of the natural resources, it will be antithetical to development.⁷⁶ Central to the conceptualisation of economic and social development, therefore, is the notion that the natural resource base of the earth should not be undermined. Sustainable development is accordingly defined as:

“Development that meets the needs of the present without compromising the ability of future generations to meet their own needs. It contains within it two key concepts:

- the concept of ‘needs’, in particular the essential needs of the world’s poor, to which overriding priority should be given; and
- the idea of limitations imposed by the state of technology and social organization on the environment’s ability to meet present and future needs”⁷⁷

This view takes into account the inherent connection between development and environment. On the one hand, environmental problems in developed countries stem from over-development, that is, the reckless and excessive exploitation of natural resources. On the other hand, environmental problems in developing countries spring from underdevelopment, that is, unequal access to wealth, lack of economic opportunity and the unequal exploitation of natural resources.

⁷⁴ See para. 2 2 1.

⁷⁵ World Commission on Environment and Development *Our Common Future* 8

⁷⁶ Ibid.

⁷⁷ Ibid. at 43.

In linking the lack of development to environmental degradation in developing nations, one should at the outset explore the way in which the “environment” as a concept is perceived in developing countries. As stated previously in this chapter, much of environmentalism’s message is concerned with the relationship between human beings and nature, and the value that should be ascribed to human involvement in the environment.⁷⁸ The environmentalism that has emerged in the developing world, however, has characteristics that are peculiar to the culture and conditions in those countries. For example, in the developed countries the term “countryside” is equated to rural idyll and pastoral plenty, whilst in most third world countries the term signifies poverty and repression, because this is where the poorest people in these countries are located.⁷⁹

The divergence of the different views of environment is also manifested in the different needs that people have. In the developed world needs such as the conservation of wildlife or freedom from pollution assume importance because for most people the more basic needs of shelter and food have already been met. In developing countries, by contrast, these basic demands are far from being realised. The truth of this matter is brought home by the fact that although disparate views on the environment exist within both developed and developing countries, these views primarily run along socio-economic and class lines. The health and well being of poor people are at a bigger risk than that of middle-income and wealthy people, since poor people are more likely to be situated near waste dumps or factory sites. Poor people consequently suffer under the double bind of the lack of access to basic services such as clean water, housing and health care, and a disproportionate share of the burden of environmental degradation. Thus it is stated that:

“The surplus generated by the exploitation of nature allows an extremely favourable and pleasant environment to be created for the middle and high-income sectors, but for the broader sectors of the population the results are fairly precarious. This gives rise to a state of affairs in which the environmental concerns of the affluent sectors rest on the quality of life, which is threatened by atmospheric pollution,

⁷⁸ See para. 2 4 1.

⁷⁹ Redclift, *Environmentalism and Development* 46.

noise, congested transport, etc., whereas the environmental concerns of the poor – water pollution, distance from places of work, precariousness and crowding of houses, etc. – threaten their very lives.”⁸⁰

The economic disjunction between the North and the South⁸¹ is not only illustrative of the inequities that exist within the so-called global economy, but can also be linked directly to environmental degradation in the South. Falling commodity prices, debilitating burdens of debt, high interest rates⁸², declining financial flows and reductions in aid are all indicative of failing economies.⁸³ These failing economies have forced developing countries to overtax their environments and to deplete their natural resources. Poor countries, in other words, are often forced to destroy their own environment, not because of ignorance, but in an effort to survive.⁸⁴ Poverty is thus both a cause and effect of environmental degradation.⁸⁵ It follows that the eradication of poverty, or the development of poor communities, will help to sustain the environment.

2 5 2 Development of the Concept “Sustainable Development”

With the advent of the global environmental consciousness in the early 1970s, it was suggested that environmental exigencies were antithetical to developmental

⁸⁰ Ibid. at 47.

⁸¹ The terms ‘North’ and ‘South’ are increasingly being used to refer to developed and developing countries respectively. Thus even though Australia is situated in the Southern Hemisphere, it is regarded as part of the North.

⁸² It has been argued that the combined effect of the World bank, the IMF and the United States government borrowing has been to maintain high interest rates, to increase pressure on less-developed country debtors to export more and consume less, and to starve much of the developing world of much needed capital. Redcliff *Environmentalism and Development* 59.

⁸³ Brundtland *What is Sustainable Development?* in Carim et al (Eds.) *Towards Sustainable Development* (1987) viii.

⁸⁴ Shridath *Poverty, Wealth and Inequity* in Carim et al (Eds.) *Towards Sustainable Development* (1987) ix.

⁸⁵ Ibid.

needs.⁸⁶ The global agenda was, however, still biased at this stage towards the problems of pollution and urban squalor that were viewed as problems predominantly of the Western industrialised countries.⁸⁷ When international organisations finally took up the issue of “development and environment” in 1974, new international policies on the issue emerged.⁸⁸ A declaration was issued by UNEP-UNCTAD that made recommendations on policies to be instituted at both national and international level. The declaration⁸⁹ stated that (writer’s bullets):

- “policies should be instituted aimed at satisfying the basic needs of the poorest, while ensuring adequate conservation of resources and protection of the environment;
- governments and international organisations should promote the management of resources and the environment on a global scale;
- strong international regimes should be set up for the exploitation of the global commons, this exploitation to be taxed so as to benefit the poorest countries;
- new priorities were needed in scientific and technological research and development;

⁸⁶ Okidi “International Perspectives on the Environment and Constitutions” 43.

⁸⁷ Ibid.

⁸⁸ At a UNEP-UNCTAD meeting held in Cocoyoc, Mexico in 1974 the follow conclusions were reached:

(1) The development of LDCs (Less Developed Countries) was governed by the availability of natural resources to a far greater extent than in MDCs (More Developed Countries), where skills, capital resources, and technological capabilities were more influential.

(2) The capacity to cope with environmental disruption was more limited in LDCs that had fewer technological and capital resources, than in MDCs. Hence environmental degradation could have a more immediate and more rapid impact on economic development.

(3) A fundamental rethinking of planning and development strategies was needed to give higher priority to social structures, more equitable distribution of income, and environmental issues. At the local level, far greater consideration should be given to local needs and conditions before, for example using techniques, crop varieties, agricultural methods and so forth, that had worked elsewhere.

⁸⁹ Ibid.

- new development priorities should aim at curbing over-consumption in the North and stepping up the production of essentials for the poor.”

For the first time, there was a deliberate move to compel governments to incorporate into their policies concerns regarding the way environmental policies influence poor people. The implications of these recommendations were not only that governments should infuse their policies with environmental concerns but that governments should oblige industry to incorporate new values into its policies.

At the time of issuing the above recommendations, most developing countries had neither an environmental policy nor a land use policy, and very few had environmental agencies. In addition, most had to cope with problems of political and economic instability.⁹⁰ The emphasis on developing technology that would advance the social and economic development of the poor countries was therefore very important. What was, however, not clearly recognised or defined at this point, was the need for an equitable redistribution of resources.

The failure to link environmental problems with a lack of economic development was addressed by the World Commission on Environment and Development established in 1983. The focus of the Commission had been on environmental problems rather than on the effects of environmental degradation.⁹¹ The Commission therefore questioned the “standard agenda” of environmental concern.⁹² First, it was usually the effects of environmental problems that were addressed, rather than the root of the problem. Second, environmental issues were usually separated from development issues and frequently pigeonholed under conservation. Third, the Commission complained that critical issues, such as acid rain or pollution, are usually discussed in isolation, rather as if solutions to these problems could be found in discrete areas of policy. Fourth, the commission criticised what it saw as a narrow view of environmental policy, which relegated the “environment” to secondary status by adding it onto more important development issues. What the commission failed to challenge, was the assumption that sustainable development was

⁹⁰ Rubin *The Green Crusade* 159. The number of less developed countries with environmental agencies grew however from 11 in 1972 to 102 in 1980.

⁹¹ Redclift *Environmentalism and Development* 13

⁹² World Commission on Environment and Development *Our Common Future* 37-41.

often seen as a Third World concern. Given the global nature of both the environment and development, however, sustainable development needed to be approached as a global consideration.

Miller⁹³ suggests that one of the ways in which sustainable development can be achieved on a global scale is through policy changes regarding debt relief. The debt burden increases the impoverishment of developing countries in part because in situations of destitution, people are unlikely to focus on long-term environmental commitments. The large debts owed by the developing world mean that future generations of people in these countries might be working to repay future residents of the developed world. Natural resources are likely to be sacrificed in the push to earn foreign exchange. It is impossible to put a monetary value on ecological damage, but one can argue that although developing countries owe an enormous economic debt to the developed countries' institutions, the developed world owes the Third World even more in terms of ecological debt.⁹⁴ As suggested by Gro Harlem Brundtland:

“Sustainable development cannot, and will not, be achieved in a world ridden by poverty. We have therefore called for a new era of economic growth, one that is forceful, global and environmentally sustainable, with a content that enhances the natural base rather degrading it.”⁹⁵

The concept “sustainable development” was redefined at the United Nations Rio Earth Summit in 1992 in Rio de Janeiro.⁹⁶ The conference drafted the Rio Declaration on Environment and Development⁹⁷ in which “sustainable development” featured prominently. The Declaration included 27 principles (Rio Principles) on general rights and obligations regarding the environment and development. The most important principles relating to sustainable development include:

⁹³ Miller *The Third World in Global Environmental Politics* (1995) 147.

⁹⁴ Ibid. at 148.

⁹⁵ Brundtland *What is Sustainable Development?* in Carim et al (Eds.) *Towards Sustainable Development* ix.

⁹⁶ *The United Nations Conference on Environment and Development* Rio de Janeiro, Brazil June 1992.

⁹⁷ *Rio Declaration on Environment and Development* United Nations Earth Summit Press Summaries 1-12 June 1992.

- Principle 1 Human beings are at the centre of concerns for sustainable development. They are therefore entitled to a healthy and productive life in harmony with nature.
- Principle 3 The right to development must be fulfilled so as to meet developmental needs of present and future generations equitably.
- Principle 4 In order to achieve sustainable development, environmental protections shall constitute an integral part of the development process and cannot be considered in isolation from it.
- Principle 5 All States and all people shall cooperate in the essential task of eradicating poverty as an indispensable requirement for sustainable development, in order to decrease the disparities in standards of living and better meet the needs of the majority of the people of the world.
- Principle 8 To achieve sustainable development and a higher quality of life for all people, States should reduce and eliminate unsustainable patterns of production and consumption and promote appropriate demographic policies.

The Rio Principles recognise the “integral and interdependent nature of the earth”⁹⁸ and adopt a very deliberate anthropocentric approach to the environment. They stress the interrelations between development, poverty and the environment, and note that poverty contributes towards environmental degradation, as much as over-development does. It is therefore impossible to view these issues in isolation. Consequently, an integrated approach is required to address them.

The Rio Principles furthermore give recognition to the principle of equity, on both an inter-generational and intra-generational level. Global inequities are mirrored at a local level in both developed and developing countries. Principle 5 of the Rio Declaration on Environment and Development requires national governments to take the responsibility for addressing environmental inequity, which invariably means addressing issues such as poverty and development within their own borders.

⁹⁸ Ibid. Preamble.

Benton⁹⁹ strongly contends that considerations of social justice should be applied in the definition of sustainable development. There are two reasons for this. First, a case can be made that distributional inequalities are causally responsible for a great deal of environmental degradation. Reducing inequalities, especially by empowering traditionally disadvantaged groups such as black people and women, and reducing poverty in developing nations is often held to be a necessary means of achieving sustainability. In this regard the World Bank has suggested in a 1992 report¹⁰⁰ that sustainable development requires self-empowerment which, in turn, is based on the following:

- community-based control of natural resources;
- access to funds, technologies and education;
- creating units of economic management working in the market place;
- people's participation in their own development and governance;
- priority aid for women and their empowerment;
- community access to the production or procurement of necessary goods and services;

Second, most advocates of sustainable development include socio-political objectives in their definition of development. "Development" is held to mean more than mere continued or accelerated economic growth. It is about addressing political and structural inequalities. Justice should therefore be part of the content of sustainable development as a social, economic and political strategy.¹⁰¹

This study argues that environmental justice requires sustainable development. While there may be many avenues for the promotion of sustainable development, the mechanisms to guarantee such development and to attain environmental justice in the South African context are best found in the human rights guarantees of the Constitution.

⁹⁹ Benton "Ecology, Community and Justice" in Hayward & O'Neill (Eds.) *Justice, Property and the Environment, Social and Legal Perspectives* (1997) 17 23.

¹⁰⁰ *The World Development Report on Development and Environment*, quoted in Turok, *South Africa's Skyscraper Economy* 245.

2 6 CONCLUSION

Long-term solutions are required that would address environmental destruction and unsustainable development. In devising new strategies to these issues, the world will inevitably be faced with choices between different ethical and ideological approaches to the environment. In this chapter it has been shown that a people-centred approach to the environment is needed and that “environment” should be broadly constructed. This approach will best serve the goal of environmental justice. In this respect three central points are made:

First, as shown by both deep and shallow ecologists, humans should be viewed as interdependent and interconnected with the non-human nature. Human beings, however, have the ability to transform nature. This human capacity is not considered to be unlimited, but is counteracted by nature’s ability to transform humans, which demonstrates the interdependence between humans and nature.

Second, humans may have caused environmental destruction, but they are at the same time affected by environmental degradation. This study therefore acknowledges the disproportionate effect of environmental degradation on people. As argued in this chapter, there is a nexus between poverty, under-development and the degradation of the environment. There is also a nexus between race and poverty and inequity in the distribution of the benefits of the environment and the burdens of environmental degradation. It is people of colour who remain the poorest in society and it is poor people that are most vulnerable to environmental degradation. Consequently, social issues such as population, race, class, and gender must be recognised as environmental issues. This entails that environmental benefits and burdens be distributed in a socially just manner. The concept of equity – equity between groups, nations and generations – must underpin a theory of justice that determines the fair distribution of benefits and burdens. In Chapter Three the theory of social justice is therefore examined for its relevance to environmental justice.

Third, development is linked to environmental conservation. Poverty is both a cause and effect of environmental degradation. The environment will therefore only be sustained if poverty is eradicated. Development is furthermore a precondition for the alleviation for poverty. It should, however happen in a sustainable manner. This

¹⁰¹ See Chapter 3 for a complete discussion of justice within the context of the environment.

study argues that the basic needs of the poorer majority of people must be met. This cannot, however, happen at the expense of the environment. In other words, the destruction of the living and natural resources should be avoided so that increases in production and improvements in living conditions can be sustained in the long term. Environmental conservation is therefore linked to sustainable development in which the needs of poor and marginalised people are fully considered.

Consequently an integrated approach to caring for the earth and catering for the needs of people is necessary to address environmental concerns on a global scale. The solution to environmental problems is therefore rooted in sustainable development and social justice.

CHAPTER THREE

JUSTICE IN THE ENVIRONMENT

3 1 INTRODUCTION

“Environmental problems are also social problems, both in their causes and their effects. Environmental degradation is being brought about by socially organised practices, and it has generally been allowed to occur because those with the power of decision have deemed it a necessary and acceptable sacrifice justified by the benefits the practices bring. Yet there is now growing concern about whether the practices really do always justify the damage incurred... [A] further dimension to (this problem) also becomes increasingly evident, namely: who benefits, and who bears the losses? The *effects* of environmental degradation are not necessarily experienced as costs by the people who cause - and most benefit - from them. Indeed, many of the most serious environmental problems are not evenly distributed but are felt most acutely by people who are also already subject to socioeconomic disadvantage. Thus, ...[q]uestions of environmental policy are inextricably linked with questions of social justice.”¹

The concept of justice has been the subject of much discussion over thousands of years and different theories have been formulated in attempts to determine the nature of justice. All these theories essentially endeavour to establish a normative basis for relationships between people in society.

In an attempt to establish a basis for the various relationships that give content to the concept “environment”, this term is also defined in different ways. This study has argued that “environment” should not be understood narrowly, but that it needs a broad interpretation that does not only recognise the importance of all species within the natural environment, but also acknowledges the existence of inter-human, inter-

¹ Hayward “Introduction: Social and Legal Perspectives on Environmental Problems” in Hayward & O’Neill (Eds.) *Justice, Property and the Environment* (1997) 1 1.

species and inter-generational relationships functioning in an encompassing context.² The passage quoted at the beginning of this chapter raises questions that go to the heart of the said relationships and simultaneously try to establish a foundation for these relationships. It is therefore essential to analyse different conceptions of justice to determine a theory that suitably underpins these relationships.

This study does not consider all the different theories on justice, but focuses on one particular form of justice, namely social justice. The underlying assumption is that social justice provides the most appropriate form of justice for addressing inequities in the environment. Selected theories on social justice are examined and analysed to determine whether they can help to achieve the broader goal of this dissertation, namely, to propose a theory within which the concept of environmental justice can be located.

Two concepts need to be explained at the outset: social justice and distributive justice. Social justice has been described as the type of justice that:

“... demands that the concrete reality of the vulnerable members of society be respected. In the normal workings of government and the market, people with power are more able to control the outcomes. In contrast to this, children do not vote, the homeless have no economic power, and in times of war and unrest, the lives of innocent people are put at risk in the face of military objectives. Social justice looks at the big picture of social relationships from the perspective of the poor, marginalized, and powerless. It recognizes, moreover, that human choice concerning actions and attitudes is expressed in social structures and social practices.”³

Social justice therefore focuses on the relationship between people and structural injustices within those relationships.

Distributive justice as a form of social justice identifies the unequal distribution of goods as the cause of structural inequalities in a society. Several

² See Chapter 2, para. 2 6.

³ Brady *The Moral Bond* 120 – 21.

scholars have developed theories of distributive justice.⁴ The question at the heart of all these theories is who can lay claim to goods and on what basis such a claim should be discharged. The principle of “equality” is often identified as the basis for distribution. Equality itself is open to different interpretations and theorists find it necessary to identify various qualifications for equal treatment. These may be merit, need, redress, etc. Distributive justice, therefore, has two important corollaries. First, it implies that all people who are equally situated should be treated equally. This has been described as a weak sense of equality.⁵ Second, distributive justice implies proportionality. It is based on the premise that every individual possesses a quantifiable attribute that makes him/her eligible for a proportionate share of social goods.⁶

What is clear is that justice requires the distribution of goods to be equitable. Distributive justice, however, is an inadequate form of social justice in the context of the broader goals of environmental justice.

In addition to the above, two issues that relate to justice and the environment need to be mentioned. In the first place, the question is often asked whether future generations of humans have the right to have their needs taken into account in present decision-making about the use and distribution of natural resources. In the second place, the question has been raised whether non-human natural beings should be considered not simply as resources, but as beings who themselves are entitled to just treatment.

While the issue of inter-generational justice is referred to in this study, it is not a main focus.⁷ Because the approach adopted in this study is deliberately anthropocentric, which specifically excludes the notion of “inherent value of the environment”, the second issue referred to above is not addressed at all. It has been argued that human concern over the environment stems from the value that the

⁴ See for example Ryan (Ed.) *John Stuart Mill and Jeremy Bentham Utilitarianism and other Essays* (1987).

⁵ Miller *Social Justice* (1976) 21.

⁶ Ibid.

⁷ For a more in-depth discussion of inter-generational justice see Weiss *In Fairness to Future Generations: International Law, Common Patrimony and Intergenerational Equity* (1992).

environment holds for humans.⁸ As such the relationship between humans and non-humans is considered to be inherently unequal, which defies the idea that “rights” can be claimed by non-human natural beings.

3 2 ARISTOTLE’S CONCEPTION OF SOCIAL JUSTICE

3 2 1 Virtue Ethics

There are two central concepts in Aristotle’s definition of justice: virtue and equality. Virtue, Aristotle argues, is a quality that exists within people, one of the intrinsic values of human nature that constitutes our excellence or flourishing as human beings.⁹ At the same time he distinguishes between the virtuous person and the person who *acts* virtuously. People can in other words perform good or virtuous acts even if they are not themselves good or virtuous.

Aristotle depicts the virtuous individual as one who can perceive what is good or right or proper to do in any given situation. This implies that virtue is in fact a choice.¹⁰ Virtue in this sense is said to be an instrumental rather than an intrinsic good. It is also contingent in nature and may vary from society to society and situation to situation.

As an exponent of virtue ethics, Aristotle takes a similar view of the centrality of human beings. He regards nature as a hierarchy within which those with less reasoning ability exist for the sake of those with more. He accordingly states:

“Plants exist for the sake of animals, and brute beasts for the sake of man – domestic animals for his use and good, wild ones (or at any rate most of them) for food and other accessories of life, such as clothing and various tools. Since nature makes nothing purposeless or in vain,

⁸ See Chapter 2 para. 2 4 2.

⁹ “Our ethics reflects our emotions, our bodily constitution, and our sociality – not just our rational capacities; the human virtues are the virtues of our ‘composite nature’, which stands between the beasts and the gods.” Aristotle NE (V) in Chapman and Galston (Eds.) *Virtue* (1992) 3 See also MacIntyre *After Virtue* (1981) and Pincoffs *Quandaries and Virtues* (1986) for further readings on virtue.

¹⁰ Slote *From Morality to Virtue* (1992) 89.

it is undeniably true that she has made all animals for the sake of man.”¹¹

3 2 2 Analysis of Aristotle’s Perception of Virtue Ethics

One argument in support of virtue ethics in the context of the environment is shaped by the notion that every thing or object has an end or function that distinguishes it from other things or objects.¹² If an object fulfils its function well, it flourishes. Almond argues that this notion of flourishing can be extended from human beings to the general flourishing of plants and animals.¹³ The Deep Ecology movement, in particular, supports the extension of the concept of flourishing. According to deep ecologists, the principles of flourishing are the following¹⁴:

- “1. The well-being and flourishing of human and non-human life on Earth have value in themselves (synonyms: intrinsic value, inherent value). These values are independent of the usefulness of the non-human world for human purposes.
2. Richness and diversity of life forms contribute to the realisation of these values and are also values in themselves.
3. Humans have no right to reduce this richness and diversity except to satisfy *vital* needs.”

Almond argues that, since the well being of our descendants can be seen as essential to our own flourishing, these principles can also be applied to general obligations that stretch beyond the present generation to people of the future.¹⁵

Deep ecologists would, however, criticise the notion of “human flourishing”, particularly the suggestion that it implies the application of self-interest above all

¹¹ Ibid. at 267.

¹² In the case of human beings it is their ability to reason. Almond “Rights and Justice in the Environment Debate” in Cooper and Palmer (Eds.) *Just Environments Intergenerational, International and Interspecies Issues* (1995) 7 3.

¹³ Almond “Rights and Justice” 7.

¹⁴ Naess and Sessions “Basic Principles of Deep Ecology” *Ecophilosophy* Vol. 6 (1984) 1

¹⁵ Almond “Rights and Justice” 7.

other things. They argue that this notion of self-interest is derived from the Christian perspective of the place of humans in nature.¹⁶

Authors such as Singer¹⁷ argue that, according to the Christian tradition, human beings are the centre of the moral universe and, in fact, the “entirety of the morally significant features of this world”. As such, they have been granted “dominion over the earth”. Singer believes that there is justification for this interpretation if it is read in the context of those sections of the Bible that have a similar approach to the role of humans in nature. In support of this idea, he cites the fact that God drowned every living creature to punish humans for their wickedness.¹⁸ However, Christians who are concerned about the environment contest the meaning of this granting of “dominion” and claim that it should not be regarded as a license to do as we wish to other living beings, but rather as a directive to look after them, “on God’s behalf”.¹⁹

In applying virtue ethics to the environment, the notion of virtue as an intrinsic value should be questioned, since it evidently leads to preference for self-interest and an elitist and individualistic view of humans in their relationship to non-humans in the environment. A more acceptable approach may be to conceive of virtue as an instrumental value, since justice requires that humans find value in non-human beings.

3 2 3 Social Justice

¹⁶ Singer *Practical Ethics* (1993) 265. He quotes some of the language used in the Book of *Genesis* 1:24-28 in the Bible:

“And God said, Let us make man in our image, after our likeness: and let them have dominion over the fish in the sea, and over the fowl on the earth, and over the earth, and over every creeping thing that creepeth upon the earth. So God created man in his own image, in the image of God created him; male and female created he them. And God blessed them, and God said upon them, Be fruitful, and multiply, and replenish the earth, and subdue it; and have dominion over the fish of the sea and over the fowl of the air, and over every living thing that moveth upon the earth.”

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ Thomas *Man and the Natural World* (1983) 152-3.

According to Aristotle, justice is a virtue that exists within people. He differentiates between what he terms “general justice” and “specific justice”. General justice requires obedience from the individual to the law of the state. Since the law of the state sanctions virtuous acts, it is implied that general justice therefore requires virtue.²⁰ The virtue that is referred to here, however, is a qualified one. It refers to virtue in relation to people’s behaviour towards other people.²¹ It is, therefore, a social virtue and not an individual one.

Aristotle argues that general justice is co-existent with, although notionally different from, virtue (as he sees it) since its concern is not with the nature of virtue as such, but with the intrusion of individuals upon the rights of others. The question that needs to be asked is whether someone is behaving lawfully towards others and, if so, whether it is a just act. The first question would form part of the general concept of justice, whilst the second inquires into a more specific concept of justice. Specific justice consists of individual virtues and is, according to Aristotle, the higher one of the two virtues.²²

General justice is realised through specific justice. Aristotle divides specific justice into three different types, namely corrective justice, retributive justice and distributive justice.

Corrective justice, also known as justice in rectification, concerns rectification in transactions. Two types of transactions may be distinguished, namely those that are voluntary and those that are involuntary. Voluntary transactions include selling, buying, lending, pledging, renting, depositing, and hiring out. Involuntary transactions are secret transactions, e.g. theft, adultery, poisoning, pimping, slave-deception, murder by treachery, false witness, whilst others involve force, e.g. assault, imprisonment, murder, plunder, mutilation, slander and insult.²³ Corrective justice

²⁰ Van Zyl & Van Der Vyver *Inleiding tot die Regswetenskap* (1982) 152.

²¹ Sherba *Justice*. At page 16 he states: “Justice is perfect because it is our mode of practising perfect virtue; and it is supremely perfect because its possessor can use it in his relations with others and not only by himself. There are plenty of people who can practice virtue in their personal affairs but who are incapable of displaying it in their relationships with others.”

²² Van Zyl & Van Der Vyver *Inleiding tot die Regswetenskap* 152.

²³ Sherba (Ed.) *Justice, Alternative Political Perspectives* (1980) 43.

focuses on public order and the way in which the law is used to bring about rectification in both voluntary and involuntary transactions.

Aristotle notes that in the context of corrective justice, equality is not viewed proportionately, but rather numerically. It treats all people as being similar since it focuses on the harm inflicted. In order to effect justice the harm has to be remedied.²⁴ Subjective traits and personal circumstances are thus placed outside of the equation.²⁵ This form of justice does not require the existence of virtue, since each party in the transaction is defined not by moral worth, but by the interactional link of an injury inflicted and received.

The second form of justice, retributive justice, is concerned with all private and public law liability arrangements. These relationships are also guided by the numeric principle of equality. In distinguishing between justice and equity, Aristotle notes that all acts that are unlawful are also unfair, but that an act may be lawful and unfair. Retributive justice, however, requires fairness and equity between a legal act and its effect. The consequence of a legal act should thus not be disproportionate to that which is considered equitable.

The third form of justice, distributive justice, is concerned with the distribution of "...honours or wealth or anything else that can be divided among members of a community who share in a political system", in which it is possible "...for one member to have a share equal or unequal to another's."²⁶ In formulating a distributive concept of justice, Aristotle treats justice as a manifestation of equality. In order for a state to distribute goods such as wealth or honour in a just manner, it should do so equally according to the principle of geometric equality. Equality is determined on a proportionate basis, so that people who are equal will receive equal

²⁴ Ibid. at 44.

²⁵ "It makes no difference whether a worthy person has deprived an unworthy one, or vice versa, nor whether a worthy or worthless person has committed adultery, but the law looks to the difference of the harm alone and treats them as equals." Aristotle *NE V* 1132a2-5. Quoted in Weinrib "Aristotle's Forms of Justice" in Panagiotou (Ed.) *Justice, Law and Method in Plato and Aristotle* (1987) 133 135.

²⁶ Solomon and Murphy (Eds.) *What is Justice?* 44.

shares and those who are not equal will not receive equal shares.²⁷ The criterion for distribution is merit: equal deserves equal treatment and unequal treatment relative to the purpose for which the distribution is made.²⁸ The idea of virtue is not essential to the existence of this form of justice. But it remains a possible candidate as a criterion of justice in that distributive justice looks at the worthiness of the parties receiving the distribution of goods.²⁹

3 2 4 Analysis of Aristotle's Perception of Social Justice

Aristotle's concept of "distributive justice" refers to the fair distribution of social goods in societies. It furthermore determines the basis upon which goods – benefits and burdens – should be distributed. Aristotle concludes that the basis for distribution should be merit, where goods are distributed according to that which one deserves.

As the criterion for distribution of goods, merit is, however, problematic. Rawls notes that merit and achievement result from skills and virtues that are a consequence of hereditary endowment.³⁰ Hence not everyone is equally situated in terms of the skills and virtues required for distribution of social goods. This has the effect that not everyone has an equal opportunity to acquire goods.

It is difficult to apply the notion of merit in the context of the environment. The environment carries different values for different people. For some, value is found in the aesthetic pleasure derived from it. For others the value is purely instrumental. In terms of Aristotle's conception of justice, people can only lay claim to a value if they deserve it. It is impossible to decide who *deserves* a healthy environment and who does not, however, or who deserves to have access to a game reserve and who does not. On the other hand it is also impossible to decide who *deserves* to be burdened by the effects of environmental degradation and who does not. It is, accordingly, impossible to distribute environmental benefits and burdens on the basis of merit.

²⁷ Ibid.

²⁸ Sherba *Justice* 14.

²⁹ Weinrib "Aristotle's Forms of Justice" 135.

³⁰ Rawls *A Theory of Justice* (1971) 303.

Aristotle's formulation of justice is, however, a point of departure in the search for a workable theory of social justice. His use of the concept of equality in this regard is particularly important. Some Western countries, such as the USA have based their legal systems on the Aristotelian maxim that like should be treated alike, while those who are different should be treated differently in proportion to their difference.³¹ Because this formulation does not take the social context of inequality into account, it is necessary to explore alternative conceptions of social justice.

3 3 MODERN THEORIES OF SOCIAL JUSTICE

3 3 1 Western Liberalism

Du Plessis argues that liberal thought underpins the Western notion of a just society and outlines some basic suppositions that form the foundation of such a "just society" as follows:³²

- Since human beings are individualistic, they seldom do things to serve their fellow human beings.
- Since a society is no more than the sum of its parts, it can be understood by studying any one individual.
- As rational beings, humans can be educated to restrain their greed.
- Where there is a spontaneous order in social affairs, it is possible to use the skills of members of society to a greater extent than where there is central control.
- The rational way of establishing structures of control with a view to maintain order in society is for people to conclude a social contract of some sort.
- Liberal justice is institutional justice *par excellence*, emphasising the need to check and balance the power of those who rule through mechanisms such as a bill of rights.

³¹ Albertyn & Kentridge "Introducing the Right to Equality in the Interim Constitution" (1994) *SAJHR* Vol. 10 149 153.

³² Du Plessis "Conceptualising 'Law' and 'Justice' (2): Just Legal Institutions in an Optimally Just Society (with particular references to possible options in a future South Africa)" (1992) *Stellenbosch Law Review* Vol. 3 No. 3 359.

- Liberals cherish constitutionalism: in other words a government that sticks to the rules of the game and remains within predefined and agreed limits. An independent judiciary is, therefore, a vital precondition to the successful state and society.

Du Plessis contends that in the Western notion of justice, the principle of merit enjoys primacy as the standard used for the distribution of goods in society.³³ It emphasises traits such as rationality and effectiveness and notes that those who are endowed with these traits deserve to be favoured.

Some proponents of social justice argue for different criteria for distribution. Utilitarians, for example, argue that distribution of goods should be proportional to their consequences.³⁴ For instance John Stuart Mill³⁵ argues that the rightness of actions should be judged by the overall measure of happiness such actions produce. Goods should consequently be distributed based on the degree of happiness their distribution would produce, that is, on their utility.

By contrast, John Rawls³⁶ sees the basis for distribution as need. At the heart of his theory is the idea that each person possesses an inviolability founded on justice that even the welfare of the society as a whole cannot over-ride. Those people who are the most disadvantaged in a society and consequently also unequally situated therefore have a claim to the distribution of goods.

3 3 2 Utilitarianism

3 3 2 1 Utilitarianism and social justice

Utilitarianism claims to be a general moral theory and not only a theory of justice.³⁷ There are various “schools” of utilitarianism, which makes the concept difficult to define. The most common formulation could probably be the following:

³³ Ibid. at 360.

³⁴ See for example John Stuart Mill in Smith and Sosa *Mill's Utilitarianism – Text and Criticism* (1969).

³⁵ Ibid.

³⁶ John Rawls *A theory of Justice* (1971).

³⁷ Miller *Social Justice* (1976) 30.

“Acts are right if they bring about the greatest possible balance of intrinsic good over intrinsic evil for everyone concerned; otherwise they are wrong.”³⁸

For Utilitarians, utility forms the foundation of ethical thought. Actions are therefore measured by their ability to produce intrinsic value. Utilitarians define the concept of intrinsic value in different ways. Whilst Jeremy Bentham defines it as pleasure³⁹, for example, pluralists like Moore believe that a plurality of intrinsic values exists per se and that it is up to each individual to identify the desire that he or she needs satisfied.⁴⁰

As mentioned above, John Stuart Mill, the best known and most influential of all utilitarian theorists, views happiness as the intrinsic value to which everyone aspires. Mill’s principle of utility is the principle that “happiness is the only thing that is desirable as an end in itself”.⁴¹ He defines his “greatest happiness principle” as follows⁴²:

“... [a]ctions are right in proportion as they tend to promote happiness; wrong as they tend to produce the reverse of happiness. By happiness is intended pleasure and the absence of pain; by unhappiness, pain and the privation of pleasure. ...[p]leasure and freedom from pain are the only things desirable as ends; and ... [a]ll desirable things (which are as numerous in the utilitarian as in any other scheme) are desirable

³⁸ Regan (Ed.) *Earthbound, New Introductory Essays into Environmental Ethics* (1984) 25.

³⁹ Ibid.

⁴⁰ Ibid.

⁴¹ Necip Fikri Alican *Mill’s Principle of Utility – A Defence of John Stuart Mill’s Notorious Proof* (1994) 7. On page 8 he quotes Mills himself: “The utilitarian doctrine is, that happiness is desirable, and the only thing that desirable, as an end; all other things being only desirable as an means to an end” and “That the morality of actions depends on the consequences which they tend to produce, is the doctrine of rational persons of all school; that the good or evil of those consequences is measured solely by pleasure or pain, is all the doctrine of the school of utility, which is peculiar to it.”

⁴² Smith and Sosa *Mill’s Utilitarianism – Text and Criticism* (1969) 36.

either for pleasure inherent in themselves or as means to the promotion of pleasure and the prevention of pain.”

Mill further distinguishes between different human pleasures: the higher pleasures of the intellect, feelings and imagination and the lower bodily pleasures of the senses. The higher pleasures, he believes, distinguish human beings from animals and prevent utilitarianism from degenerating into a “doctrine worthy only of swine.”⁴³ He argues that the various forms of pleasures not only differ in quantity, but also in quality. Whilst human beings are capable of enjoying both the higher and lower pleasures, it is the higher pleasures that they prefer.

Mill therefore characterises utilitarianism as a noble theory. Even though the individual is concerned with happiness, individual happiness is only one facet of the “greatest happiness principle”. The noble end goal is to achieve the greatest measure of happiness for all people, even if it is at the expense of the agent’s own happiness.

It is within this context that Mill formulates his theory of social justice in which the justness of actions is to be judged by the over-all measure of happiness it produces. He argues that the appeal of the idea of justice lies in its utility.⁴⁴ He questions whether the ideal of justice would have made any sense or would have had any attraction at all if it were not also expedient. He also questions the notion of justice as a virtue. He agrees that to commit a just act may be a natural instinct, but doubts whether there is a connection between the origin of such an act and its binding force.⁴⁵

To prove this theory of “justice as utility” Mill attempts to ascertain what the distinguishing characteristic of justice is by focusing on the various modes of action that are considered just or unjust. He examines the quality attributed to an action in each case.⁴⁶

- First, he points out that it is deemed unjust to deprive anyone of his or her legal rights, such as personal liberty, property or anything that is legally

⁴³ Ibid. at 37.

⁴⁴ Ibid. at 67.

⁴⁵ Ibid. at 66.

⁴⁶ Ibid. at 68.

owned. It is therefore just to respect and unjust to violate the legal rights of another.⁴⁷

- Second, it is unjust to withhold from anyone that to which he or she has a moral right.⁴⁸
- Third, the notion of desert requires that a person deserves good when he or she has done good and evil if he or she has done wrong.⁴⁹
- Fourth, it is unjust to break an agreement with another.⁵⁰
- Fifth, partiality is inconsistent with justice and one should not show favour or preference to one person over another where it is not relevant.⁵¹
- Finally, to be treated unequally is generally considered unjust, unless it is considered expedient to do so, in which case the unequal treatment will be considered just.⁵²

Proceeding from the above exposition, Mill infers that justice is simply a name for a certain class of fundamental moral rules, the adherence to which is essential for maximising social utility.⁵³ He thus rejects the notion of justice as a moral ideal and claims that it is in essence social utility. The aim of distributive justice, therefore, is to ensure the greatest amount of happiness to as many people as possible and to prevent people from harming one another through their actions.

Mill admits that justice may mean different things to different people. He cites punishment as an example and states that for some it is just to inflict suffering on the individual for his or her own good, whilst others may argue that justice is found in punishing the wrongdoer to satisfy the needs of society for retribution. Utility will, however, always be the crucial consideration. This will be the case, even where it

⁴⁷ Ibid. at 69.

⁴⁸ Ibid.

⁴⁹ Ibid. at 70.

⁵⁰ Ibid.

⁵¹ Ibid.

⁵² Ibid. at 71.

⁵³ Ibid.

may conflict with a person's rights. He states, for example, that "[a]ll persons are deemed to have a right to equality of treatment, except when some recognised social expediency requires the reverse".⁵⁴ He concludes that justice is a name for certain social utilities which, regarded collectively, stand higher on the scale of social utility, and are therefore, more absolute and imperative as a class than any other social utility.⁵⁵

3 3 2 2 Utilitarianism and environmental justice

Given the above, it has to be considered whether utilitarianism provides a mechanism for conceptualising environmental justice. In general terms, utilitarianism requires us to maximise the overall good or to produce the greatest good for the greatest number of people. The theory rests on two elements: an account of the good and a rule for judging all acts in terms of that good. The rule tells us to look at the consequences of any particular act and to judge the ethical status of that act in terms of those consequences. If the act tends to maximise good consequences, it is ethically right; if it does not, it is ethically wrong. Utilitarians distinguish between two basic types of value: the good, which is valued for its own sake, and all other things, which are valued because of their relation to the good.⁵⁶ All acts are thus judged in terms of their utility or usefulness in producing good consequences. In contrast to virtue ethics, this distinction is made in terms of an instrumental and not an intrinsic value.

Two versions of utilitarianism have gained prominence. Bentham's *hedonistic utilitarianism* takes pleasure (and the absence of pain) to be an ultimate objective and universal good.⁵⁷ Mill's *preference utilitarianism*, on the other hand, holds that good is happiness that results from the satisfaction of our desires.⁵⁸ According to these two authors, people are happy when they have what they want and when their desires are satisfied. The happiest world, therefore, would be one in which as many people have as much of what they possibly desire. This is qualified by the notion that individuals

⁵⁴ Ibid. at 87.

⁵⁵ Ibid. at 88.

⁵⁶ Joseph Des Jardins (Ed.) *Environmental Ethics An Introduction to Environmental Philosophy* (1997) 24.

⁵⁷ Regan *Earthbound* 25.

⁵⁸ Ibid.

should choose what they desire – hence *preference* utilitarianism. The aim is to satisfy as many preferences as possible.

Preference utilitarianism is closely associated with free-market economy theory. The ethical framework of classical economic policy can be understood in terms of ends and means. The goal of economic policy is the maximum satisfaction of individual desires or maximum happiness. The functioning of a free and competitive market is believed to be the ethically best means for attaining that end.⁵⁹ In the context of justice, market theory utilitarianism is justified in that it promotes individual freedom.⁶⁰ People should be able to utilise the free market to seek and attain the highest measure of individual happiness.

Utilitarians similarly place environmental problems in the framework of economic theory.⁶¹ They couch environmental issues in economic terms, and in the environmental context refer to, for example, “the distribution of scarce resources, allocation of risks and benefits, competing interests and production of desired goods”. They would therefore justify the protection of the natural environment from exploitation in order for humans to reap greater long-term economic benefits from it. Natural resources thus have an instrumental value.

The idea of individual freedom is also connected to instrumental environmental value. Those who support and want to take part in (environmental) activities are free to do so. Utilitarians would also argue that in an environmental context people should be free to exercise their right to private property and free transfer of property in the market. This, it is reasoned, is of value to the environment since many environmental problems, such as a lack of protection for wildlife, poor water quality and air pollution are due to a lack of transferable property rights.⁶²

Some preservationists use utilitarian arguments to reason that the environment should be protected from any human activity that would disrupt or degrade it.⁶³ Their

⁵⁹ Ibid. at 49.

⁶⁰ Ibid. at 50.

⁶¹ Des Jardins *Environmental Ethics* 25.

⁶² Ibid. at 51 quoting O’ Toole *Reforming the Forest Service*.

⁶³ Des Jardins *Environmental Ethics* 25.

claims are not based on economic utility, but stem from the aesthetic value of wilderness, namely that it serves as a source of religious inspiration, a refuge from modern life, an aesthetic location, and so forth. They argue that the environment, if protected, can provide people with the maximum of their wants for a longer duration of time.

The utilitarian theory recognises that human beings would protect the environment for their own happiness and pleasure. They would thus preserve it not because they believe that it has intrinsic value, but rather because of the value *they* derive from it. The utilitarian approach to the environment may, however, also be questioned.⁶⁴

The first point of critique is that of quantification. The question is how goods such as pleasure, happiness and desire can be quantified and measured. Do Utilitarians assume that these goods are qualitatively the same? Are all pleasures equal? Does one, for example, derive the same pleasure from inhaling cigarette smoke as from inhaling mountain air?

Since the above-mentioned goods are difficult to quantify, Utilitarians have a tendency to substitute the *good* with something that can be quantified. Good health, for example, is not easily quantified. In comparing health considerations to pollution control, the per capita expenditure on health care as a result of pollution is considered. Instead of focusing on the issue of health itself, therefore, the focus shifts to the monetary cost of ill health. Because the most quantifiable substitute for goods is money, policy decisions are often based on a comparison between the cost of health and the cost of closing down the source of pollution. This method of subjecting environmental regulation to a cost-benefit analysis can be severely criticised in terms of instrumental theory.⁶⁵

The second main criticism of utilitarianism is that it countenances the sacrifice of some for the good of others.⁶⁶ In doing so, it fails to analyse the distributive effects of costs and benefits for the environment. The reality is that these are skewed. Some

⁶⁴ See e.g. Des Jardins *Environmental Ethics* and Regan *Earthbound*.

⁶⁵ Des Jardins *Environmental Ethics* 26.

⁶⁶ Kelly "Contractarian Social Justice – An Overview of Some Contemporary Debates" in Boucher and Kelly (Eds.) *Social Justice: From Hume to Walker* (1998) 181 183.

people benefit disproportionately more from the environment while others carry disproportionately more of the costs. Although this cost-benefit appropriation is inherently unequal, it remains unchallenged by utilitarianism. Since the goal of utilitarianism is to achieve the distribution that gives the maximum overall satisfaction to all, even if it occurs at the expense of some, it can never meet the challenge of equality.

Another challenge against this theory is that it does not take into account intergenerational justice. Since it is impossible to know all the consequences of an act, it is difficult to measure what its effects will be on future generations. Utilitarians therefore restrict consideration of the expected consequences of environmental degradation to the concerns of the present generation. In this way future generations are not only left to their own devices, but may, in fact, be disadvantaged by present practices.

In short, utilitarianism does not provide answers for a just approach to the environment. It treats individual human beings as means to the end of producing beneficial social outcomes. The utilitarian goal of maximising overall benefits is unjust if the price of those benefits involves a distribution of burdens that is unfair or unjust. Justice instead demands that benefits and burdens be distributed equally, fairly and impartially among all citizens. It is therefore necessary to consider a more egalitarian theory that requires the equal distribution of goods in society.

3 3 3 A Theory of Social Justice based on Egalitarianism

3 3 3 1 Rawls' social contract

In its most simplistic form egalitarianism requires that social goods be distributed on an equal basis. Most egalitarians do not, however, adhere to an absolute application of this requirement, but rather establish some standard that forms the basis upon which goods should be distributed equally. Bernard Williams, for example, identifies need as the requisite standard.⁶⁷ Since every individual is equal in his or her ability to experience pain or desire for self-respect and love, every

⁶⁷ For a discussion of the theory of Williams, see Van Zyl, L *Gesondheidsorg en Geregtigheid, 'n Filosofies-etiese Ondersoek* (1993) Masters thesis University of Stellenbosch.

individual also has an equal claim to have his or her desires and needs satisfied. Justice therefore requires that the basic needs of people be satisfied.

John Rawls emphasises equality in his understanding of justice. His central thesis is that inequalities in birth, natural abilities and historical circumstances are undeserved and therefore morally arbitrary.⁶⁸ Justice therefore requires that those people who are disadvantaged due to historical and biological contingencies be treated in a way that would diminish or eradicate inequalities. Individuals who are unequally situated in society should consequently not be disadvantaged. To the extent that they are disadvantaged, justice requires that their unequal position be remedied. Since Rawls has probably been one of the most influential philosophers on this form of justice in recent times,⁶⁹ his social contract theory will also be considered in the context of the environment.⁷⁰

Authors agree that Rawls' conception of justice is distinctly social in nature.⁷¹ He recognises the ultimate moral significance of the ideal of social equality and states his central conception of justice as follows:

“All social primary goods – liberty and opportunity, income and wealth, and the bases of self-respect – are to be distributed equally, unless an unequal distribution of any or all of these goods is to the advantage of the least favored.”⁷²

Rawls bases his idea of a social contract between individuals on the assumption that a society is a more or less self-sufficient association of persons who, in their relations to one another, recognise certain rules of conduct as binding and who, for the most part, act in accordance with them.⁷³ He presupposes that these rules

⁶⁸ Pettit *Rawls, A Theory of Justice and its Critics* (1990).

⁶⁹ See amongst others Jackson *Matters of Justice* (1986), Martin *Rawls and Rights* (1985), Kukathas and Pettit *Rawls, A Theory of Justice and its Critics* (1990).

⁷⁰ See para. 3 3 3 3.

⁷¹ Sterba *Justice* 6.

⁷² Rawls *A Theory of Justice* (1971) 303.

⁷³ Rawls acknowledges that there may be objection to the term “contract”, but he explains that the merit of the contract terminology is that it conveys the idea that principles of justice may be conceived as principles that would be chosen by a rational person. It also suggests a

specify a system of co-operation designed to advance the good of those participating in the contract. The system requires principles that would provide a way of assigning rights and duties in the basic institutions of society and that would define the appropriate distribution of the benefits and burdens of social co-operation. These principles represent his view of social justice.⁷⁴

Rawls draws on the theory of the social state as formulated by earlier philosophers such as Locke, Rousseau and Kant. He distinguishes his formulation of his theory by making the principles of justice the object of the contract instead of the particular form of government. The state of nature or “original position” is his starting point in which he sets an imaginative stage for the design of the social contract. The “original position” provides an ethically neutral position since no person is advantaged. It thus ensures an impartial, yet fair space from which the principles of justice can be derived.

The question to be determined is what sort of hypothetical world we would choose to live in if we had a choice.⁷⁵ Rawls recognises that this choice cannot simply be an unrestricted bargain or else the principles chosen would merely reflect the unequal power and bargaining positions of individuals in existing society. To counter this, Rawls introduces his notion of a “veil of ignorance”.⁷⁶ Participants in the original position are denied specific knowledge about their goals, life plans, their

plurality of relationships and conflicting interests and claims operating within them. Finally, he suggests that the contract terminology is also useful to denote the public nature of political principles. At 16.

⁷⁴ Ibid.

⁷⁵ Ibid. at 11. He states: “Thus we are to imagine that those who engage in social cooperation choose together in one social act, the principles which are to assign basic rights and duties and to determine the division of social benefits. Men are to decide in advance how they are to regulate claims against one another and what is to be the foundation charter of their society. Just as each person must decide by rational reflection what constitutes his good – that is, the system of ends which is rational for him to pursue – so a group of persons must decide once and for all what is to count amongst them as just and unjust. The choice which rational men would make in this hypothetical situation of equal liberty, assuming for the present that this choice problem has a solution, determines the principle of justice.’

⁷⁶ Ibid. at 136.

social position and all but general information about their society.⁷⁷ The “veil of ignorance” has the effect of turning a rational calculation of advantage into a situation of impartial and fair choice. Inequalities may well be justifiable in such an agreement, but only in so far as they are to the benefit of those worst off in that society.⁷⁸

Rawls sets himself the task of establishing which moral principles should govern the basic structure of a just society. He does not simply ask what is desirable and feasible, but also which principles to choose for an impartial position.⁷⁹ Once those principles have been identified, those living in the original position should agree to accept them as the binding principles of (the rational) society.⁸⁰ Since everyone operates from under the veil of ignorance, their willingness to accept the principles will not be clouded by their own social position. These principles are therefore binding and as such enforceable against everyone. Yet they are part of a voluntary agreement and people will thus adhere to them willingly. The social contract, therefore, becomes a vehicle through which all members of that society can voluntarily accept certain principles of justice.⁸¹

He identifies the voluntary principles on which justice should be based in the rational society as the following⁸²:

“First Principle

Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all.

Second Principle

Social and economic inequalities are to be arranged so that they are both:

⁷⁷ Ibid. at 142.

⁷⁸ Ibid. at 15.

⁷⁹ Ibid. at 147-150.

⁸⁰ Ibid.

⁸¹ Ibid.

⁸² Ibid. at 302.

- (a) to the greatest benefit of the least advantaged, consistent with the just savings principle, and
- (b) attached to offices and positions open to all under conditions of fair equality and opportunity”

According to Rawls, these two principles comprise “justice as fairness”. He chooses this conception of justice for three reasons.⁸³ First, fairness looks at the welfare of the worst-off group in society and ensures that the group fares well without endangering the liberty of other groups. No member of society is therefore required to accept a lesser liberty for the sake of the greater good of others. Second, fairness generates its own support and is thus stable, because every person’s liberty is secured. Third, fairness implies respect for others, thereby not only increasing social co-operation, but also instilling a sense of personal value into people.

In identifying his two principles, Rawls assumes the existence of a constitutional democracy that upholds certain values, such as liberty, participation of all in the political process, the rule of law and a just economic order. It is within this context that he proffers his principles.

The first principle acknowledges the freedom of every individual and establishes the significance of liberty. Since each person is entitled to the maximum measure of liberty attainable, Rawls places this rule in a position of priority. In order for an individual in a society to be free, basic freedoms should be distributed on an equal basis. This requires absolute equality in the treatment of every individual. Because Rawls views equality as the baseline for the principle of justice, it must be satisfied before the second principle may be invoked. Hart⁸⁴ suggests that this first principle refers to a specific set of basic liberties, which should be acknowledged as being held equally by all. Rawls identifies these basic liberties as rights of citizenship and of the person, in other words, the right to vote, freedom of speech and assembly,

⁸³ Ibid.

⁸⁴ Hart “Rawls on Liberty and its Priority” in Daniels (Ed.) *Reading Rawls* (1975) 230 252.

liberty of conscience, the right to own personal property and freedom from slavery, arbitrary arrest, and seizure.⁸⁵

The second principle acknowledges that everyone is equal and this can be described as a principle of social justice. According to this principle, justice exists in the way in which the benefits of social and economic co-operation are allocated. It suggests that even though the distribution of wealth and income may not be equal, benefits should be distributed in such a way that the least advantaged person does as well as the most advantaged person can do. The first part, known as “the difference principle,”⁸⁶ therefore requires that goods be distributed in a way that will advantage the most vulnerable members of society. Preference will only be allowed to the extent that it benefits the most disadvantaged in society. The second part, known as “the principle of fair equality of opportunity”⁸⁷ requires that people with equal competencies and abilities have equal access to the relevant social and economical positions. This will ensure a fair distribution of power.

Rawls suggests that these principles be applied in a specific lexical order. The first principle must be fully satisfied before the second can be invoked. Similarly, the principle of fair equality of opportunity is to take precedence over the difference principle. This ordering establishes a strict preference among the different demands of Rawls’ theory. Equal liberty has first priority, followed by the demand for fair equality of opportunity. Once these have been fully satisfied, the arrangement of social and economic inequalities can be addressed in order to benefit the least advantaged in society.

Rawls bases his argument for the above framework on rationality. The rational strategy in the original position would be to select those principles that could maximise the minimum share in primary goods that each member of society receives. His set of principles will therefore be the preferred *rational* choice since it protects the freedoms and opportunities of every individual, whilst at the same time ensuring

⁸⁵ Rawls did not delineate these liberties in his original work, but did discuss it in some of his later writings. *Martin Rawls and Rights* 29.

⁸⁶ Miller *Social Justice* (1976) 41.

⁸⁷ *Ibid.*

minimum primary goods.⁸⁸ Primary goods are freedom, power, opportunities, wealth, income and positions of authority. It would also include the essential liberties referred to previously. They are in other words the goods that are a prerequisite for the welfare of individuals in society.

3 3 3 2 Rawls' conception of justice

Rawls goes beyond the notion of formal equality.⁸⁹ The second principle, for example, requires that in addition to maintaining the usual kinds of social overhead capital, the government should ensure equal access to education and culture through subsidised or public schooling, and promote equality of opportunity in economic activities by policing the conduct of corporations, by preventing monopolies and by guaranteeing a social minimum income. He focuses, therefore, on the welfare of the individual in society, as opposed to the utilitarian approach that focuses on the welfare of society as a whole.

Also, unlike the Utilitarians who are prepared to sacrifice individual rights in the common interest, Rawls opts for a conception of justice that is free from such compromise. There is, however, one important constraint. Justice does not permit one generation to take advantage of its descendants by simply consuming all its wealth. In this regard, he refers to the principle of just savings that requires one generation to save for the welfare of future generations.⁹⁰

3 3 3 3 Rawls and environmental justice

Rawls' theory of justice serves to justify an equal distribution of environmental costs and benefits. His conception of justice is one that generates rights. It can consequently be argued that every individual in society has a right to the benefits derived from the environment. Unlike Utilitarians who would allow disproportionate burden and benefits if it were to the advantage of a few, Rawls would argue for the maximisation of environmental benefits and the minimisation of environmental burdens for all. To the extent that people are disadvantaged by contingencies such as gender, race and class, they should not, according to his theory,

⁸⁸ Ibid.

⁸⁹ For a discussion on the difference between formal and substantive equality see para. 3 4.

⁹⁰ Ibid.

be treated unequally. If people of colour, women and poor people therefore bear the burdens of environmental degradation disproportionately, it should be considered unjust and unfair.

The constraint implicit in Rawls' theory of justice is equally valid in an environmental context. His principle of "just savings" requires that limits be placed on the consumption of primary goods in society and that justice does not permit one generation to consume the natural wealth of the earth. Since inter-generational justice requires conservation of the environment so that future generations may benefit from it, this is an important principle in the environmental context.

Rawls' theory of justice has been criticised in that it may aid the "free rider" problem.⁹¹ This problem arises, according to Almond, when one person gets away with trading on the rest. She cites the example of the person who secretly ignores requests to turn down central heating during a fuel shortage while everyone else complies, or the person who secretly continues to water his or her garden during a drought. She argues that although this makes for overall social advantage – you gain, and no one else loses out perceptibly – such conduct is unjust or unfair. Rawls therefore does not provide an answer to the question why *rational* egoists should *not* act selfishly when they can get away with it.⁹² It may, however, be argued that Rawls does in fact address this problem in that he insists on an equal distribution of benefits and burdens. Injustice occurs when one individual, who is equally situated with others, benefits disproportionately from a specific good. Although liberties are emphasised, Rawls also makes it clear that limits to consumption are inherent in his notion of justice, thereby unseating the free rider.

3 4 EQUALITY AS THE BASIS OF SOCIAL JUSTICE

Aristotle's formulation of justice does not serve the true aims of social justice. The main argument against his theory is his formulation of equality, which amounts to formal equality. As shown above,⁹³ this view prescribes equal treatment of all individuals in society, regardless of their circumstances or social context. It therefore

⁹¹ Almond "Rights and Justice in the Environment Debate" 15.

⁹² Ibid.

⁹³ See para. 3 2 2.

suggests that all people are similarly situated and are unequal only to the extent that they are treated differently to other people in a same situation. Since this perspective on equality is unacceptable, and justice is based on equality, Aristotle's view of justice is insufficient for the purpose of this study.

The utilitarian treatment of justice is also unacceptable. Mill, for example equates justice with utility. Rather than equality, the goal of justice according to him is to ensure happiness for all. Mill does consider equality as a quality that is located within justice. He believes, however, that although it is unjust to be treated unequally, unequal treatment will not be deemed unjust if it is expedient to do so. Since the goal of justice is to achieve the greatest measure of happiness for all people, even if it is at the expense of one person, it may be expedient to treat someone unequally in order to advance a greater good. This maxim of "the greatest measure of happiness for all" pre-supposes an abstract individualism and perceives human beings as devoid of social relationships and outside of contextual reality. The implication is that a utilitarian view of justice is also insufficient in the context of the environment.

Rawls rejects the Aristotelian assumption that all people are equally situated, arguing that inequalities may be derived from birth, natural ability or historical or social circumstances. He takes the context of individuals and groups of people into account. As such, he provides a starting point from which to examine the concept of equality.

Taking Rawls' point further, some feminist writers have suggested that the complexity of social relationships and the inequality they inherently foster should be considered, especially when engaging with the law.⁹⁴ Consequently, they reject the liberal legal notion of difference that accepts that human beings are materially separate from one another.⁹⁵ In this regard, Minnow has argued that difference does not inhere in the individual or group but in the relationships between individuals.

⁹⁴ See for example Minnow *Making all the Difference: Inclusion, Exclusion and American Law* (1990), Young *Justice and the Politics of Difference* (1990), West "Jurisprudence and Gender" in Barnett (Ed.) *Jurisprudence and Gender* (1997) 227.

⁹⁵ West "Jurisprudence and Gender" 228.

These relationships are informed by social arrangements.⁹⁶ It is therefore to the extent that “difference” perpetuates existing inequalities that it becomes important.

For equality to be useful in an environmental context, it should “address the actual conditions of human life and not an abstract concept of identical treatment, which is equally applicable to all, whether black or white, man or woman.”⁹⁷ Equality should therefore be understood as substantive equality, a perspective according to which disadvantaged groups are subject to forms of inequality that are not incidental results of prejudice or stereotypes, but are structurally determined.⁹⁸

3 5 CONCLUSION

It can be argued that there is a wide range of issues that evoke environmental concern and that a theory of justice should be identified that takes different concerns into account. The dilemma of the rapid extinction of species, for instance, differs considerably from the dangers that air and water pollution may hold for human health or for our cultural heritage. Virtue ethics may provide a theory to address the problem of extinction. It could thus be argued that justice demands that we recognise the intrinsic value of non-human life and take the necessary steps that will allow its flourishing. These steps, may for example, include the creation of stringent quotas for fishing or harvesting abalone, or the placing of bans on the trade in animal products such as ivory.

In addressing the issue of pollution, on the other hand, we may want to turn towards utilitarianism. Utilitarianism demands that we decide on actions that would enhance the greater good or safeguard substantial happiness. We may decide that the ultimate good lies in the economic welfare of the community as a whole. We would consequently have to weigh the short-term effects of terminating pollution, for instance, by closing down the source, thereby resolving the health quandaries of a small group of individuals while failing to address the long-term effect of loss of

⁹⁶ See Minnow *Making all the Difference: Inclusion, Exclusion and American Law* (1990) for a discussion of “difference”.

⁹⁷ Albertyn and Goldblatt “Facing the challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality” (1998) *SAJHR* Vol. 14 (2) 249 252.

⁹⁸ *Ibid.*

revenue and employment by the community as a whole. If continued pollution served the greater good, according to this argument, justice lies in continued pollution.

Neither of the above outcomes is, however, satisfying. When quotas are created, the big fishing or harvesting companies do not necessarily feel the impact thereof. Subsistence fishermen, who depend on their quotas for their daily income or sometimes even their daily sustenance are, however, severely affected. Similarly, the ban on ivory may deter poachers from killing elephants. The other side of the story is, however, that in areas where elephants are not contained in reserves or parks, they often create havoc by destroying crops, causing bodily harm to people and sometimes even killing them. A ban on ivory will therefore not encourage a conservationist attitude in people that feel burdened by elephants.

The cost-benefit analysis of pollution is equally unsatisfactory. First, it is questionable whether the interest of the greater community should always outweigh the interest of the affected community, especially when the interest of the greater community is measured solely in monetary terms. Second, as will be shown in Chapter Six⁹⁹, polluting industries are most commonly placed adjacent to communities that are politically or economically marginalized and that do not have the capacity or political power to lobby against decisions that are made to their detriment.

How should people who are concerned about justice then approach environmental issues? From the above, it can be inferred that an integrated approach to environmental problems is preferable to locating them in separate domains. Conservation should therefore not be viewed as an issue that affects non-human species whilst poverty is considered to be a problem that concerns humans. In fact, poverty is often not considered as an environmental problem; yet, as pointed out, decisions made in the name of conservation may have a substantial effect on the extent of poverty that humans experience. Since a holistic approach negates the need to apply separate theories to distinct environmental concerns, this study departs from the point of view that a holistic theory of justice should apply to all environmental concerns. It is thus argued that a commitment to social justice is a pre-condition for the attainment of environmental justice.

⁹⁹ See Chapter Six para. 6 2.

The underlying reasons for environmental problems should be sought in the human and social conditions attached to environmental destruction. This study therefore takes the viewpoint that the issue of justice should be addressed by examining the relationship between individuals and the social patterns in which they live before asking who benefits from specific social patterns and who does not.

This study also claims that every individual in society has a right to the benefits derived from the environment. In view of this contention, Rawls' conception of justice is best suited to address environmental justice concerns. Since his theory acknowledges the concept of individual rights and promotes the notion of equal distribution of environmental costs and benefits, it offers a framework for the conception of an environmental right. The point of departure for this study is that environmental justice can best be served within the framework of a human rights approach to the environment.

As argued before,¹⁰⁰ equality lies at the heart of the principle of environmental justice. Taking into account structural inequality in society and more specifically how societal inequality is mirrored in the unequal distribution of benefits and burdens in the environment, the concept of equality is central to locating a theory on which to base the notion of environmental justice. This study therefore maintains that equality serve as the basis for social justice and consequently the basis for environmental justice. Rawls' theory of justice provides the point of departure in determining what equality is.

In the rest of the study it will be shown that systemic patterns of disadvantage in the environmental context are most often group based. In this regard it has been argued that where social group differences exist and some groups are privileged while others are oppressed, social justice requires explicitly acknowledging and attending to those group differences in order to undermine oppression. As a result, the eradication of disadvantage requires an examination of the individual in the context of his or her group as well as social and economic conditions. This view of equality, as the

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See para. 3 4.

foundation of justice, provides a basis for environmental justice as developed in this dissertation.

CHAPTER FOUR

ENVIRONMENTAL JUSTICE IN THE UNITED STATES OF AMERICA

4 1 INTRODUCTION

This chapter contains two parts. The first traces the development of the concept environmental justice and examines the nature and history of the environmental justice movement as it evolved in the US. In the second part, the concept is analysed as it is applied in United States law.

4 2 CONCEPTUALISING ENVIRONMENTAL JUSTICE IN THE US

4 2 1 The Roots of Environmental Equity

The concept 'environmental justice' originated relatively recently and would probably not have developed if environmental racism had not given rise to a new consciousness of the structural prejudices that occur even in a developed society such as the US. *Environmental racism* has been defined as follows:

"It is an extension of racism. It refers to those institutional rules, regulations, and policies of government or corporate decisions that deliberately target certain communities for least desirable land uses, resulting in the disproportionate exposure of toxic and hazardous waste on communities based upon certain prescribed biological characteristics. Environmental racism is the unequal protection against toxic and hazardous waste exposure and the systematic exclusion of people of color from environmental decisions affecting their communities."¹

¹ Bryant (Ed.) *Environmental Justice: Issues, Policies, Solutions* (1995) 5. Other definitions include: "it refers to any policy, practice or directive, intentional or not, that differentially affects the environment of individuals, groups, or communities based on their race." The Environmental Justice Group, National Conference of State Legislatures *Environmental Justice, A Matter of Perspective* (1995) 1.

4 2 2 Race and Racism in the US²

The USA as a racially diverse country is host to a multitude of racial and ethnic groups with white people as the dominant racial group both in terms of numbers and political and social power. African Americans are currently the biggest minority group, but as a result of large-scale immigration from South America, Latino Americans will outnumber African Americans sometime around 2005 according to census projections.³ Asian and Native Americans make up the other dominant minority groups. Despite living in one of the oldest democracies in the world and having a constitution that upholds the principle of equality, these minority groups still experience deeply entrenched racism.

As indicated above, racism is based on the notion that differences in behaviour, attitude and accomplishments attach to race.⁴ Native Americans and Africans were historically perceived as groups who were radically different from the white race in terms of physical attributes and social behaviour. This perception functioned as a biological justification for their marginalised position outside of mainstream (white) America. It also served as the basis for the eradication of Native Americans and the enslavement of Africans.⁵ It has been noted in this regard that the history of racism in the USA was born from a need to generate cohesion amongst early settlers and explorers.⁶ The notion of

² The issue of race and racism in the U.S. is complex and vast. For a more complete study, see: e.g. Yetman (Ed.) *Majority and Minority: The Dynamics of Race and Ethnicity in American Life* (1985); Thomas (Ed.) *U.S. Race Relations the 1980s and 1990s: Challenges and Alternatives* (1990); Davis *The Problem of Slavery in Western Culture* (1966); Oakes *The Ruling Race: A History of American Slaveholders* (1982); Franklin and Resnick *The Political Economy of Racism* (1973); Moore and Pachon *Hispanics in the United States* (1985); Talbot *Roots of Oppression: The American Indian Question* (1985).

³ Piatt *Black and Brown in America: The Case for Co-operation* (1997) 1.

⁴ It has been argued that race is in reality socially constructed. The argument therefore is that the use of criteria of classification to denote race is something that is developed and used by humans. It is thus socially created and not natural. Webster *The Racialization of America* (1992) 9.

⁵ Ibid.

⁶ Kitano *Race Relations in the US* (1985) 3.

difference was consequently also used to justify the creation of a homogenous “white race”. In the “post-settler” period racism continued to be the mechanism for structuring American society. At this time it served mainly as a justification for the atrocities committed in the name of homogeneity.⁷

Each of the above-mentioned minority groups has at some point in American history experienced victimisation based on their racial classification.⁸ African Americans were, for example, captured in Africa and taken to the USA as slaves. They became the property of white landowners and were forced into indentured labour for more than two hundred years.⁹ The eventual abolition of slavery gave African Americans their freedom, but did not make them equal citizens. Southern states enacted a variety of laws that disenfranchised the black population and established a system of *apartheid* that created segregation in social areas such as education, housing, transport and employment. In 1954 the Supreme Court eventually ruled against school segregation in the judgement of *Brown v Board of Education*¹⁰, but it was not until the passing of the Civil Rights Act in 1964 and the Voting Rights Act in 1965 that black people became *de jure* equal citizens.

The enactment of equality legislation did not bring an end to racism. Most African Americans continue to live in poor segregated neighbourhoods and more black people suffer from a racially skewed implementation of the criminal justice system than any other group in the United States.¹¹

⁷ Ibid.

⁸ The discussion of this history of racial subjugation will be limited to the groups currently most affected by environmental racism, i.e. African Americans, Native Americans and Latinos.

⁹ It is said that the first slaves arrived in 1619; some historians claim that a system of debt peonage kept black labourers in slavery well after it was officially abolished. Kitano *Race Relations in the US*. 110.

¹⁰ 347 U.S. 483 (1954).

¹¹ Bell “Remembrances of Racism Past: Getting Beyond the Civil Rights Decline” in Hill and Jones (Eds.) *Race in America: The Struggle for Equality* (1993) 73 75. Public schools, for example, remain mostly segregated and even where schools are desegregated, the gap in achievement between black and white learners is large.

The Latino¹² experience in the USA is one that grew primarily out of colonialism and migration.¹³ When the south-western section of the United States was incorporated into the USA through a war of conquest, thousands of Mexican Americans were dispossessed of their land.¹⁴ As industry came to dominate the American economic system in the latter half of the nineteenth century, a colonial labour system was introduced. This system was pillared upon a primarily Mexican American work force that was systematically kept in a subordinate position.¹⁵ This earlier system of prejudice and segregation created a basis for the present-day treatment of the Latin American migrant population. Today they enter into a secondary labour system that condemns them to low wages, substandard education, inadequate health and welfare services and political invisibility.¹⁶

The history of Native Americans is marked by tales of genocide in the post-Columbus period in the US. It is claimed that by the end of the nineteenth century, a

¹² The term “Latino” generally refers to people whose cultural heritage can be traced back to a Spanish-speaking country in Latin-America, but also includes people with links to Spain, or from the south-western region of the US, once under Spanish or Mexican control. See Valdivieso and Davis “U.S. Hispanics: Challenging Issues for the 1990’s” (December 1988) *Population Trends and Public Policy* No. 17 2.

¹³ Although the biggest group of Latin Americans that are currently in the U.S. arrived by way of migration, the first wave of mostly Mexican Americans and Puerto Ricans were “incorporated” as U.S. citizens through colonialisation.

¹⁴ The Mexican American War lasted from 1846 to 1848 and the Treaty of Guadalupe Hidalgo, signed in 1849, added a vast territory to the United States - primarily the area later to be known as the states of California, New Mexico, Arizona, Nevada, Utah and parts of Colorado and Texas. See Barrera *Race and Class in the Southwest: A History of Racial Inequality* (1979) 11.

¹⁵ A dual wage system, for instance, was incorporated. It established a practice of paying one wage to minority workers and another to non-minority workers even though they were all performing the same task. Minority workers were furthermore concentrated in the least desirable occupations and a system was developed in terms of which certain jobs were classified as “suitable” for minority workers. Barrera *Race and Class in the Southwest: A History of Racial Inequality* 39 - 43.

¹⁶ Ibid.

population of between 3 and 12 million Native Americans were reduced to 250 000 by early white settlers through so-called Indian-wars.¹⁷ Between the sixteenth and nineteenth centuries, the dispossession of Native Americans was a principal objective of the settlers, who destroyed Native American forms of social organisation through the dissolution of tribal independence and legislative dismantling of their right to own tribal land.¹⁸ After the Civil War, for example, an attempt was made to assimilate all Native Americans into a single ethnic group, encourage urban migration, grant citizenship to “civilised tribes” and establish “Pan-Indian” education. The Indian Reorganization Act of 1934 reversed this assimilation policy, attempting to restore tribal structure and to create a system of reservations for specific tribes unilaterally.¹⁹ Today, the conditions of Native Americans both in reservations and in urban areas reflect the havoc caused by these early policies:

“Theirs is the highest rate of infant mortality on the continent, the shortest life expectancy, the greatest incidence of malnutrition, the highest rate of death by exposure, the highest unemployment, the lowest per capita income, the highest rate of communicable or ‘plague’ diseases, and the lowest level of formal educational attainment.”²⁰

From the above it is clear that racism was institutionalised in the USA through the practices of genocide, slavery, peonage and segregation. Although these institutional practices have been abolished, the vestiges of discrimination remain in more subtle and nuanced ways. There is, for example, a correlation between the social status of minorities today and the history of subjugation. It is significant that one of the

¹⁷ Three popular views of Native Americans at the time were: “Indians are of a different, if not inferior, race and civilization, they are non-Christian, and their way of life is an obstacle to progress.” Webster *The Racialization of America* 140.

¹⁸ Tribal independence was abolished in 1871 and the Dawes Severalty Act of 1871 removed the right of Native Americans to own land. Webster *The Racialization of America* 141.

¹⁹ Ibid.

²⁰ La Duke and Churchill “The Political Economy of Radioactive Colonialism” (Fall 1985) *Journal of Ethnic Studies* Vol. 13 No. 3 111.

differences in the experience of racial minorities from those of European immigrants is the subjection of racial minorities to various aspects of forced or subordinated labour in the past. Another example is that minorities represent the poorest section of American society today.²¹ They have inadequate access to housing, health and education and are more likely to be victims of “social diseases” such as alcoholism and domestic violence. They account for the highest percentage of convicts in prisons and they remain in the lowest paying positions.

There have been attempts at redress, of which affirmative action is one. However, since the decision of *City of Richmond v J. A. Croson*²², the courts have viewed affirmative action programmes, which were designed to eradicate systemic inequality, as unconstitutional. Racism therefore persists in various sectors of the American society. It is within the context of systemic racism and the persistence of discrimination, that environmental racism is situated.

4 2 3 Evidence of Environmental Racism

Over the last twenty years numerous studies have advanced empirical evidence of systemic racism in environmental policies and practices by both government and private industry.²³ The United Church of Christ initiated one of the most important studies in this respect in 1987. The report focused mainly on the distribution of hazardous waste sites²⁴ in the USA and confirmed that commercial hazardous waste sites are

²¹ Farley “The Common Destiny of Blacks and Whites: Observations about the Social and Economic Status of the Races” in Hill and Jones (Eds.) *Race in America* 197 220.

²² 488 U.S. 469 (1989).

²³ See the report prepared by The Environmental Justice Group for the National Conference of State Legislatures (September 1995), titled *Environmental Justice: A Matter of Perspective* for a summary of studies based on race and income variables.

²⁴ Although some waste sites are federal or state owned, the private sector has been responsible for most of the disposal of hazardous waste. Private companies base their decisions about where to site facilities on factors such as proximity to markets and materials, availability of labour, transportation, utilities and industrial location costs and low land and development costs. Since heavy industries tend to generate the most hazardous waste, disposal facilities tend to be located near these industries, which in turn are mostly located in urban areas. When applying to develop a

disproportionately located in minority neighbourhoods.²⁵ The study, which covered the whole of the US, found that the number of minority residents in communities where commercial hazardous waste facilities were located was about double the number of minorities in communities without such facilities. This study showed that even when the socio-economic characteristics of communities, such as average household income and average value of homes, were taken into account, race still remained the best indicator of where commercial hazardous waste facilities would be located.²⁶ According to the report, three out of the five largest commercial waste landfills, accounting for 40 percent of US waste, were located in the proximity of Black and Latin American communities. It also showed that 60 percent of all African and Latin Americans (and approximately half of all Asian, Pacific Island and Native Americans) were living in communities with uncontrolled toxic waste sites.

Similar studies have found that:

- black communities are exposed to higher levels of pollution than white communities,²⁷

hazardous waste facility, the developer must obtain a permit for running the facility. States have siting criteria that must be considered when a hazardous waste facility is planned. These criteria include factors such as depth to groundwater; proximity to wells, surface waters, residences, property lines and recreational areas; and avoidance of wetlands and endangered species habitat. Often these criteria are not adhered to or exemptions are granted. See Gerrard *Whose Backyard Whose Risk: Fear and Fairness in Toxic and Nuclear Waste Siting* (1994).

²⁵ United Church of Christ Commission for Racial Justice *Toxic Wastes and Race in the United States: A National Report on the Racial and Socio-economic Characteristics of Communities with Hazardous Waste Sites* (1987).

²⁶ Mohai and Bryant "Environmental Racism: Reviewing the Evidence" in Mohai And Bryant (Eds.) *Race and the Incidence of Environmental Hazards, A Time for Discourse* (1992) 161.

²⁷ Ibid. Citing studies conducted by Freeman "The Distribution of Environmental Quality" in Kneese and Bower (Eds.) *Environmental Quality Analysis* (1972) and Gelobter *The Distribution of Outdoor Air Pollution by Income And Race: 1970-1984* Master's Thesis, Berkeley (1987). Both studies have found that minorities are consistently exposed to significantly more air pollution than whites and that this was the same in both urban and rural areas.

- the likelihood of pollution-induced asthma among inner-city blacks is many times higher than the average for whites. It kills five times as many blacks as whites. Black urban children are almost three times more likely to die of asthma than their white counterparts;²⁸
- minority fishermen and their families are more likely to consume toxic fish (caused by polluted rivers) than are white fishermen and their families;²⁹
- close to 50 percent of all African American infants tested for lead contamination still had blood levels higher than the standard prescribed by the US Centre for Disease Control;³⁰
- communities in which incinerators are sited have 89 percent more minority residents than the national average;³¹ and
- more than 200 million tons of radioactive waste lie in tailings piles on Indian reservations. The rate for cancers affecting sex organs among Navajo teenagers is 17 times the national rate.³²

It has been shown that the federal government has not only sanctioned these forms of discrimination, but has been actively practising them. This indicates that environmental discrimination is, in fact, institutionalised. In 1992 the *National Law Journal* published a comprehensive analysis of environmental lawsuits settled during the previous seven years.³³ It found that the penalties against violators of pollution laws in minority areas are lower than those imposed for violators in largely white areas. This

²⁸ Ibid.

²⁹ West, Fly, Larkin and Marans *Minority Anglers and Toxic Fish Consumption: Evidence from a State-wide Survey of Michigan* (1992).

³⁰ Dowie *Losing Ground: American Environmentalism at the Close of the Twentieth Century* (1995) 145.

³¹ Editorial "Playing with Fire" *Greenpeace Magazine* (1990).

³² Ibid.

³³ Cited in Lavelle and Coyle "Unequal Protection: The Racial Divide in Environmental Law" in Hofrichter R (Ed.) *Toxic Struggles: The Theory and Practice of Environmental Justice* (1993) 137.

indicates that the government's policies of dealing with polluters during the past decade have contributed to racial imbalance.

Most of the studies providing evidence of environmental racism have focused on the siting of waste and toxic facilities rather than on enforcement pertaining to existing polluting facilities. As shown above, there is evidence that suggests that enforcement of existing environmental standards is racially skewed and, since very few new facilities are being developed, such enforcement provides yet another framework for discrimination.³⁴ Since penalties are low enough to be discounted as part of the running costs of the business, the low levels of enforcement draws polluters to minority communities.³⁵ Because minorities have historically been underrepresented in politics, they do not have the political power to prevent siting or to seek a more balanced approach to enforcement.

4 2 4 Socio-economic Status and Discrimination

Apart from the direct relationship between race and environmental degradation, there is a link between socio-economic status and environmental degradation. Toxic waste dumps, landfills, and polluting industries are for example, often sited near poor working class (often also white) communities.³⁶ It has, for example, been shown that low-income groups in three urban areas (Kansas City, St. Louis, and Washington D.C.) were more severely exposed to total suspended particulates and sulphates than upper-income groups.³⁷

³⁴ Interview with Richard Lazarus May 1999.

³⁵ Lavelle and Coyle "Unequal Protection" 140.

³⁶ One of the first toxic waste cases that gained prominence occurred in such a community in 1978. The community of Love Canal, a working class white neighbourhood, discovered that the school and a significant number of houses were built on a toxic waste dump, with the result that the community suffered from a multitude of inexplicable diseases, most of them related to exposure to this site. A strong grassroots movement was formed, which forced national decision-makers to evacuate the community. For a detailed description of this event see Gibbs *Love Canal, The Story Continues...* (1998).

³⁷ Mohai and Bryant "Environmental Racism: Reviewing the Evidence" in Mohai And Bryant (Eds.) *Race and the Incidence of Environmental Hazards, A Time for Discourse* (1992) 167.

If poor white people also fall prey to environmental degradation, the question may be asked whether the argument that disproportionate exposure is solely based on race has any substance. However, race cannot necessarily be divorced from class in the US. Minorities generally represent the poorest sections of the society. Whilst more white people are poor, the (smaller) minorities are disproportionately poor. There has also been evidence that race plays a determining role in discrimination, even within certain categories of low-income people. In this regard, two studies have shown that in the lower income category, minorities tend to have greater exposure to environmental degradation than whites.³⁸

The relationship between socio-economic status and race is also illustrated in the employment sector. Blue-collar workers are, for example, traditionally the low income-earners in society and consequently constitute the poorer sections of society. Because they are disproportionately represented in the low-income workplace, they are also the most likely to be employed in high-risk positions.³⁹ Navajo Indians, for example, provide

³⁸ Mohai and Bryant "Environmental Racism: Reviewing the Evidence" 161

³⁹ In 1990 African American workers comprised 10.1 percent and Latin American workers 7.2 percent of the U.S. workforce. An analysis of six occupational categories by race/ethnicity indicates that Latino workers are over-represented and comprise over 7.2 percent of the workers in three categories: 11.1 percent of operators, fabricators and labourers; 10.2 percent of service workers; and 21.3 percent of "other agricultural occupations" (including farm workers, but excluding farm managers and operators). African American workers are over-represented and comprise over 10.1 percent of the workforce in two categories: 15 percent of operators, fabricators and labourers; and 17.6 percent of service workers. Both African Americans and Latin Americans are substantially under-represented in the professional/managerial and technical, sales, and administrative support categories. It is commonly accepted that the six higher risk industrial categories are agriculture, forestry and fishing; manufacturing; construction; services; mining; and transportation and public utilities. Within these categories the most dangerous occupations are in the fields of operators, fabricators, labourers, services and farm workers. Friedman-Jimenez "Achieving Environmental Justice: The Role of Occupational Health" (1994) *Fordham Urban Law Journal* Vol. XXI 605 608.

the primary work force for the mining of uranium ore, leading to alarming rates of lung cancer and mortality.⁴⁰

Farm workers are particularly vulnerable to unsafe environmental practices. Two thirds of workers in the agricultural sector are immigrants and the majority of all workers are from minority backgrounds.⁴¹ Evidence indicates that these workers are disproportionately suffering from environmentally induced diseases.⁴² ⁴³ Workers in agriculture, for example, face an average risk of skin disease due to pesticides that is four times higher than the risk for workers employed in other industries.⁴⁴ Moreover, every year 300 000 farm labourers, mostly Latin American, suffer pesticide-related illnesses and disorders.⁴⁵

In analysing the evidence of disproportionate environmental exposure, it becomes clear that although socio-economic status plays an important role in the allocation of

⁴⁰ Ibid.

⁴¹ Mexicans make up 92 percent, 4 percent are other Latinos, 3 percent are Asians, and 1 percent Caribbean. Of the other third that are U.S. born, 34 percent are Latin Americans, 5 percent are African Americans and 1 percent are Native Americans and Asian Americans. Moses "Farm Workers and Pesticides" in Bullard (Ed.) *Confronting Environmental Racism* 161 162.

⁴² A study of steel workers, for example, found that long-term, full-time topside coke oven work, one of the most hazardous plant jobs, had a ten-fold increase in the risk of lung cancer. Of these workers 88 percent were minorities, while only 21 percent were white. Moses "Farm Workers and Pesticides" 610. See also Wright and Bullard "The Effects of Occupational Injury, Illness, and Disease on the Health Status of Black Americans, A Review" in Hofrichter (Ed.) *Toxic Struggles* 153 155-8.

⁴³ "Environmentally induced diseases are those that result from environmental rather than physical or social causes and are caused by the quality of the environment in which we live. These include our homes, communities and work environments. For example, African American shipyard workers in coastal Georgia "were found to have a disproportionately high lung cancer death rate. This incidence of cancer was shown to be related to job-exposure." Moses "Farm Workers and Pesticides" 610.

⁴⁴ Moses "Farm Workers and Pesticides" 166.

⁴⁵ Dowie *Losing Ground* 145.

environmental risks, race is still the determining factor. Minorities are therefore subjected to environmental injustice, both because of their race and because of their socio-economic position.⁴⁶

4 3 THE DEVELOPMENT OF PRINCIPLES FOR ENVIRONMENTAL JUSTICE

4 3 1 The Development of the Environmental Movement in the US

“It was no co-incidence that the age of ecology was also the age of environmental inequality. Between 1945 and 1980, the United States witnessed the rise and maturation of a popular movement that promised to curb the environmental excesses of industrial and economic growth. Yet, everyone did not benefit equally from the achievements of environmental reform. Despite the strength of organised labour, the rise of a civil rights movement, and a liberal political order that pledged itself to uplifting the nation’s underprivileged, the political process and the dynamics of the marketplace gave industrial capitalists and wealthy property holders a decisive advantage in moulding the contours of environmental change. Those groups who failed to set the terms – African Americans and poor whites – found themselves at a severe disadvantage, consistently bearing the brunt of industrial pollution in virtually all its forms: dirty air, foul water, and toxic solid wastes.”⁴⁷

The organised environmental movement in the USA started out as a grassroots movement in the mid-nineteenth century with the creation of Yellowstone and Yosemite as national parks.⁴⁸ The people who initially supported the movement were mostly highly educated white males.⁴⁹ Since wilderness preservation was a key objective of

⁴⁶ Ibid at 172.

⁴⁷ Hurley *Environmental Inequalities: Class, Race and Industrial Pollution in Gary, Indiana* (1995) xiii.

⁴⁸ Ibid.

⁴⁹ Ibid.

these early conservationists, they had massive tracts of land declared as wilderness areas. These areas were accessible to a privileged few, as early national parks in the USA admitted only white people.⁵⁰

The early conservationists formed the basis for today's mainstream environmental groups. These groups still focus narrowly on the protection of natural systems and species, in other words, on the non-human world.⁵¹ Although modern mainstream environmental organisations have become increasingly activist in nature, challenging industries whose practices have a destructive effect on the environment, they have not challenged policies that have a social, economical and cultural impact on workers or the communities surrounding the industries. In contrast, they generally view an anthropocentric approach to the environment as the underlying problem for environmental degradation.

A more radical movement emerged in the eighties with groups such as Earth First!, an activist group using methods of protest such as demonstrations, sit-ins, and "ecotage".⁵² Their membership is, however, still mostly white and well educated.⁵³ The moral basis for these organisations is also situated within the context of deep ecology.⁵⁴ Hargrove argues that their moral outlook makes it even more difficult for environmentalists and environmental ethicists to think about and feel genuine concern for

⁵⁰ Dowie *Losing Ground* 2.

⁵¹ Hargrove "Foreword" in Westra and Wenz (Eds.) *Faces of Environmental Racism, Confronting Issues of Global Justice* (1995) ix.

⁵² "Ecotage" refers to the practice of sabotaging the equipment of industries that are perceived to be destroying wilderness areas.

⁵³ Taylor "Can the Environmental Movement Attract and Maintain the Support of Minorities?" In Bryant and Mohai (Eds.) *Race and the Incidence of Environmental Hazards* 28 35.

⁵⁴ They therefore claim that non-human life is valuable separate from its usefulness to human beings; that every species has "intrinsic worth" and each should be allowed to fulfil its "evolutionary destiny"; and that humans are no more valuable than other species. Taylor "Earth First! And Global Narratives of Popular Ecological Resistance" in Taylor (Ed.) *Ecological Resistance Movements, The Global Emergence of Radical and Popular Environmentalism* (1995) 11 15.

humans who have been marginalised environmentally. This has prevented the movement from addressing environmental justice concerns.⁵⁵

In addition to the broad-based radical movements, a group of community-based environmental organisations that uses activist methods of organising and lobbying has emerged in the last decade. The so-called NIMBY (Not In My Backyard) groups consist mostly of middle-class whites that campaign against the siting of industries in their neighbourhoods. Due to their position of wealth and power they are usually successful in driving polluting industries out. The critique against these groups is that they focus narrowly on their own interests and their immediate neighbourhoods, with the result that their successes cause offending industries to relocate to poor minority areas, where the communities have less influence in decision-making processes.⁵⁶ In this regard, NIMBY groups have been viewed as a possible threat to poor communities and communities of colour, since they are more likely to win the “contest of keeping the toxins out”.⁵⁷

4 3 2 The Emergence of an Activist Movement

Over the last two decades, a new form of environmental activism has emanated primarily from African American, Latino, Asian, Pacific Islander and Native American communities. These groups can be linked to the civil rights movement,⁵⁸ which started in response to the policies of segregation and so-called Jim Crow laws enforced by Southern states in the US. Civil rights organisations have persistently challenged inequality in areas such as employment, housing and education. As advocates of civil rights, these

⁵⁵ Hargrove “Foreword” xii

⁵⁶ “... when many middle class neighbourhoods or environmental groups say ‘not in my backyard’, ‘not in my park’, ‘don’t block my view’, ‘don’t pollute my air’; then the waste dumps, smoke stacks, processing plants, factories, highways and other pariahs end up on the front porches of the poor and the powerless.” Taylor “Attracting and Maintaining the Support of Minorities” 40.

⁵⁷ Taylor “Attracting and Maintaining the Support of Minorities” 70.

⁵⁸ The term “civil rights movement” is commonly used to describe the wave of protest that swept the South between 1955 and 1965. Fairclough “The Civil Rights Movement in Louisiana, 1939-1954” in Ward and Badger (Eds.) *The Making of Martin Luther King and the Civil Rights Movement* (1996) 15 16.

groups have traditionally been concerned with issues of social justice rather than with the right to a safe and healthy environment. The environment was seen neither as a priority nor recognised as a social justice issue. Despite the earlier lack of interest in environmental issues, civil rights leader Martin Luther King was killed in Memphis while on an environmental justice mission to obtain better working conditions for African American garbage workers.⁵⁹

The “new” grassroots movements that have emerged from these civil rights activities are more aware of the potential of the environment as a space for social activism. They have organised their communities and challenged the discriminatory environmental practices of industries and governments. They have also identified issues such as waste-facility siting, lead contamination, pesticides, water and air pollution, native self-government, nuclear testing and workplace safety.⁶⁰ Like the NIMBY groups, some of their central concerns are human health and the protection of families and neighbourhoods. These grassroots activists, however, do not focus only on health issues, but also on broader environmental and developmental threats such as neighbourhood disinvestment, housing discrimination and residential segregation, urban mass transportation and pollution.

They focus on themes of fairness, distribution of environmental impacts and sharing the costs of environmental impacts.⁶¹ They also view environmental injustice as a human rights issue and believe that it impacts on basic rights to equality, education, employment and health care. They see environmental issues as broader issues that concern human beings and consequently base their moral claims on the need for equity and, more specifically, social justice.

In 1991 more than 600 African Americans, Latin Americans, Asian Americans and Native Americans came together at the First National People of Color Summit in

⁵⁹ Bullard “Environmental Justice for All” in Bullard (Ed.) *Unequal Protection, Environmental Justice and Communities of Color* (1994) 3.

⁶⁰ Bullard “Anatomy of Environmental Racism and the Environmental Justice Movement” in Bullard (ed.) *Confronting Racism* (1993) 15 24.

⁶¹ Ibid. at 30.

Washington DC and committed themselves to the environmental justice movement.⁶² They adopted a set of Principles of Environmental Justice⁶³, defining the term as follows:

- “Environmental Justice:
- affirms the sacredness of Mother Earth, ecological unity and the interdependence of all species, and the right to be free from ecological destruction;
- demands that public policy be based on mutual respect and justice for all people, free from any form of discrimination or bias;
- mandates the right to ethical, balanced and responsible uses of land and renewable resources in the interest of a sustainable planet for humans and other living beings;
- calls for universal protection from nuclear testing, extraction, production and the disposal of toxic/hazardous wastes and poisons and nuclear testing that threatens the fundamental right to clean air, land, water and food;
- affirms the fundamental right to political, economic, cultural and environmental self-determination of all peoples;
- demands the cessation of the production of all toxins, hazardous wastes and radioactive materials, and that all past and current producers be held strictly accountable to the people for detoxification and the containment at the point of production;

⁶² They made the following statement:

“We the people of color, gathered together, to begin to build a national and international movement of all peoples of color to fight the destruction and taking of our lands and communities, do hereby re-establish our spiritual interdependence on the sacredness of our Mother Earth; to respect and celebrate each of our cultures, languages and beliefs about the natural world and our roles in healing ourselves; to ensure environmental justice; to promote economic alternatives that would contribute to the development of environmentally safe livelihoods; and to secure our political, economic and cultural liberation that has been denied for over 500 years of colonialization and oppression, resulting in the poisoning of our communities and the genocide of our peoples, do affirm and adopt these principles.” Quoted in Grossman “The People of Color Environmental Summit” in Bullard (ed.) *Unequal Protection* (1994) 272.

⁶³ Ibid.

- demands the right to participate as equal partners at every level of decision-making including needs assessment, planning, implementation, enforcement and evaluation;
- affirms the right of all workers to a safe and healthy work environment, without being forced to choose between an unsafe livelihood and unemployment. It also affirms the right of those who work at home to be free from environmental hazards;
- protects the rights of victims of environmental injustice to receive full compensation and reparations for damages as well as quality health care;
- considers governmental acts of environmental injustice as a violation of international law, the Universal Declaration on Human Rights, and the United Nations Convention on Genocide;
- must recognize a special legal and natural relationship of Native Peoples to the U.S. government through treaties, agreements, compacts, and covenants affirming sovereignty and self-determination;
- affirms the need for urban and rural ecological policies to clean up and rebuild our cities and rural areas in balance with nature, honoring the cultural integrity of our communities, and providing fair access for all to the full range of resources;
- calls for the strict enforcement of principles of informed consent, and a halt to the testing of experimental reproductive and medical procedures and vaccinations on people of color;
- opposes military occupations, repression, and exploitation of lands, peoples and cultures, and other life forms;
- calls for the education of present and future generations which emphasizes social and environmental issues, based on our experience and an appreciation of our diverse cultural perspectives;
- requires that we, as individuals, make personal and consumer choices to consume as little of Mother Earth's resources and to produce as little waste as possible; and make the conscious decision to challenge and reprioritize our lifestyles to ensure the health of the natural world for present and future generations.”

It is clear from these principles that the concerns regarding environmental justice are largely anthropocentric. The document recognises that mainstream environmental movements have not addressed the well-being of people, but have narrowly focused on issues such as conservation. The principles therefore attempt to counter the inequities that result from such a narrow approach to the environment. Although the focus of the movement has been on locally undesirable land use, the principles of environmental justice address wider concerns of equity and social justice. Environmental concerns are therefore viewed holistically as political, social, economic and cultural concerns.

4 4 ADDRESSING ENVIRONMENTAL INJUSTICE

4 4 1 The Principle of Equality

The question arises whether the holistic approach to the environment has been manifested in US law in order to provide minorities with legal protection against environmental racism. As the US Constitution does not explicitly provide for the right to a healthy environment⁶⁴, the infringement of environmental rights as such cannot be used as a basis for a constitutional claim. Lawyers have attempted to defend communities carrying a disproportionate burden of environmental degradation on the basis that the disparate distribution of burdens offends the constitutional principle of equality or, alternatively, under the principle of equality found under the various civil rights statutes.

⁶⁴ In *Stop H-3 Association v Transportation Department* 570 F.2d 1419 (9th Circuit 1989) Hawaiian groups wanted to stop an inter-state highway project (H-3). The United States Congress passed a law which exempted H-3 from federal statutes requiring that no public parks, wildlife refuges, or historical sites be used for any project unless “no feasible and prudent alternatives existed and unless harm to the area is minimised.” The groups argued that this law violated the 14th Amendment, in that the right to a healthy environment is an important individual right and that Congress violated important constitutional principles of federalism in enacting a provision that discriminates against the citizens of Hawaii. They furthermore argued that the law created an arbitrary classification based on state citizenship by denying Hawaiians the environmental protection provided by these statutes. The court found that a right to a healthy environment does not exist under the US Constitution. Congress has the power to exempt special projects from federal laws, and exempting this project did not amount to arbitrary discrimination against Hawaiians.

These claims were, however, not successful. Whilst some successes have been achieved by using environmental statutes and common law, the effect has been marginal. Since it appears as if US law does not provide the necessary protection for minorities who are disproportionately subjected to environmental degradation, it is worth examining the law for its potential to protect minority groups.

4 4 1 1 The constitutional principle of equality

The constitutional principle of equality is found in the Equal Protection Clause of the 14th Amendment.⁶⁵ It provides that no state shall deny any person equality before or the equal protection of the law, and has been applied to prevent discrimination on the basis of arbitrary classification. For a classification to violate the 14th Amendment, it must be shown that there is no reasonable basis for the discrimination applied. A law is therefore presumed valid and, unless clear and convincing proof demonstrates that the law is arbitrary and unreasonable, must be upheld.

In *Washington v Davis*⁶⁶ and *Village of Arlington Heights v Metropolitan Housing Development Corp.*⁶⁷ the Supreme Court furthermore required proof of discriminatory intent on the part of the defendant for racial discrimination to be asserted. The Supreme

⁶⁵ U.S. CONST. amend XIV §1.

⁶⁶ 426 U.S. 229, 239 (1976). The Supreme Court narrowed the applicability of the equal protection clause and held that it was not enough for a plaintiff to show that the challenged practice had a discriminatory impact, but that the plaintiff must also prove that the practice was motivated by a discriminatory intent.

⁶⁷ 429 U.S. 252 265 (1977). In this later decision, the court attempted to clarify what would suffice as evidence of discriminatory intent. It stated that “determining whether an invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.” Ibid. at 266. The court established five factors that would indicate proof of unequal protection: (i) whether the impact of the action bears more heavily on one race than another; (ii) the historical background of the decision; (iii) the series of events prior to the decision; which would reveal the decision-maker’s purpose; (iv) any departures, substantive or procedural, from the decision-making process; and (v) the legislative and administrative history of the decision. Ibid. at 266-68

Court made it clear that it would not be sufficient to prove discriminatory impact.⁶⁸ To prove racially discriminating impact, a plaintiff needs only show that the defendant's action caused racially disproportionate consequences. In order for a plaintiff to prove racially discriminating intent, however, he or she must prove that the defendant acted with a racially discriminating purpose in mind. In some cases a plaintiff may use statistical evidence of an invidious discriminatory pattern to establish an inference of discriminatory intent, but a plaintiff must show that the defendant's policies were enacted, at least in part, because of, and not in spite of, their adverse effects on an identifiable group.⁶⁹ The plaintiff consequently has to prove that race was the motivating factor in the policy decision.

It is, however, extremely difficult to prove something as subjective as intent and this has made the use of the equal protection clause in environmental justice cases extremely complex. It has been as difficult to prove disparate impact, mainly because the plaintiffs are unable to provide statistical evidence of such disparate impact. Usually too few (waste or other polluting) facilities exist in a particular geographical area to be statistically significant.⁷⁰ Other factors, such as the phenomenon that a neighbourhood may only become a minority area once the facility has been sited, may also distort the evidence. The location of these facilities often drives down the property values of the areas with a result that people who can afford to leave, do so. The spiralling decrease in property values subsequently draws low- income minorities.

The first action filed to charge environmental discrimination in the placement of a waste facility was that of *Bean v Southwestern Waste Management Corporation*.⁷¹ The case involved residents of a suburban middle-class neighbourhood of homeowners and Brown-Ferris Industries, a private disposal company in Houston, Texas. The

⁶⁸ *Adarand Constructors v Pena* 115 S Ct 2097 (1995).

⁶⁹ *Personnel Adm'r v Feeney* 442 U.S. 256, 279 (1979).

⁷⁰ Colopy "The Road Less Travelled: Pursuing Environmental Justice Through Title VI of the Civil Rights Act of 1964" (1994) *Stanford Environmental Law Journal* Vol. 13 125 150.

⁷¹ 482 F.Supp. 673 (S.D. Tex.1997), *aff'd*, 782 F.2d 1038 (5th Cir.1986).

neighbourhood was 82 percent black.⁷² The statistical evidence supported the disproportionate impact argument. Fourteen of the corporation's seventeen waste facilities were located in mostly African American neighbourhoods. The African American population comprised only 28 percent of the Houston population, and minority communities were therefore clearly bearing a disproportionate burden of Houston's solid waste facilities.⁷³ The plaintiffs argued that the approval of a permit for the waste facility in the predominant African American neighbourhood was part of a pattern of discrimination regarding the placement of waste facilities. In the context of the historical placement of these facilities, the approval of the current permit by the state agency amounted to discrimination. In response, the district court noted that the census tracks submitted as evidence were too small to indicate that the facilities were located predominantly in minority neighbourhoods.⁷⁴ It concluded that, although the approach of the Texas Department of Health to the siting had been "unfortunate and insensitive", there was a lack of satisfactory evidence to establish discriminatory intent.⁷⁵ In a critique of the case, Lazarus notes that even though the census tracks included white neighbourhoods that undermined the discrimination charge, the approved sites were located specifically in minority neighbourhoods.⁷⁶

In *East Bibb Twiggs Neighbourhood Ass'n v Macon-Bibb County Planning and Zoning Commission*⁷⁷ constitutional claims of discrimination were similarly rejected. In this case the local planning and zoning commission had approved a permit for a solid

⁷² An earlier attempt was made in 1970 to locate a municipal landfill in the area when it was predominantly white, but the Harris County Board of Supervisors vetoed the attempt. Bullard "Solid Waste Sites and the Black Houston Community" (1983) *Sociological Inquiry* Vol. 53 273 277.

⁷³ Ibid.

⁷⁴ Bullard "Solid Waste Sites and the Black Houston Community" 278

⁷⁵ 482 F.Supp. 673 at 677-680.

⁷⁶ Lazarus "Pursuing 'Environmental Justice'- the Distributional Effects of Environmental Protection" (1993) *Northwestern University Law Review* Vol. 87 787 831.

⁷⁷ 706 F.Supp 880 (M.D. Ga.) *aff'd*, 846 F.2d 1264 (11th Cir. 1989).

waste landfill to be sited in a predominantly African American community. The plaintiffs sued the commission and the landfill operator, alleging an equal protection violation in terms of the Fourteenth Amendment. They argued that the decision of the commission to locate the landfill in their neighbourhood had to be seen against the background of placing undesirable land uses in African American communities. They viewed the history of siting such facilities in African American communities as an indication of discriminatory intent. The court applied the “intent requirement”, but interpreted the historical background element even more restrictively than in the *Bean* decision and held that evidence of past discrimination by agencies other than the county planning commission was irrelevant to the discrimination issue at hand.⁷⁸ Since the plaintiffs relied primarily on evidence of discriminatory decisions by authorities other than the defendant, they were unsuccessful.

The effect of the “intent requirement” has been devastating to plaintiffs’ claims and has been compounded by the fact that, even if intent is proved, the courts will allow for the burden to be shifted once a discriminatory purpose has been proved. The defendant can therefore disprove evidence of discriminatory intent by asserting a legitimate non-discriminatory purpose for his or her conduct. Since developers and siting boards can almost always establish a race-neutral justification for a site, including geological, economic or transportation indicators, courts have failed to find evidence of intentional discrimination where such justification was submitted.

In *R.I.S.E Inc. v Kay*⁷⁹ a neighbourhood association opposed a landfill that was to be a joint venture between a Virginia county and a private corporation. The county had previously rezoned a rural, traditionally African American neighbourhood to make it suitable for the siting of a landfill. The residents claimed that this violated the equal protection clause, since it created a racially disparate pattern. The population around the landfill, as well as the population surrounding existing landfills, was African American. The court found evidence of disparate impact, but held that there was insufficient evidence of discriminatory intent, since the site chosen in the black community was

⁷⁸ Ibid. at 885.

⁷⁹ 768 F.Supp. 1144 (E.D. Va. 1991) aff’d, 977 F.2d 573 (4th Cir. 1992).

environmentally more suitable for a landfill than the previously proposed site in the white community.

Plaintiffs have thus not been successful in using evidence of dissimilar impact to establish an inference of discriminatory intent.⁸⁰ Commentators have suggested that there are four major reasons why the Supreme Court has refused to adopt a discriminatory impact standard:

- the impact standard would be too costly for the government because it would be easier to prove discrimination, which would lead to more litigation;
- under an impact standard, “innocent” people would bear the cost of remedying the harm;
- the impact test is inconsistent with traditional equal rights doctrine, since the judicial decision maker would need to consider race explicitly; and
- it would be inappropriate for the judiciary to remedy the impact of otherwise neutral government action at the expense of other legitimate social interests.⁸¹

This insistence on the intent requirement has come under a great deal of criticism. Some commentators have argued that it reveals an unwillingness on the side of the court to accept the existence of racist attitudes (albeit sometimes unconscious⁸²) and discriminatory institutions that produce environmental inequalities. The US has a history of institutionalised racism that is perpetuated by theories such as “colour-blindness” and “race-neutral criteria” in equal protection doctrine. The US approach to equality is

⁸⁰ Other unsuccessful cases include *NAACP v Gorsuch*, No. 82-768-CIV-5 (E.D.N.C. Aug. 10, 1982); *In re Genesee Power Station Ltd. Partnership*, PSD Appeal Nos. 93-1, to 93-7, 1993 WL 473846 (EPA Oct. 22, 1993). Plaintiffs have been more successful in proving discriminatory intent in cases involving the provision of municipal services. E.g. *Dowdell v Apopka* 511 F.Supp. 1375 (M.D. Fla. 1981) *aff'd* 698 F2d 1181 (11th Cir. 1992) where the court found that disparities in water and storm water drainage between black and white neighbourhoods were motivated by discriminatory intent.

⁸¹ Colopy “The Road Less Travelled” 145.

⁸² See Lawrence C “The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism” (1987) *Stanford Law Review* Vol. 39 317 for a discussion of the concept of “unconscious racism”.

therefore formal. It does not address systemic inequality and it does not take into account the context within which race discrimination occurs. The result has been that the disparate effects of environmental degradation remains unchallenged.

4 4 1 2 Civil rights legislation

An alternative remedy to the 14th Amendment is the Civil Rights Acts of 1964. The most significant instrument is Title VI of the Act, which states:

“No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any programme or activity receiving Federal financial assistance.”⁸³

Title VI prohibits institutions that receive federal assistance from discriminating against anyone in determining the location of facilities, contracting, hiring and distributing benefits and services. It furthermore regulates the granting of financial assistance from the federal government to its ultimate beneficiaries. Beneficiaries can be individual, local, or state governments, non-profit organisations or private industry, and funding can be used for programmes such as schools, highways, housing and urban renewal, hospital construction and public health and disaster relief. The Act places a responsibility on federal agencies to “demolish the lingering barriers to full participation faced by minorities...” These barriers are the legacy of legally mandated or tolerated segregation and discrimination, and experience has shown that they can be dismantled only with the assistance of the Federal Government.”⁸⁴ Title VI also ensures that the federal authority does not provide funding to discriminatory institutions. If an institution is found to be discriminating on the basis of race, funding may be withheld.⁸⁵

⁸³ Civil Rights Act of 1964, Pub. L. No. 88-352 § 601 78 Stat. 241, 253 (1964).

⁸⁴ U.S. Commission on Civil Rights, *Federal Civil Rights Commitments: An Assessment of Enforcement Resources and Performance* (1983) as quoted in Colopy “The Road Less Travelled” 154.

⁸⁵ 42 U.S.C. § 2000d-1 (1988).

Most federal environmental laws provide funding for state programmes to enforce state environmental laws and regulations, which makes application of Title VI an appropriate tool in providing a judicial remedy to environmental discrimination. Most environmental justice suits are, in fact, brought against state agencies.

In terms of Title VI a plaintiff has three options, namely suing the funding recipient, bringing an action against the funding agency or filing a complaint through the funding agency's Title VI administrative procedure.

4 4 1 2 1 Bringing an action against the discriminatory funding recipient

Title VI does not expressly provide for private claims against funding recipients. It has been up to the courts to interpret the statute and create an implied cause of action against such actors.⁸⁶ The rationale behind this has been that the courts wanted to empower plaintiffs in Title VI cases to activate and participate in remedial procedures.⁸⁷ A plaintiff does not necessarily have to exhaust his or her administrative remedies before bringing an action against the recipient. When a preliminary injunction is sought, however, the plaintiff has to show irreparable injury and the probability of success with the Title VI claim.⁸⁸

As shown above, the intent requirement seems to be the most substantial impediment to the success of an equal protection claim in terms of the 14th Amendment.

⁸⁶ Colopy "The Road Less Travelled" 155. The most significant case in this respect is that of *Cannon v University of Chicago* 441 U.S. 677 (1979) where the court held that individuals injured by the discriminatory practices of a funding recipient could maintain an action against the recipient directly, as opposed to navigating the administrative procedures of the funding agency to terminate the recipient's funding.

⁸⁷ Bringing a complaint against the funding agency does not ensure this, for two reasons: first, the plaintiff injured by the discriminatory actions of the recipient who decides to file a Title VI administrative complaint with the funding agency generally does not participate in the administrative process beyond the filing of the complaint. Second, Title VI regulations do not provide a direct remedy for the complainant, since the agency's penalty powers only encompass the termination of funding to the recipient and not direct relief to the complainant. Colopy "The Road Less Travelled" 157

⁸⁸ Ibid.

It is unclear whether Title VI places a similar obstacle in the path of possible litigants. In *Lau v Nichols* the court held that Title VI does not require actual discriminatory intent to establish discrimination and that discriminatory impact may suffice.⁸⁹ In the subsequent decision of *Regents of University of California v Bakke*,⁹⁰ however, the court stated that Title VI does not extend beyond the boundaries of the equal protection clause and thus implied that proof of intent is necessary to establish a violation of Title VI. A lower court, which attempted to resolve the apparent conflict between the *Bakke* and *Lau* decisions, held that:

“It would be inconsistent with Congress’s expansive remedial intent to interpret Title VI as prohibiting acts that have the effect of discrimination, yet permitting patent preferences designed to remedy past discrimination... [w]hen the charge is intentional discrimination in the nature of a governmental act, Title VI incorporates the constitutional standard ... [w]hen the charge is disparate impact, a prima facie case can be established without proof of intent.”⁹¹

Finally, the Supreme Court itself addressed the issue, holding that Title VI permits federal agencies to promulgate regulations that prohibit disparate impact discrimination.⁹² In accordance, the Title VI regulations of the Environmental Protection Agency (EPA) provides for a discriminatory *impacts* test.⁹³

⁸⁹ 414 U.S. 563 (1974). Non-English speaking Chinese students had allegedly been deprived of equal educational opportunities, and the Supreme Court found that Title VI had been violated because of the discriminatory effect of the challenged school policies, even though no purposeful discriminatory intent was present. The court held that discriminatory intent was not necessary under Title VI and confirmed that Title VI provides an implied right of action against the funding recipient by the individuals who have suffered discrimination deemed unlawful under Title VI.

⁹⁰ 438 U.S. 265 (1978).

⁹¹ *NAACP v Medical Ctr., Inc.* 657 F.2d 1322 (3d Cir. 1981).

⁹² *Guardians Ass’n v Civil Service Commission of New York* 463 U.S. 582 (1983).

⁹³ 463 U.S. at 593-95.

The Title VI complainant has the burden of showing that the practices of the recipient have a disproportionate impact on the community⁹⁴. For instance, if a funding recipient wants to establish a waste-fill near a community, the community has to prove that the siting would have a discriminatory effect in itself. This would not be sufficient to prove a Title VI violation, but would shift the burden to the funding recipient to demonstrate a legitimate, non-discriminatory reason for the siting decision. If this burden is not discharged, the court will assume that there is no legitimate reason for the siting decision. If, however, the defendant can show that a legitimate reason for the siting exists, the plaintiff must show that this justification is a pretext for the discriminatory action and that alternatives exist that would serve the same legitimate purpose.⁹⁵ If the plaintiff is unable to do so, the Title VI claim would fail.

4 4 1 2 2 Bringing an Action against the Federal Funding Agency

The EPA is the main federal agency charged with the regulation and enforcement of environmental laws.⁹⁶ It is also responsible for the enforcement of Title VI. If an institution that receives federal funding discriminates on the basis of race, a plaintiff can bring an action against the EPA to force them to terminate the funding or to ensure that the recipients comply with the requirements of the agency's regulations.

⁹⁴ Lazarus "Pursuing 'Environmental Justice': The Distributional Effects of Environmental Protection" (1993) *Northwestern University Law Review* Vol. 87 787 838.

⁹⁵ Colopy "The Road Less Travelled" 162. The plaintiff's alternative site proposal should specify location, economic factors, social costs, and environmental impacts. In 1991 the US Congress amended the Civil Rights Act so as to include a strengthened mechanism for proving disparate impact under Title VII. Under the 1991 act, to make a prima facie case of discrimination the plaintiff must demonstrate that a "particular practice" causes a disparate impact based upon race. The defendant must then demonstrate that the challenged practice is job related for the position in question and consistent with business necessity. Consequently, the persuasive burden shifts to the defendant. If the defendant satisfies this requirement, the plaintiff can still present evidence that "other tests or selection devices, without a similarly racial effect" would also serve the employer's legitimate interests. Title VII has served as a model for other civil rights acts and may have an impact on Title VI case law. Colopy "The Road Less Travelled" 164.

Additionally, individuals can also file suit against the federal agency for its own discriminatory practices.⁹⁷ Up to 1979 several plaintiffs had been successful in bringing suits forcing federal agencies to fulfil their Title VI responsibilities,⁹⁸ but in the decision of *Cannon v University of Chicago*⁹⁹ the Supreme Court held that Title VI does not include actions against the funding agency. It based its decision on the evidence in the legislative history of Title VI that Congress had resisted the concept of private suits against the federal government and held that Title VI is “a compromise aimed at protecting individual rights without subjecting the Government to suit.”¹⁰⁰ In a decision by a lower court, the impact of *Cannon* had been lessened and the D.C. Circuit Court held that a remedy against the federal government would depend on the scope of the remedy sought. If a plaintiff brings an action based on the federal government’s failure to uphold its Title VI responsibilities in a specific case, the plaintiff may succeed. Should the plaintiff, however, request a review of an agency’s practices that amounts to “continuing across-the-board federal court superintendence”, aimed at the broad enforcement of Title VI responsibilities, the challenge will be considered as overbroad and would most probably fail.¹⁰¹

⁹⁶ Sullivan “Basics of Environmental Law” in Arbuckle et al. (Eds.) *Environmental Law Handbook* (1993) Government Institutes, Inc. Rockville 1 3.

⁹⁷ *Doe v Attorney General of the United States* 941 F.2d 780 (9th Cir. 1991).

⁹⁸ *Adams v Richardson* 480 F.2d 1159 (D.C. Cir. 1973) where the court stated that if an agency “consciously and expressly” abdicates its enforcement duties, a suit may be brought against them. See also *Shannon v United States Dep’t of Housing and Urban Development* 436 F.2d 809 (3d Cir. 1970): a suit may be brought if an agency used improper procedure for granting federal financial assistance; *Gautreaux v Romney* 448 F.2d 731 (7th Cir. 1971): an action may be brought if an agency knowingly acquiesced or participated in discriminatory practices; and *Hardy v Leonard* 377 F. Supp. 831 (N.D. Cal. 1974): an action may be brought when an agency wrongly chose not to pursue further enforcement after failing to obtain voluntary compliance.

⁹⁹ 441 U.S. 677 (1979).

¹⁰⁰ *Ibid.*

¹⁰¹ *Women’s Equity Action League v Cavazos* 906 F.2d 742 (D.C. 1990).

Ordinarily, a plaintiff would also be able to bring an action for judicial review of an agency's practices in terms of the Administrative Procedure Act (APA).¹⁰² The APA permits a plaintiff to sue a federal agency for failing to enforce its regulations, but only when "no other remedy" is available.¹⁰³ The Supreme Court has limited the scope of these suits and held that an agency's decision to take no enforcement action should be presumed immune to judicial review.¹⁰⁴ The rationale for this seems to be that Title VI already provides an "adequate remedy", namely the availability of a direct action against the recipient of federal funds.¹⁰⁵

Courts have, however, allowed APA suits if the plaintiff is challenging the funding agency's administration of its own Title VI enforcement procedures. A plaintiff may, for instance, challenge a funding agency's refusal to take action against a recipient if the agency has established that the recipient is in violation of Title VI, but he or she cannot use the APA to challenge an agency's determination of the recipient's Title VI compliance.¹⁰⁶ Courts can award various types of relief in APA and Title VI actions, i.e. injunctive relief, reversal of the agency action or reversal and remand with a court order for the agency to properly follow its own procedures.

4 4 1 2 3 Filing a Complaint through the Funding Agency's Title VI Administrative Procedure

When the US Congress enacted Title VI, its intention was that all federal agencies should adopt uniform regulations to implement the Act.¹⁰⁷ The EPA has since come

¹⁰² 5 U.S.C. § 701-706 (1988). Agencies must act in accordance with the procedures specified in their enabling legislation, or, if no other procedures are specified, in accordance with the *APA*.

¹⁰³ 5 U.S.C § 704. Review is also not permitted when the agency's decision falls under agency discretion. 5 U.S.C § 701(a) (2).

¹⁰⁴ *Heckler v Chaney* 470 U.S. 821 (1985).

¹⁰⁵ Colopy "The Road Less Travelled" 169.

¹⁰⁶ Colopy "The Road Less Travelled" 170.

¹⁰⁷ 42 U.S.C. § 2000d-1 (1988). Title VI requires that federal agencies should ensure that funding recipients comply with the Act, first by encouraging voluntary adherence and then, if necessary, by initiating procedures culminating in the termination of funding. The Department of Justice

under a great deal of criticism for apparently de-emphasising its civil rights responsibilities.¹⁰⁸ ¹⁰⁹ It has, however, recently created an Office on Environmental Equity that has attempted to change the civil rights policy of the EPA significantly.

The regulations of the EPA under Title VI explicitly codify the disproportionate impact standards and specifically prohibit disparate effects.¹¹⁰ The siting of facilities are

(DOJ) co-ordinates and reviews the proposed Title VI regulations of all federal agencies and is required to ensure that each agency enforces its regulations. Colopy "The Road Less Travelled" 171.

¹⁰⁸ Gareis-Smith "Environment Racism: The Failure of Equal Protection to Provide a Judicial Remedy and the Potential of Title VI of the 1964 Civil Rights Act" 1994 *Temple Environmental Law and Technology Journal* Vol. 13 57 63. The EPA's administrator acknowledged this shortcoming in a 1971 hearing, but the EPA was again criticised for its lax attitude in a report on federal civil rights enforcement drafted by the United States Commission on Civil Rights in 1975.

¹⁰⁹ In 1976, the EPA drafted new regulations requiring that each agency collect and distribute to the public information about its Title VI programme, including non-discrimination requirements, individual rights under the Act, and procedures for enforcing those rights. Agencies also had to draft extensive compliance regulations for recipients, maintain fully staffed civil rights offices at both national and local levels, and develop a written enforcement programme. Colopy "The Road Less Travelled" 171.

¹¹⁰ Cole "Community-based Administrative Advocacy under Civil Rights Law: A Potential Environmental Justice Tool for Legal Services Advocates" (1995) *Clearinghouse Review* 360 361 citing EPA Regulations 40 C.F.R. 7.35(b) which states: "[a] recipient [of federal funds] shall not use criteria or methods of administering its programme which have the *effect* of subjecting individuals to discrimination because of their race, color, national origin, or sex, or have the *effect* of substantially defeating or substantially impairing accomplishment of the objectives of the program with respect to individuals of a particular race, color, national origin, or sex." [Emphasis added].

expressly addressed by these regulations.¹¹¹ The regulations affect all recipients of federal funds, regardless of whether they are governmental or private entities. The process involves the filing of a complaint with the EPA alleging discrimination by a recipient of federal funds and EPA assistance in the discriminatory programme or activity.¹¹² The EPA has the discretion to decide whether to accept a claim or not, but once it has accepted the claim, it is obliged to investigate the complaint within 180 days of it being filed.¹¹³ Once a finding has been made, the agency can take four possible courses of action. It can

- attempt to resolve the problem informally through negotiations,
- terminate funding of the offending party,¹¹⁴
- refer the case to the Department of Justice, or
- refrain from doing anything.

Although this process has not often been utilised by environmental justice organisations, Cole argues that its informality and low cost renders it beneficial for groups as a tool in environmental justice cases.¹¹⁵ Some of the drawbacks are that the

¹¹¹ Cole “Community-based Administrative Advocacy under Civil Rights Law” 361 citing 40 C.F.R. 7.35(c) “a recipient shall not choose a site or location of a facility that has the purpose or effect of excluding individuals from, denying them the benefits of, or subjecting them to discrimination under any program to which this Part applies on the grounds of race, color, national origin or sex; or with the purpose or effect of defeating or substantially impairing the accomplishment of the objectives of this subpart.”

¹¹² Ibid. These claims should be supported with evidence of the alleged discrimination.

¹¹³ Cole “Community-based Administrative Advocacy under Civil Rights Law” 368. According to Cole, this rarely happens in practice

¹¹⁴ This process could involve notifying the party of EPA preliminary findings, which would give them time to respond. Once a final finding of non-compliance with Title VI has been made, the offending party may request an evidential hearing before an EPA administrative judge. If the EPA administrative judge rule against them, they have a right to judicial review under the APA. Cole “Community-based Administrative Advocacy under Civil Rights Law” 365.

¹¹⁵ Cole “Community-based Administrative Advocacy under Civil Rights Law” 367.

EPA often drags its feet in investigating complaints, complainants cannot participate in the investigation of complaints and the remedies available to affected communities are indirect. In other words, remedies are restricted to promised compliance or termination of funding.¹¹⁶

4 4 1 2 4 **The effectiveness of Title VI as a tool**

Title VI has several limitations. Its non-discrimination mandate applies only to programmes or activities that receive federal financial assistance. It consequently covers all activities of federal agencies. Non-federal activities, however, are subject to Title VI only when they receive federal financial assistance. Gareis-Smith believes that since most federal environmental laws provide for funding to state programmes, the limitation is not that significant.¹¹⁷

Other drawbacks include the fact that the effective use of Title VI depends on complaints being timely and carefully drafted, containing appropriate allegations and sufficient factual support. This often includes sophisticated statistical evidence and analysis, requirements that grassroots complainants, who are resource poor and unaccustomed to the intricacies of the formal legal process, may be unable to meet.¹¹⁸

A further drawback is that the EPA is resource strapped and thus does not have enough staff to investigate Title VI complaints.¹¹⁹ Finally, since Title VI complainants cannot receive compensatory relief without proving discriminatory intent, they may be awarded only declaratory and injunctive relief to “identify the violation and enjoin its continuance”, and only once disparate impact has been proved.¹²⁰

¹¹⁶ Ibid.

¹¹⁷ Gareis-Smith “Environmental Racism” 64.

¹¹⁸ Foreman *The Promise and Peril of Environmental Justice* (1998) 57. In 1996 thirty complaints had been filed, of which twelve had been rejected and one withdrawn due to technical weaknesses, citing a May 1996 report given by the EPA Office of Civil Rights (OCR) at a NEJAC meeting.

¹¹⁹ Ibid.

¹²⁰ Colopy “The Road Less Travelled” 165.

The result of these constraints is that very few cases have been successfully brought under Title VI. Commentators like Colopy¹²¹ nonetheless believe that it holds potential for future environmental justice litigation, while Cole argues that even losing cases may be useful for empowering communities, gaining media attention and pressuring key decision-makers.¹²²

4 4 2 Environmental Law and Regulations

In the past, US lawyers have generally used civil rights law to litigate environmental justice cases. There are particular reasons for this strategy. Lazarus argues that environmental and land use laws have provided more environmental benefits to the white and the affluent than to communities of colour and poor communities, and has even worsened the conditions of the latter.¹²³ He notes, for example, that the focus on reducing ambient levels of pollution has failed to address the concentrations of pollution to which minority populations are exposed. Similarly, laws that require the removal of toxic waste do not address the question of where toxic waste disposal facilities are located.¹²⁴ Environmental justice scholars therefore appear to suggest that environmental laws are only available to those with money and power in their NIMBY cases, and often exacerbate existing disparities. Environmental laws consequently serve the wealthy and the powerful better than the poor and marginalised.

There is an alternative argument. Some commentators believe that environmental law may be an effective tool for achieving legal redress, especially in light of the difficulties presented by the Equal Protection Clause or civil rights laws.¹²⁵ Although Lazarus also believes that these laws may often be more successful than civil rights law,

¹²¹ Ibid at 167.

¹²² Cole “Environmental Justice Litigation: Another Stone in David’s Sling” (1994) *Fordham Urban Law Journal* Vol.21 523 541.

¹²³ Lazarus “Pursuing ‘Environmental Justice’” 792.

¹²⁴ Ibid.

¹²⁵ Kaswan “Bridging the Gap between Environmental Laws and ‘Justice’ (1997) *American University Law Review* Vol. 47 No.2 222 275.

he notes that environmental law, being extremely technical, may require the use of skilled environmental lawyers to whom minority communities may not have access.¹²⁶

Some of the laws that have been used with a measure of success are the National Environmental Policy Act (NEPA)¹²⁷ and the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA).¹²⁸ CERCLA, for example, has established a right to recovery for any person who has incurred clean-up costs. NEPA procedurally opened the way for citizen suits under the Clean Air Act¹²⁹ and the Clean Water Act¹³⁰. The citizen suit provisions have enhanced access to justice in that they grant standing to anyone for the purpose of enforcing the provisions of environmental statutes such as the Clean Air Act and the Clean Water Act.¹³¹ In addition, these statutes make it possible for citizens to sue for a civil penalty against a polluter in breach of their statutory obligations.¹³² NEPA, together with the Freedom of Information Act (FOIA)¹³³, has ensured access to the relevant information required for instituting an action.

NEPA also legislates the environmental policy of the federal government and authorises the federal government to administer federal programmes in the most environmentally sound fashion with a consideration for the impact of industrial development on human beings. Ross argues that NEPA is compatible with environmental justice goals and is therefore ideal as an instrument to make the siting of environmentally burdensome facilities more equitable.¹³⁴ She cites the part of the Act

¹²⁶ Interview with Lazarus May 99.

¹²⁷ 42 U.S.C. § 4321 *et seq* (1969).

¹²⁸ 42 U.S.C. § 9601 *et seq* (1980).

¹²⁹ 42 U.S.C. § 7401 *et seq* (1955).

¹³⁰ 33 U.S.C. § 1251 *et seq* (1948).

¹³¹ Greve "The Private Enforcement of Environmental Law" (1990) 65 *Tulane LR* 339.

¹³² *Ibid.*

¹³³ 5 USC § 552

¹³⁴ Ross "Using NEPA in the Fight for Environmental Justice" (1994) *Williams and Mary Journal of Environmental Law* Vol. 18 No. 285 353 357.

that mentions “the profound influences of population growth, high-density urbanisation, industrial expansion, resource exploitation, and new and expanding technological advances” and that recognises the “critical importance of restoring and maintaining environmental quality to the overall welfare and development of man”. According to her, the language suggests that the goal of NEPA is to balance the welfare of people against the detrimental effects of industrialisation and urbanisation. She further argues that the plain meaning of the statute¹³⁵, where it refers to the “overall development of man” and “fulfil[ing] the social, economic and other requirements of present and future generations of Americans”, provides for socio-economic concerns about potential environment hazards to be considered in the decision-making process. In siting waste facilities, for example, the kind of socio-economic concerns that should be considered are the health effects on the community, contamination of groundwater, the nuisance effects of transportation of waste to waste facilities and the decline in property values.

The Act also states in section 101(b) that “[I]t is the continuing responsibility of the federal government to use all practicable means ... to assure for all Americans safe, healthful, productive, and aesthetically and culturally pleasing surroundings ... preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity...” Ross maintains that this wording, read in conjunction with the goals of the Act, provides a means for introducing environmental justice concerns into NEPA. By stressing a safe environment for “all Americans” the wording implies that it is unacceptable for environmental hazards to be concentrated in minority communities.¹³⁶ By encouraging the preservation of important historic and cultural aspects of the American national heritage, NEPA also prohibits the destruction of ethnic communities. The Act has, for example, been successfully used in the case of *Houston v City of Cocoa*¹³⁷, where a redevelopment plan would have

¹³⁵ U.S. courts have applied the “plain meaning” doctrine, in terms of which a court may decide what a statute means by considering the plain or ordinary meaning of the words used. It was for example used in *Fogerty v Fantasy*, 114 S Ct. 1023 (1994) cited in Ross “Using NEPA” 357.

¹³⁶ Ross “Using NEPA” 358.

¹³⁷ No. 89-92-CIV-ORL-19 (M.D. Fla. 1989) cited in Ross “Using NEPA” 358.

eliminated a historically black neighbourhood.

An important feature of the Act is Section 101, which makes it clear that “environment” cannot be narrowly interpreted. The Act specifically refers to the inter-relationships within the natural environment; the need to assure for all Americans “safe, healthful, productive, and aesthetically and culturally pleasant surroundings”; the need to preserve historical and cultural aspects of their national heritage; the need to enhance the quality of renewable resources and the need to achieve a balance between population and resource use. Judicial decisions have furthermore confirmed that NEPA is not limited to undisturbed natural areas.¹³⁸

There is, however, the argument that NEPA cannot have unlimited scope and that it was not the intention of the drafters that an Environmental Impact Statement (EIS) had to be issued by the government every time they made a decision about foreign policy, medicaid, or tax law, even though these decisions are likely to affect the quality of human life.¹³⁹ In *Metropolitan Edison Co. v People Against Nuclear Energy*¹⁴⁰ the Court had to decide whether an EIS had to be submitted before Metropolitan Edison could be allowed to resume operation of a nuclear reactor. The lower Court held that an EIS was required because the psychological stress caused by reopening the plant would have a significant health effect on the surrounding communities. The Supreme Court agreed that “effects on human health can be cognisable under NEPA, and that human health may include psychological health”, but stated that generally speaking the Court believed that NEPA referred to the physical environment. In terms of *Metropolitan Edison*, an impact qualifies as environmental when it has a “reasonably close causal relation” to a change in the physical environment. Thus a psychological effect can only qualify as environmental if it is proximately caused by a physical event.

¹³⁸ In *Hanly v Mitchell* (2d Cir. 1972) the court held that the construction of a new jail in Manhattan potentially involved significant environmental impact. Among the impacts considered were the possibility of increased crime in the area, the aesthetic impact of the building, and other socio-economic effects.

¹³⁹ Findley & Farber *Environmental Law* 29.

¹⁴⁰ (S.Ct. 1983).

Commentators argue that the legislative history of NEPA points to the initial intention to create an environmental bill of rights, which could address negative environmental impacts on communities that have historically been marginalised.¹⁴¹ This argument is supported by the fact that President Clinton issued an Executive Order¹⁴² on environmental justice in 1994¹⁴³, which reminded federal agencies that NEPA requires them to consider the socio-economic impacts of proposed actions.

4 4 3 Common Law

It has been suggested that some common law doctrines may aid environmental justice lawyers, especially where constitutional and statutory mechanisms fail them.¹⁴⁴ The law of torts, for example, has been used successfully within the general area of environmental law.¹⁴⁵ Since this area of the law is based on the legal duty to avoid doing

¹⁴¹ Hanks & Hanks “An Environment Bill of Rights: The Citizen Suit and the National Environmental Policy Act of 1969” (1970) *Rutgers Law Review* Vol. 24 230. Ross “Using NEPA” 360 also argues this and quotes the following remarks from Congressional Debates on the passage of the Act:

“The crisis of the cities and the crisis of the natural and rural environments have many roots in common, although they may erroneously be viewed as extraneous to one another.... An effective environmental policy in the past might have prevented and would certainly have focused attention upon the wretched conditions of urban and rural slums. It would surely have stimulated a search for knowledge that could have helped to correct and prevent degraded conditions of living. It is now evident that the fabric of American society can no longer contain the growing social pressure against slum environments.... What is needed ... is a systematic and verifiable method for periodically assessing the state of the environment and the degree and effect of man’s stress upon it, as well as the effect of the environment and the environmental change in man.” 115 Cong. Rec. S29, 070-71 (daily ed. Oct. 8 1969).

¹⁴² No. 12,898.

¹⁴³ 3 C.F.R. 859 (1994) See discussion hereafter in para. 4 4 3.

¹⁴⁴ See e.g. Williams “The Anticipatory Nuisance Doctrine: One Common Law Theory for Use in Environmental Justice Cases” (1995) *William and Mary Environmental Law & Policy Review* Vol. 19 223, and Kanner “Environmental Justice, Torts and Causation” (1995) *Washburn Law Journal* Vol. 34 505.

¹⁴⁵ Sullivan “Basics of Environmental Law” 7.

harm to others, it is concerned mainly with allocating damages to people who have been harmed by others.¹⁴⁶

As damages are awarded after the harm has manifested itself, a victim of an environmental impact may only bring a tort action for compensation if the damage had already occurred. Given that most environmental justice cases seek to prevent damage from happening, by preventing the siting of undesirable facilities, for example, seeking compensation by way of the tort law route has its limitations. The use of tort law to obtain damages may therefore be feasible only when a community brings an action against existing hazardous threats.

There are other limitations inherent to the nature of tort law that could make environmental justice litigation cumbersome. The biggest obstacle is proving causation, which in tort litigation is often the central and most controversial issue.¹⁴⁷ It is argued that the difficulty of establishing causation is compounded where the plaintiffs are people of colour.¹⁴⁸ Since the areas in which they live are exposed to a multitude of toxins and very few scientific studies have to date been undertaken in these areas, it is difficult to establish specific causes of harm. However, since environmental statutes do not provide for compensatory damages, the common law provides the only means through which plaintiffs can receive compensation for damages due to adverse environmental impacts.

There is one tool within the law of torts that may be more appropriate for the environmental justice plaintiff, i.e. the “anticipatory nuisance doctrine”. Williams has argued that the doctrine of anticipatory nuisance can be used to prevent the construction of a facility by an injunction where a “threat of sufficient seriousness and imminence exists to justify coercive relief.” Should the court refuse to grant the injunction, plaintiffs

¹⁴⁶ Ibid.

¹⁴⁷ Kanner “Environment Justice, Torts and Causation” (1995) *Washburn Law Journal* Vol. 34 505 511. It is difficult to prove a causal connection where the harm to the plaintiff may have been caused by other factors, such as toxic exposures associated with prior work history, residence, personal lifestyle, or genetic predisposition.

¹⁴⁸ Ibid.

may alternatively ask for an injunction requiring the facility to maintain certain standards or provide particular safeguards.¹⁴⁹

Williams argues that the major benefit of this doctrine in the case of siting lies in the fact that the harm can be prevented before it occurs.¹⁵⁰ Her argument is supported by the Supreme Court of Oklahoma, which held that injunctive relief was proper where plaintiffs showed that pollution of their underground water would most likely result from the operation of a landfill nearby.¹⁵¹ Another benefit of the doctrine of anticipatory nuisance is the prevention of economic waste. If a plaintiff's only remedy is to wait for the nuisance to occur before seeking injunctive relief, the defendant may waste resources by investing in an activity which will likely be prohibited after the fact. Seeking an injunction before the offending action is set in motion can prevent this.¹⁵²

4 4 4 The Executive Order on Environmental Justice

Although lawyers have been unsuccessful in bringing constitutional environmental justice claims and have had to resort to "alternative" legal measures to challenge hazardous activities, the US government has taken the issue of environmental injustice seriously. In 1994 President Clinton issued an executive order on environmental justice entitled Federal Actions to Address Environmental Justice in Minority Populations and Low-income Populations (hereafter referred to as "the Order").¹⁵³ This was the first

¹⁴⁹ Ibid.

¹⁵⁰ Ibid.

¹⁵¹ *Sharp v 251st Street Landfill, Inc.*, 810 P.2d 1270 (Okla. 1991), overruled on other grounds, *Dulaney v Oklahoma State Dep't of Health* 868 P.2d 676 (Okla. 1993). The court noted that "the difficulty, complexity, and costliness of remedying groundwater contamination is well documented" and that "once seriously contaminated, groundwater is often rendered unusable and cleaning it up is often unsuccessful". Cited in Williams "The Anticipatory Nuisance Doctrine" 241.

¹⁵² Sharp "An Ounce of Prevention: Rehabilitating the Anticipatory Nuisance Doctrine" (1988) *B.C. Environmental Affairs Law Review* Vol. 15 627 630.

¹⁵³ Executive Order No. 12,898 3 C.F.R 859 (1995). Executive orders were historically issued by the President of the U.S. without need for Congressional approval to address internal administrative manners of the federal bureaucracy. They have, however, become more legislative in character

time that the federal government had recognised the existence of environmental injustice and it was also the first attempt to address it.

The Order requires “each Federal agency to make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programmes, policies, and activities on minority populations and low-income populations.”¹⁵⁴ The President required agencies to develop environmental justice strategies; to identify programmes, processes, enforcement activities, and rules that should be revised; and to establish a timetable for their planned revisions.¹⁵⁵ The Order states that “each Federal agency shall conduct its programmes, policies, and activities that substantially affect human health or the environment, in a manner that ensures that such programs, policies, and activities do not have the effect of excluding persons (including populations) from participating in, denying persons (including populations) the benefits of, or subjecting persons (including populations) to discrimination under, such programs, policies, and activities, because of their race, color, or national origin.”¹⁵⁶

The Order created an interagency working group to assist agencies in understanding and developing an environmental justice strategy.¹⁵⁷ The working group is supposed to develop criteria for determining “disproportionately high and adverse human health effects on minority populations and low-income populations”, and will guide agencies through the early phases of implementing a strategy.¹⁵⁸ The working group will

and may directly affect the rights and duties of both private parties and government officials. Most executive orders are now issued pursuant to specific delegations of authority by Congress and they have the force and effect of law and pre-empt inconsistent state law. Ostrow “Enforcing Executive Orders: Judicial Review of Agency Action under the Administrative Procedure Act” (1987) *George Washington Law Review* Vol. 55 659.

¹⁵⁴ Section 1-1.

¹⁵⁵ Section 1-1 103.

¹⁵⁶ Section 2-2.

¹⁵⁷ Section 1-102(a).

¹⁵⁸ Sections 1-102(b)(1) and 1-102(b)(2).

also assist in the co-ordination, collection, and examination of new research and data collection and review existing studies on environmental justice; it will hold public meetings “for the purpose of fact-finding, receiving public comments, and conducting inquiries concerning environmental justice”; and finally, it will develop an inter-agency model programme addressing environmental justice.¹⁵⁹ The Executive Order is an attempt to level the playing field for minority communities by improving the availability of resources and access to government.¹⁶⁰ Public participation is seen as a major component of the Order.¹⁶¹ It is thus an attempt to empower communities politically, which is what environmental justice activists and commentators have advocated since the beginning of the movement.

The Order also aims to “improve the internal management of the executive branch”.¹⁶² It imposes no substantive, enforceable duties upon government agencies. To gain effect, it is intended to become part of environmental laws by way of regulations.¹⁶³

¹⁵⁹ Section 1-102(b)(3)-(6).

¹⁶⁰ Hernandez “Environmental Justice: Looking Beyond Executive Order No. 12,898” (1996) *Journal of Environmental Law* Vol. 14 181 202. The Order allows for documents to be translated into the dominant language of the region and hearings in limited English speaking communities will be translated. See also section 5-5(b). The public will be also be allowed to submit recommendations to federal agencies advocating a particular position with respect to environmental justice concerns. Section 5-5(a)

¹⁶¹ “One of the biggest reasons for the order was that the federal government had to change the way it did business – we had to open the process” Statement by Kathy Aterno, Deputy assistant administrator for EPA’s Office of Administration and Resources Management quoted in “ELI Report” (1995) *Environmental Forum* March/April 52.

¹⁶² Executive. Order No.12,898 § 6-609.

¹⁶³ Hernandez “Environmental Justice” 203.

President Clinton noted NEPA as a case in point when he issued the Order.¹⁶⁴ In accordance, the White House Council on Environmental Quality (CEQ), which has overall responsibility for both NEPA and the Order, was required to produce a guidance document for implementation of the Order under NEPA. A draft document produced in 1996¹⁶⁵ states that “environmental justice issues may arise at any stage of the NEPA process” and “encompass a broad range of impacts covered by NEPA, including impacts on the natural and physical environment and interrelated social and economic effects.” It notes that there is no routine formula for how environmental justice issues should be identified or addressed, but invites agencies to be creative about public participation and communication, and to be diligent about impact assessment.¹⁶⁶ The document makes it clear that the Order does not expand existing provisions under NEPA, and states that an environmental impact that is not “significant” within the meaning of NEPA would not be recognised as such simply because an impact has a disproportionate and adverse effect on a population.¹⁶⁷ Also, such effects would “not preclude a proposed agency action from going forward, nor necessarily compel a conclusion that a proposed action is environmental unsatisfactory”.¹⁶⁸ In view of the fact that NEPA’s most substantive shortcoming is that it cannot be used to prevent federal action that will have a disproportionately adverse effect on a community, this interpretation is most disappointing.

¹⁶⁴ “Each Federal Agency shall analyze the environmental effects, including human health, economic, and social effects, of Federal actions, including effects on minority communities, and low-income communities when such analysis is required by the National Environmental Policy Act of 1969 (NEPA), ” “Memorandum on Environmental Justice” (February 14 1994) *Weekly Compilation of Presidential Documents* 30 280.

¹⁶⁵ Council on Environmental Quality *Draft Guidance for Addressing Environmental Justice under the National Environmental Policy Act*. May 24 1996.

¹⁶⁶ Council on Environmental Quality *Draft Guidance for Addressing Environmental Justice under the National Environmental Policy Act* 5-6.

¹⁶⁷ Council on Environmental Quality *Draft Guidance for Addressing Environmental Justice under the National Environmental Policy Act*. 7.

¹⁶⁸ *Ibid.*

Although the nature of executive orders and the way in which courts treat them make it difficult for them to act as enforceable legislative mechanisms,¹⁶⁹ there have been some successes. The Atomic Safety and Licensing Board enforced the Order for the first time in a 1997 administrative decision,¹⁷⁰ denying the Louisiana Energy Services (LES), a Nuclear Regulatory Commission (NRC), a special nuclear material license to enrich uranium at a proposed plant near Homer, Louisiana. The site, selected by LES and approved by NRC staff, was immediately adjacent to two low-income African American communities. The board found that the siting procedures used by the LES did not effectively rebut the evidence brought by the intervenor (Citizens Against Nuclear Trash) that social discrimination may have played a role in the plant's proposed siting. The intervenor asserted that the siting of the plant follows a national pattern of siting hazardous facilities in minority communities and that no steps to avoid or mitigate the disparate impact had been taken. They also argued that the negative economic and sociological impacts of closing a connecting road between the two communities were not appropriately considered in LES' Environmental Report. The board therefore found that although the NRC had properly assessed significant physical impacts, such as water quality, it did not properly weigh up other socio-environmental impacts on minority communities.

The Board stated that the Order does not create new rights, but is "in effect, a procedural directive to the head of each executive department and agency that, 'to the

¹⁶⁹ Executive order No. 12,898 explicitly rejects creating any rights, benefits, or trust responsibility, substantive or procedural, enforceable at law against the U.S. Furthermore, the failure of the Order to *impose* certain duties upon federal agencies makes it merely a procedural request. There is also the danger that when the Clinton administration leaves office, a new administration may declare policies that will drastically conflict with the existing order. Hernandez "Environmental Justice" 204. See also Ostrow "Enforcing Executive Orders" 659.

¹⁷⁰ The Matter of ASLBP 91-641-02-ML Louisiana Energy Services, L.P. (May 1 1997). The agency in question is an independent regulatory agency and as such not mandatorily subject to the Order, but the chairman of the Commission wrote to the President stating that the NRC would carry out the measures in the Executive Order and the NRC has participated in the interagency working group.

greatest extent practicable and permitted by the law,' it should seek to achieve environmental justice in carrying out its mission by using such tools as the National Environmental Policy Act."¹⁷¹ This decision illustrates that the Order can be used effectively, at least to oblige agencies to comply with existing legislation such as NEPA.

4 5 CONCLUSION

Studies in the USA have advanced empirical evidence of systemic racism in environmental policies and practices by both government and private industry. Apart from the direct relationship between race and environmental degradation, studies have also indicated a link between socio-economic status and environmental degradation. It is furthermore clear that environmental racism is inextricably linked to the history of racism in the US. It is also obvious that historical racism is perpetuated in the modern USA where people of colour, especially poor people of colour, cannot always lay claim to equal protection by the law. Since these groups are marginalized from mainstream environmental groups, they remain on the periphery of decision-making processes.

Environmental injustices therefore occur largely as a result of the political, social and economical disempowerment of vulnerable groups. These conclusions drawn from empirical studies have been very effective in proving the existence of environmental injustice in the US. Similar studies have never been undertaken in South Africa. Litigation in the USA has, however, relied on such studies to attest to legal claims of environmental injustice. Similar studies may be required in South Africa to substantiate environmental justice claims.

Activist groups and lawyers have adopted an integrated and holistic approach to addressing environmental inequities. Some environmental legislation, in particular, has proved to be compatible with environmental justice goals. It is argued that the language in environmental legislation suggests the need for a balance between the welfare of people and the detrimental effects of environmental degradation caused by industrialisation and urbanisation. The contention furthermore is that it is unacceptable for environmental hazards to be concentrated in minority communities. Much can be

¹⁷¹ The Matter of ASLBP 91-641-02-ML Louisiana Energy Services, L.P. (May 1 1997) 12

learnt from this approach and from the way in which “ordinary” environmental legislation can be used to address environmental inequities.

The Clinton administration has actively promoted environmental justice. The executive order on environmental justice, in particular, attempts to address the adverse human health or environmental effects of environmental degradation on minority and low-income populations. The executive order remains, however, a political remedy. It is the nature of these political remedies to be subject to the benevolence of the rulers. As governments change, so may the policies of a previous government. Environmental justice may not survive under a new, politically more conservative government. It is therefore not advisable to rely solely on political remedies to achieve environmental justice.

This study argues that environmental injustices are largely a manifestation of racial and social inequities. Environmental racism cannot be separated from the disparate treatment of people in society. In line with this argument, environmental injustice in the USA has been connected to racial and social inequality. Consequently the constitutional principle of equality has underpinned the legal strategy to attain environmental justice.

The US Supreme Court has, however, taken a formal approach to equality, with the result that it has not addressed systemic inequality and it has not taken into account the social and historical context within which race discrimination occurs. The result has been that the disparate effects of environmental degradation remain unchallenged as a violation of the constitutional proscription of equal protection. A formal approach to equality may inevitably defeat the object of attaining environmental justice in the US. In view of this shortcoming it is important that the South African judiciary take a different route when interpreting inequality in the context of the environment.

In reviewing the US experience it is evident that the courts have shown a great measure of self-restraint in the conceptualisation of environmental justice. The hesitancy in relating environmental degradation to equality is an indication of such restraint. The judiciary has also not been innovative in carving out remedies that would address environmental injustice in a meaningful way. There has not been any real activism in this regard on the part of judiciary. It is furthermore submitted that it is this lack of activism

that limited the attainment of environmental justice in the US. South African courts should therefore bear in mind the limitations of judicial restraint in considering the US experience.

It is a further contention of this study that environmental justice is best attained if promoted by way of a constitutionally protected environmental right. The USA does not have such a right. The Fourteenth Amendment may have proven more effective if comprehensively construed in relation to an environmental right. It seems therefore that an environmental right is essential if environmental justice is to be achieved. The rest of the study will focus on the ways in which such a right should be construed. In this respect India may provide some lessons. Chapter five of this study therefore examines environmental justice in India and the way in which it has been dealt with.

CHAPTER FIVE

ENVIRONMENTAL JUSTICE IN INDIA

“The environment is not just pretty trees and tigers, threatened plants and ecosystems. It is literally the entity on which we all subsist, and on which the entire agricultural and industrial development depends.”¹

5.1 INTRODUCTION

Many of the environmental problems that India is experiencing can be ascribed to the ever-increasing size of its population. Environmental degradation is felt both in urban and in rural areas of the country. India houses about 16 per cent of the world's population, even though it covers only 2.42 % cent of the world's surface.² The population of India is unevenly distributed with an urban population in the 1990s of about 217.7 million, accounting for about 74 % of the total population.³ The country is plagued by environmental problems that affect the use and enjoyment of land, water and the forests in the rural regions, whilst environmental problems in urban sectors centre mainly on waste and pollution.

It has been argued that the ever-increasing impoverishment of people in India is accompanied by systematic erosion of the environment.⁴ The government of India acknowledged in its sixth five-year plan for the environment, that environmental problems in India can be classified in two broad categories:

“(a) those arising from conditions of poverty and under-development. And (b) those arising as negative effects of the very process of development”⁵

¹ Agarwal “Politics of Environment – II” in Centre for Science and Environment *The State of India's Environment 1984-85: The Second Citizen's Report* (1986) 362.

² Dwivedi *India's Environmental Policies, Programmes and Stewardship* 1997 4.

³ Ibid.

⁴ Rosencranz, Divan & Noble *Environmental Law and Policy in India, Cases, Materials and Statutes* 1995 18.

⁵ Planning Commission, Government of India; *Sixth Five Year Plan 1980-1985*, (1981) 343.

According to the Centre for Science and Environment (CSE), “the poor live within a biomass-based subsistence economy.... All their fundamental needs (food, fodder, fuel, firewood, cow dung, crop-wastes, fertilisers, building materials and herbal medicines) are collected (often freely) from the immediate environment. To these be added water, which though not a biomass itself, is biomass-related and crucial for survival.”⁶ As the rural Indian population systematically consumes natural resources to fulfil its basic needs, therefore, it brings about the destruction of that on which it depends for its existence.⁷

The relationship between poverty and environmental degradation in India is a complex one. Not only is it true that the poor are systematically exhausting their own resources, but they are also disproportionately affected by environmental destruction. It is within this link between poverty and environmental destruction that environmental injustice in India is situated.

This chapter investigates the “state of the environment” as it affects poor and disadvantaged groups in India, focusing on the interaction between caste, tribe and class on the one hand, and environmental degradation on the other. It analyses environmental policy in India in an attempt to illustrate how environmental injustice emanates from state sources. The reaction to government policy or lack of it manifests in “activism” on various levels. Environmental activism as practised by community groups is therefore also explored, as well as judicial activism, and the way in which the judiciary achieve environmental justice.

A section of the chapter is furthermore devoted to the Directive Principles of State Policy, Fundamental Duties and Fundamental Rights in the Constitution and their interpretation by the courts. Finally, in an attempt to argue that it has provided the impetus for developing a human rights-based approach to environmental justice, judicial activism itself is considered.

⁶ Rosencranz, Divan & Noble *Environmental Law and Policy in India* 18.

⁷ Some authors have cautioned though that environmental degradation in rural India can and should not only be ascribed to domestic use, but that deforestation may often be due much more to commercial tree-felling and the extension of agriculture into forests. See Braidotti, Charkiewitz, Häusler & Wieringa “Women, Environment and Sustainable Development” in Visvanathan, Duggan, Nisonoff & Wiegiersma (Eds.) *The Women, Gender and Development Reader* (1997) 54 55.

5 2 ENVIRONMENTAL INJUSTICE IN INDIA

5 2 1 The Relationship between Poverty and the Environment

Environmental degradation occurs in India, as in most other countries. It is, however, the poor that are most affected by the hazards of environmental damage. The poor are equally affected by policies and practices aimed at development. Since developmental projects are not always carried out in an environmentally sustainable manner, they frequently affect the environment adversely. The resulting environmental degradation disproportionately impacts on those people who depend on the environment for their livelihood. Furthermore, since poor people are not always in a position to influence policy decisions, they are more vulnerable to environmental harm.

5 2 1 1 The impact of land degradation

Approximately 6% of India's population are engaged in pastoral nomadism.⁸ The destruction of grazing lands has come about as a result of the ever-increasing need for more agricultural land. Through a combination of land reforms and development programmes, extensive grazing lands have been transformed into agricultural land, thereby impoverishing nomadic groups and forcing them to become labourers or urban immigrants.⁹

In rural India, land plays an important role in providing a source of income and food through agriculture and grazing. Agriculture accounts for 37% of India's GNP and employs 70% of the working population.¹⁰ Due to soil erosion, floods and drought, amongst other factors, land degradation is extremely high.¹¹ Substantial portions of cropland are lost each year due to waterlogging, salinity or excess alkalinity. The lost land needs to be replaced continually and thus new land is being brought into production, leading to deforestation.

The increase in the population furthermore leads to smaller areas of land being put under production, placing more pressure on the land itself. The combined effect

⁸ Agarwal "Politics of Environment – II" 362.

⁹ Ibid.

¹⁰ World Bank Country Study *Gender and Poverty in India* (1991) 19.

¹¹ Dwivedi *India's Environmental Policies* 5.

of all of this is that much of the agricultural land has insufficient nutrients and organic materials, so that chemical fertilisers increasingly replace natural nutrients, often subjecting consumers of agricultural products to an improper and unrestricted use of chemicals.¹² Diwedi argues that with malnutrition amongst poor people already a prevailing problem in India, the unfettered use of chemicals in agricultural products compounds the existing problem.¹³

5 2 1 2 Forests

Forests serve as a critical resource for the subsistence of rural people in India. They provide food, fuel and fodder and stabilise soil and water resources. They are also extremely biodiverse. Not only do they help to maintain biodiversity, but they also provide a source for bioproducts. Indigenous tribes often rely on bioproducts for their medicinal and nutritional value. Forests are furthermore claimed to be part of Indian people's cultural and religious heritage.¹⁴ Loss of forest cover not only has an effect on the environment, but also has a direct impact on people who depend on it. The need for land, as well as mining activities in parts of India, has led to substantial loss in forest cover.¹⁵ Diwedi describes the impact of deforestation on poor tribal people as follows:

“The springs and the streams upon which local folk depend for domestic use started to dry up. Women have to trek much further to fill their buckets, adding to the drudgery of life. The shortage of timber has deprived these people of their traditional source of firewood, as minor forest officials are not willing to supply them with wood. An altogether new type of social upheaval has arisen – because lush green pasture has been turned into barren land, grazers have been forced to take their flock of sheep and herds of cattle to distant places.”¹⁶

¹² Ibid.

¹³ Ibid. at 6.

¹⁴ Ibid. at 5.

¹⁵ Rosencranz, Divan & Noble *Environmental Law and Policy in India* 18.

¹⁶ Dwivedi *India's Environmental Policies* 9.

Over and above these encroachments upon the daily lives of tribal and other forest dwelling people, deforestation has had the effect of particularly destroying the social, cultural and economic base of tribal groups.¹⁷ Since forests are under the control of the Indian government, tribes that rely on forest resources have little or no say in the allocation of forest resources. The result is that they are politically and economically disempowered.

5 2 1 3 Water

Seventy percent of all available water in India is polluted and both urban and rural Indians are affected.¹⁸ The pollution of India's water sources is due mainly to industrial effluent and domestic waste, and few cities have adequate water treatment facilities. Domestic waste accounts for 90 % of total waste in the country. In rural areas, water is polluted by agricultural runoff containing pesticides and other harmful chemicals.¹⁹

In an attempt to meet the needs for irrigation, hydroelectric power and flood control, the government of India in the 1950s embarked upon numerous major dam building projects. The dam building programme has, however, not always met the aims of economic progress and development. Not only did it cause major environmental damage, it also had a detrimental effect on local communities. The programme led to loss of forests, wildlife, and arable land, as well as water logging and siltation.²⁰ It also displaced thousands of people, mostly tribal people and forest dwellers, who represent the poorest sections of the Indian population.²¹ Since some

¹⁷ Agarwal "Politics of Environment – II" 362.

¹⁸ Rosencranz, Divan & Noble *Environmental Law and Policy in India* 19.

¹⁹ Dwivedi *India's Environmental Policies* 10. "In 142 cities surveyed only 43.4 per cent of the population had sewerage facilities, and only 37 per cent of waste water received some form of treatment. ...[o]nly 198 towns, and thus only 27 percent of the total urban population of India, have even limited sewerage facilities. At the national level a little over 5 per cent of the population have sewerage facilities and only 3 per cent are served by sewage treatment systems."

²⁰ Rosencranz, Divan & Noble *Environmental Law and Policy in India* 276.

²¹ In 1988 it was estimated that the Tehri dam in the Bhilangana valley would submerge Tehri town and 23 villages in its vicinity, partially submerge 72 other villages and that 5200 hectares of land and 1600 hectares of cultivated land would be lost to the reservoir. It was

rivers are considered sacred and the displaced land contained sacred sites,²² the projects also had a substantial social and a cultural effect on (poor) tribal people.

5 2 1 4 Air and land pollution

Both city and countryside face major pollution. In the cities the pollution stems from thermal power plants, steel mills, petrochemical and fertiliser factories, steam engines, rayon and textile mills, metallurgical works and pharmaceutical and other industries, as well as from motor vehicles.²³

In rural villages the major source of pollution is wood-burning stoves.²⁴ Poor people rely on natural resources as a source of energy. These natural resources such as wood or cow dung are considered to be high pollutants and are damaging to the health of those who use it. Since these people are not privy to cleaner sources of energy, however, they have no choice but to face exposure to high levels of pollution.

Land pollution in India results largely from the insanitary disposal of solid wastes.²⁵ Open dumping of municipal and industrial waste on low-lying land, where the poor reside, is a common phenomenon. This constitutes a breeding ground for pests and the outbreak of disease.

5 2 2 The Relationship between Caste, Socio-Economic Status and the Environment

It has been argued that Scheduled (lower) castes and tribes are unequally burdened with environmental costs. Castes²⁶ are part of the social and cultural

furthermore estimated that about 85 600 people were to be displaced by the project. Rosencranz, Divan & Noble *Environmental Law and Policy in India* 289.

²² Ibid.

²³ Dwivedi *India's Environmental Policies* 11. Dwivedi argues that the worst polluters in cities are government-owned plants, followed by the agrochemical industries.

²⁴ Ibid. In three hours of cooking time, women inhale as much carcinogenic benzopyrene as contained in a pack of 20 cigarettes.

²⁵ Rosencranz, Divan & Noble *Environmental Law and Policy in India* 15.

²⁶ Caste systems can be described as systems of stratification. A caste is a culturally relatively homogeneous group functioning as a differentiated, yet interdependent unit in broader society. Membership of castes is usually ascribed by birth and remains rigid, i.e. not permitting individual mobility. Castes can be distinguished from tribes in India in that the groups (of

structure of India.²⁷ Historically, the Indian term associated with caste is *varna*.²⁸ The four varnas are the Brahmins (priests), the Kshatriyas (warriors), the Vaishyas (businessmen), and the Sundras (artisan-labourers). Those who do not fall within these four varnas are considered to be outcastes and are known as the untouchables.²⁹

Within each caste further sub-castes (*jāti*) may be found.³⁰ The formal five-layered scheme represents the framework for the hierarchical status and accompanied treatment of the different castes.³¹ People are treated according to the caste or sub-caste to which they belong, and the higher the caste they belong to, the better the treatment. The untouchables, who do not belong to a caste, are the most vulnerable in Indian society.

It has been argued that the caste system can only be maintained at high cost, which includes intra- and inter-group violence, exploitative economic practices, the waste of human resources resulting from a discriminatory and hereditary selection of

castes) are inter-acting and interdependent, whilst tribes function on a relatively independent basis. See Berreman "Comparative Analysis of Caste" in Knight and De Reuk (Eds.) *Caste and Race: Comparative Approaches* (1968) 45 46-49.

²⁷ It is not possible to provide a complete treatise on caste and this work will not attempt to do so. For more information on caste see Gupta *Caste, Kinship and Community* (1986); Knight and De Reuk *Caste and Race: Comparative Approaches* (1968); Östör, Fruzetti, Barnett *Concepts of Person: Kinship, Caste, and Marriage in India* (1992); Bétteile *Caste, Class and Power – Changing Patterns of Stratification in a Tanjore Village* (1965); Hsu *Clan, Caste, and Club* (1963).

²⁸ Hsu *Clan, Caste, and Club* 94.

²⁹ Ibid.

³⁰ Knight and De Reuk *Caste and Race: Comparative Approaches* 46.

³¹ This implies a system of "differential evaluation, differential power and rewards, and differential association; in short a system of institutionalised inequality." Berreman "Comparative Analysis of Caste" in Knight and De Reuk (Eds.) *Caste and Race: Comparative Approaches* (1968) 45 49. Castes are ranked in terms of their intrinsic worth and rank is expressed and validated through interaction with members of other castes. In other words, personal (and other) relationships are determined by caste.

occupational and other specialists, distorted and inefficient distribution of goods, services and opportunities, and obstacles to planned economic and political change.³²

The castes that constitute the top ranking positions in the social order are the most advantaged in terms of the distribution and control of economic goods.³³ This can, for example, be seen in the separation between ownership and control over land on the one hand and the cultivation of land on the other. Traditionally land ownership and control rested in the hands of the upper castes, such as the Brahmins, whilst the lower castes and untouchables were respectively tenants and labourers.³⁴

Scheduled castes and tribes are regarded as the poorest and most vulnerable sections of Indian society.³⁵ Not only are they culturally seen as outcasts, they also have relatively little economic and political power. It is these groups that are the most likely to be exposed to environmental hazards such as poor water quality, excessive air pollution, degraded land, deforestation and displacements. Environmental injustice in India therefore manifests in the close relationship between poverty, social and cultural status and environmental degradation.

5 3 ATTEMPTS BY THE GOVERNMENT TO ADDRESS ENVIRONMENTAL PROBLEMS

“On the one hand the rich (*world*) look askance at our continuing poverty – on the other they warn us against their worn methods. We do not wish to impoverish the environment any further and yet we cannot for a moment forget the grim poverty of large numbers of people. Are not poverty and need the greatest polluters? For instance,

³² Berreman “Comparative Analysis of Caste” in Knight and De Reuk (Eds.) *Caste and Race: Comparative Approaches* (1968) 45 68-69.

³³ Leach “Caste, Class and Slavery” in Knight and De Reuk (Eds.) *Caste and Race: Comparative Approaches* (1968) 5 6.

³⁴ See for example Bétteile *Caste, Class and Power – Changing Patterns of Stratification in a Tanjore Village* (1965).

³⁵ Within these groups it seems as if women are the worst affected. They lead strenuous lives and have to spend an extraordinary amount of time foraging for fuel, fodder and water. They apparently walk as much as 1400 kms a year to collect firewood. Bétteile *Caste, Class and Power* 19.

unless we are in a position to provide employment and purchasing power for the daily necessities of the tribal people and those who live in or around our jungles, we cannot prevent them from combing the forest for food and livelihood; from poaching and despoiling the vegetation. When they themselves feel deprived, how can we urge the preservation of animals? How can we speak of those who live in villages and in slums about keeping the oceans, the rivers and the air clean when their own lives are contaminated at the source? The environment cannot be improved in conditions of poverty. Nor can poverty be eradicated without the use of science and technology.”³⁶

At the United Nations Conference on the Human Environment in Stockholm in 1972 Prime Minister Indira Gandhi, speaking on behalf of the Indian government, stressed the relationship between the degradation of the environment and human destitution. She concluded that development is the primary means of improving the environment and called for developmental support to developing countries. In the same year, and in anticipation of the conference, the UN General Assembly requested a report from each member country on the state of the environment. India set up a Committee on Human Environment to prepare its reports.³⁷ The Committee attested to a need for greater co-ordination and integration in environmental policies and programmes, and in February 1972, a national Committee on Environmental Planning and Co-ordination (NCEPC) was established in the government Department of Science and Technology.

Every five years the government of India publishes a five-year plan on the intended policies of the government. Since 1952 the government has prioritised national programmes on sanitation, public health, nutrition, water supply and housing. The issues of the environment and development did not receive any significant recognition until 1968 when the following statement was made:

³⁶ Address of the Prime Minister of India Indira Gandhi at the United Nations Conference on the Human Environment at Stockholm on June 14, 1972 as quoted in Rosencranz, Divan & Noble *Environmental Law and Policy in India* 39.

³⁷ Dwivedi & Kishore “Protecting the Environment from Pollution: A Review of India’s Legal and Institutional Mechanisms” (1982) *Asian Survey* Vol.22 894.

“Planning for harmonious development ... is possible only on the basis of comprehensive appraisal of environment issues ... It is necessary therefore to introduce the environment aspects into our planning and development.”³⁸

In successive five-year plans the government has stressed programmes that take into account environmental considerations. In its Seventh Five-year Plan, for example, it noted the negative effects of badly planned or poorly implemented development programmes and recognised that “developmental activities have had a damaging effect on the Indian environment”.³⁹ A number of programmes for enhancing rural health and sanitation, nutrition, drinking water, provision of housing sites and slum improvement have since been announced in the expectation that they would minimise environmental pollution and degradation in the rural areas and reduce poverty levels.⁴⁰

On the 3rd of December 1984 India faced its biggest environmental disaster ever. Forty tons of highly toxic methyl isocyanate (MIC), manufactured and stored in the chemical pesticide plant of the US company Union Carbide, escaped into the atmosphere in Bhopal and killed over 3500 people in the surrounding area. Another 200 000 people were injured. This tragedy, together with the decline in the quality of the environment, has led to a call for stronger environmental policies by the Indian government.⁴¹

After the Bhopal accident, a Department of Environment was created to act as the central organ for environmental policy planning and management. It also had to assume responsibility for environmental co-ordination, promote environmental awareness, prepare environmental policy guidelines for various sectors, conduct the environmental appraisal of development projects, promote environmental research and education, and promote international co-operation.⁴²

³⁸ Ibid.

³⁹ Planning Commission Government of India; *Seventh Five Year Plan: 1985-90* (1985) 385.

⁴⁰ Ibid.

⁴¹ Rosencranz, Divan & Noble *Environmental Law and Policy in India* 46.

⁴² Dwivedi *India's Environmental Policies* 58-59.

The government also attempted to address the problem of water pollution, and created a pollution control programme for the Ganga River and its tributaries. It established the Central Ganga Authority to improve the water quality by creating a series of sewage treatment plants near main urban centres, renovating all the existing sewage pumping and treatment plants, providing waste water sub-pumping stations at the outfall points of open drains not yet connected to the existing sewage system, extending the existing sewage treatment system to cover unsewered areas and constructing electricity powered crematoriums.⁴³

Despite the government's apparent attempts to transform its environmental policies, it does not seem to have been very successful in reducing environmental damage, nor has it succeeded in reducing the impact of environmental damage on vulnerable groups. Instead, the government is accused of remaining the worst culprit, through its unsound environmental practices at central, regional or local level, for which its citizens have challenged it numerous times.

5 4 ENVIRONMENTAL ACTIVISM IN INDIA

“Embrace our trees

Save them from being felled

The property of our hills

Save it from being looted”⁴⁴

Since industrial and commercial demands have destroyed forests, local communities have found themselves unable to sustain their livelihood in what have become deforested areas. Deforestation has also led to an increase in floods, which has caused continuous destruction within forest communities. As a result, women have to walk miles in search of firewood, fodder and patches of land for grazing.⁴⁵

Environmental activism in India was born out of community interests and religion. Dwivedi, for example, argues that the nine main religions in India all

⁴³ Ibid.

⁴⁴ Jain “Standing Up for Trees: Women’s Role in the Chipko Movement” in Sontheimer (Ed.) *Women and Environment: A Reader – Crisis and Development in the Third World* (1991) 163 173.

⁴⁵ Dwivedi *India’s Environmental Policies* 186.

emphasise respect for and unity with nature.⁴⁶ The Bishnois community in the Rajasthan State is a case in point. The members of the community have for instance used their own bodies to protect trees from being logged.⁴⁷ This practice still continues and the community's dedication has become the inspiration of the Chipko⁴⁸ activist movement.

The Chipko Movement started as a spontaneous protest against logging abuses in Uttar Pradesh in the Himalayas.⁴⁹ These resisters practice *satagraha*⁵⁰, i.e. non-violent resistance, which they also achieve by interposing their bodies between trees and the axes of forest contractors. Poor women who, influenced by the Ghandian movement, are prepared to wage a non-violent campaign for land reform and saving the forest, lead them. Each of the women has a tree of her own, which she protects or "stewards" by wrapping her body around it when the bulldozers arrive. This rural movement has accomplished a great deal, from winning bans on tree felling to influencing natural resource policy in India.⁵¹ The Chipko movement may be described as an ecological movement, concerned with the preservation of forests, but their concerns are more complex. They also believe in the maintenance of the traditional ecological balance between forest dwelling people and the environment.

Another example of activism can be found in the vehement opposition to the Indian government's dam construction project. India is the world's third biggest dam

⁴⁶ See Dwivedi *India's Environmental Policies* 170 – 185. He claims that these religions - Islam, Hinduism, Buddhism, Jainism, Sikhism Baha'I, Zoroastrianism, Judaism, and Christianity – all proclaim stewardship for the environment.

⁴⁷ Ibid.

⁴⁸ A Hindi word meaning "hugging" is used to describe this activist movement, because women literally embraced the trees to protect them. Jain "Standing Up for Trees" 164.

⁴⁹ URL <http://usd1.usd.ca/50comm/commdb/list/c07.htm>.

⁵⁰ *Satagraha* literally means persistence and endurance for the truth. It is a word used by Mahatma Gandhi to distinguish the non-violent resistance of the Indians of South Africa from the passive resistance of suffragettes and others. Dwivedi *India's Environmental Policies* 187.

⁵¹ Ibid.

builder with approximately 3600 big dams and another 1000 under construction.⁵² One of these is the Narmada River Project where the government plans to build a number of dams that will reconstruct the Narmada River into a series of step reservoirs. The two biggest are the Sardar Sarovar reservoir in Gujarat and the Narmada Sagar in Madhya Pradesh.⁵³ Not only will the proposed project affect the ecology of the entire river basin, but the Sardar Sarovar dam alone will displace an estimated 200 000 people, 117 000 of whom are tribal people.⁵⁴ Local people have consequently fought this planned project for the past ten years.

The protest against the project has been widespread and popular. Numerous grassroots movements have been formed as a result of it and a coalition of individuals and organisations has been built. Those involved have been using passive resistance methods to block survey and relocation efforts. International political and media pressure that developed from the community-based activism eventually forced the World Bank to withdraw its funding for the project. Since the World Bank is not the only foreign investor in the project, however, work on the dam continues⁵⁵.

The above analysis has shown that there is a substantial difference between environmental movements in the industrialised world and those in India.⁵⁶ Whilst mainstream ecological movements in the developed world would lobby for the protection of the environment because of its intrinsic worth, ecological movements in India are concerned with the survival of people within the environment and their traditional relationship with the environment. It seems as if environmental movements in India have much more in common with activist environmental justice movements in the industrialised world. As explained in Chapter four⁵⁷ environmental

⁵² *Mail & Guardian* June 18 to 24 (1999) 20. Proponents of these projects point to the social and economic development benefits that dams make possible, such as providing electric power, irrigation for agriculture, and water supply to growing towns and cities.

⁵³ *Ibid.*

⁵⁴ The government has offered some groups rehabilitation packages, but the alternate housing is not considered to be adequate. *Ibid.*

⁵⁵ The United Kingdom Overseas Development Administration is another main foreign investor.

⁵⁶ Jain "Standing Up for Trees" 168.

⁵⁷ See para. 4 3 2.

justice movements in the United States focus their concerns on environmental and developmental threats such as neighbourhood disinvestment, housing discrimination and residential segregation, urban mass transportation and pollution. Environmental justice movements in both India and the USA therefore view environmental injustice as a human rights issue. They see environmental issues as broader issues that concern human beings and consequently base their moral claims on the need for equity and, more specifically, social justice.

5 5 THE ENVIRONMENT AND THE CONSTITUTION

“The Indian Constitution is first and foremost a social document. The majority of its provisions are either directly aimed at furthering the guidelines of the social revolution, or attempt to foster this revolution by establishing the conditions necessary for its achievement. Yet despite the permeation of the entire Constitution by the aim of the national renaissance, the core of the commitment to the social revolution lies in Parts III and IV, in the Fundamental Rights and in the Directive Principles of State Policy. These are the conscience of the Constitution”.⁵⁸

5 5 1 Introduction

India is a federal state with government powers divided between the Union or “central” government and the 25 states. Part XI of the Constitution governs the legislative and administrative relations between the Union and the States. The central legislature, Parliament, has the power to legislate for the entire country, whilst state legislative powers are restricted to the respective states.

The Constitution does not make express provision for the federal legislature to enact uniform environmental legislation applicable to all states, and the jurisdiction for national environmental policy is distributed amongst the federal and the state governments. Some legislative powers, such as interstate transportation, shipping and navigation, development and extraction of minerals, atomic energy, and interstate rivers fall exclusively under the control of the central jurisdiction. The state governments have legislative authority over public health and sanitation, agriculture,

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Granville Austin quoted in Mahajan *Constitutional Law of India* (1991) 366.

irrigation and drainage, and ownership, management and the use of natural resources like water and land.⁵⁹ Provision is also made for concurrent legislative powers as regards matters such as population control and family planning, social welfare, the regulation of industries and forestry and the protection of wildlife.⁶⁰

In terms of Article 249 of the Constitution, Parliament has residual power to legislate on subjects not covered by the three categories of powers. Power is also conferred upon Parliament in terms of Article 253⁶¹ to make laws implementing India's international obligations as well as any decision made at an international conference, association or other body. This has provided Parliament with the power to enact laws to protect the environment and safeguard environmental health. It has enacted the Prevention and Control of Pollution Act of 1981 and the Environment Protection Act of 1986 to implement the decisions reached at the United Nations Conference on Human Environment held in Stockholm in 1972.⁶²

The Constitution of India is one of an increasing number of constitutions in the world that is committed to the protection of the environment. This was not part of the original Constitution, which was first proclaimed in 1950, but was introduced by way of the forty-second amendment in 1976.⁶³ The amendment contains the following policy directive that obliges the central government to protect and improve the environment for the good of society: "The state shall endeavour to protect and improve the environment and to safeguard the forests and the wildlife of the country."⁶⁴ In the chapter entitled "Fundamental Duties" a duty is placed on citizens

⁵⁹ Article 246 of the Constitution divides the subject areas of legislation between the Union and the states and the Union powers are contained in List I. The state legislative powers are contained in List II.

⁶⁰ List III of the Constitution.

⁶¹ The provision states: "Notwithstanding anything in the foregoing provisions of this Chapter, Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body."

⁶² Rosencranz, Divan & Noble *Environmental Law and Policy in India* 55.

⁶³ Dwivedi *India's Environmental Policies* 61.

⁶⁴ The Constitution of India, the (Forty-second Amendment) Act 1976, Article 48A.

“to protect and improve the natural environment including forests, lakes, rivers and wildlife, and to have compassion for living creatures.”⁶⁵

5 5 2 The Directive Principles of State Policy

“There were millions of people in the country who were steeped in poverty and destitution and for them, civil and political rights had no meaning. It was realised that to the large majority of people who are living an almost sub-human existence in conditions of abject poverty and for whom life is one long unbroken story of want and destitution, notions of individual freedom and liberty, though representing some of the most cherished values of free society, would sound as empty words bandied about only in drawing rooms of the rich and well to do.”⁶⁶

India’s Constitution, like many other constitutions, contains Fundamental Rights, which act as shields against the abuse of power by the state. Over and above the Fundamental Rights in Part III of the Constitution, provision is made for Directive Principles of State Policy in Part IV. These principles enjoin the state to endeavour to achieve certain socio-economic goals. They have been drafted in ways which emulate other Western documents such as The Declaration of the Rights of Man proclaimed by the French revolutionaries of 1789, the Declaration of Independence by the American colonies against England, the Constitution of the Irish Republic that contains a chapter on “Directive Principles of Social Policy” and the Constitution of the Republic of Spain.⁶⁷ However, India’s unique position as a developing nation and the socio-economic position of the people of India also influenced the drafters. The aim was to draft a constitution that would embody the ideals and aspirations of the people of India and the goals they had set for the attainment of these aspirations, as well as facilitate social transformation.⁶⁸

5 5 2 1 The contents of the Directive Principles of State Policy

⁶⁵ Article 51A(g) of the Constitution.

⁶⁶ Bhagwati J in *Minerva Mills Ltd. v Union of India* AIR 1980 SC 1789 at para. 103.

⁶⁷ Mahajan *Constitutional Law of India* (1991) 365.

⁶⁸ Dube *The Role of the Supreme Court in the Indian Constitution* (1987) 152.

The Directive Principles provide that the state shall secure a social order in which social, economic and political justice shall inform all the institutions of national life.⁶⁹ They state that every citizen shall have the right to a livelihood and that wealth and its source of production shall be distributed to serve the common good.⁷⁰ They also declare that the state shall aim to secure the health and strength of workers⁷¹ and safeguard the right to work, education and public assistance in cases of unemployment, old age, sickness and disablement.⁷² In this regard it shall also strive towards just and humane conditions of work, maternity relief⁷³ and living wages for workers.⁷⁴

The Directive Principles also safeguard the operation of the legal system, promote justice on a basis of equal opportunity⁷⁵ and provide for free and compulsory education for children.⁷⁶ They proclaim the promotion of the educational and economic interests of the weaker sections of the population, in particular the Scheduled castes and Scheduled Tribes, whilst seeking to protect them from social injustice and all forms of exploitation.⁷⁷ They require the state to raise the level of nutrition and standard of living, to improve public health⁷⁸ and to organise agricultural and animal husbandry along modern and scientific lines⁷⁹. They provide that the state shall endeavour to protect and improve the environment and safeguard the forests and wildlife of the country,⁸⁰ and that the state shall protect monuments

⁶⁹ Article 38.

⁷⁰ Article 39.

⁷¹ Ibid.

⁷² Article 41.

⁷³ Article 42.

⁷⁴ Article 43.

⁷⁵ Article 39-A.

⁷⁶ Article 45.

⁷⁷ Article 46.

⁷⁸ Article 47.

⁷⁹ Article 48.

⁸⁰ Article 48-A.

and places or objects of artistic or historic interest.⁸¹ The Directive Principles furthermore provide that the state shall take steps to separate the judiciary from the executive⁸², promote international peace and security and foster respect for international law and comity of nations.⁸³

5 5 2 2 The function of the Directive Principles of State Policy and their relationship with Fundamental Rights

Unlike the Fundamental Rights, the Directive Principles of State Policy were not made justiciable. Article 37 states that the provisions contained in Part IV of the Constitution dealing with Directive Principles of State Policy shall not be enforceable by any court, but that they are nevertheless fundamental in the governance of the country and that it shall be the duty of the State to apply these principles in making law. The effect is that personal and political rights can be enforced against the state, while social and economic rights cannot be enforced.⁸⁴

During the drafting of the Constitution, the function of the Directive Principles of State Policy was described as giving content to the kind of democracy to which India strives, that is, an economic democracy.⁸⁵ This statement does not, however,

⁸¹ Article 49.

⁸² Article 50.

⁸³ Article 51.

⁸⁴ The justiciability of the Directive Principles of State Policy was a contentious issue during the drafting of the Constitution. One of the delegates, Krisnamarachi, referred to it as “a veritable dustbin of sentiment ... sufficiently resilient as to permit any individual of this house to ride his hobby horse into it” quoted in Dube *The Role of the Supreme Court in the Indian Constitution* (1987) 154. Others labelled the directive principles as “pious hopes”, “pious expressions” and “pious superfluities”, and said that they could be equated to “resolutions made on new year’s day which are broken at the end of January”, that they are “vague” and “a drift” and that they are a “cheque on the bank payable when able”. Dube *The Role of the Supreme Court in the Indian Constitution*. 153.

⁸⁵ Dr. Ambedkar stated: “We do not want merely to lay down a mechanism to enable people to come and capture power. The Constitution also wishes to lay down an ideal before those who would be forming the Government. The ideal is economic democracy, whereby so far as I am concerned, I understand to mean ‘one man one vote’... Now having regard to the fact that there are various ways by which economic democracy may be brought about, we have deliberately introduced in the language that we have used in the directive principles

give any indication of the legal function of the Directive Principles, their relationship with the Fundamental Rights and, more specifically, how the courts should deal with irreconcilable conflict between the two. The Indian courts have developed their own view of this relationship over the years starting out from a position in which Fundamental Rights trumped Directive Principles. Currently, however, the courts seem to place increasing importance on the Directive Principles. It has consequently been argued that three distinct periods exist in the jurisprudence of the Indian Supreme Court on Directive Principles:⁸⁶

The first period extends from the adoption of the Constitution in 1949 to the 1960s, during which the Fundamental Rights were seen as more important than the Directive Principles. The second period, in which equal consideration was given to the Fundamental Rights and the Directive Principles, extends from 1965 until 1979. The final period extends from 1979 to the present. During this period considerably more weight has been attached to the Directive Principles than during the two earlier periods.⁸⁷

The Directive Principles were first considered by the Supreme Court in the case of *State of Madras v Campakam Dorairajan*.⁸⁸ In this case the government ordered reserved seats for admission into medical colleges for vulnerable groups, and the petitioner challenged the order on the basis that it violated Article 29(2) of the Constitution. Article 29(2) provides that no citizen may be refused admission to an educational institution on the basis of religion, race, class or language. It was contended on behalf of the state that Article 46, a directive principle that provides that the state shall promote with special care the educational interests of the weaker sections of the population, supported its decision. The court rejected this view and

something which is not fixed or rigid. We have left enough room for people of different ways of thinking with regard to the reaching of the ideal of economic democracy, to strive in their own way, to persuade the electorate that it is the best way of reaching economic democracy, the fullest opportunity to act in the way in which they want to act. Quoted in Dube *The Role of the Supreme Court in the Indian Constitution* 367-8.

⁸⁶ De Vos *Direktiewe Beginsels in die Indiese Grondwet: 'n Wegwyser vir die Opneem van Sosio-ekonomiese regte in 'n Suid-Afrikaanse Grondwet* LLM verhandeling (1994) 67.

⁸⁷ De Vos *Direktiewe Beginsels* 68.

⁸⁸ AIR 1951 S.C. 226.

held that the Directive Principles cannot override the Fundamental Rights in Part III, since the Fundamental Rights are sacrosanct and not liable to be abridged by any legislative or executive act or order except where provided in Part II itself. The court made it clear that the Directive Principles have to conform to and take second place to the Fundamental Rights.

During this first period the Supreme Court developed the doctrine of "harmonious construction". In *M.H. Quareshi v State of Bihar*⁸⁹ the court had to decide whether laws prohibiting the slaughter of cows infringed the right of a person to carry on a business. The court applied the doctrine of harmonious construction and resorted to the values contained in Part IV regarding balancing conflicting claims. According to the court, a harmonious interpretation would entail that the state should implement the Directive Principles, but in a way that would not take away or abridge fundamental rights.⁹⁰ In summary it may be said that the court favoured an approach in which Fundamental Rights could be reconciled with the Directive Principles, but if irreconcilable, Fundamental Rights would trump Directive Principles.

In 1970 the Supreme Court entered a new phase with its decision in *Chandra Bhawan Boarding v State of Mysore*.⁹¹ In this instance the court had to determine whether different rates of minimum wages could be fixed for different industries and different localities without infringing the equality provision in Article 14 of the Constitution. Hedge J suggested that the Fundamental Rights and the Directive Principles were not in conflict with each other, but operated jointly to serve the mandate of the Constitution.

"While rights conferred under Part III are fundamental, the Directives given under Part IV are fundamental in the governance of the county. We see no conflict on the whole between the provisions contained in Part III and Part IV. They are complementary and supplementary to each other... The mandate of the constitution is to build a welfare society in which justice social, economic and political shall inform all institutions of our national life, and aspirations aroused by the

⁸⁹ AIR 1958 S.C. 731.

⁹⁰ Ibid. at 739.

⁹¹ AIR 1970 S.C. 2042.

constitution will be belied if the minimum needs of the lowest of our citizens are not met.”⁹²

In 1971 the Constitution was amended⁹³ by the inclusion of Article 31C which attempted to strengthen the position of the Directive Principles. The amendment had the effect of precluding the courts from questioning the validity of any law that was certified by Parliament to be one in fulfilment of the Directive Principles. In particular, the courts were barred from questioning the validity of an act that purports to give effect to the Directive Principles.⁹⁴

In the groundbreaking decision of *Kesavananda Bharti v Union of India*⁹⁵ the court had to decide what the status of the Fundamental Rights in the Constitution was and whether parliament had the power to amend the Fundamental Rights. The court decided with a seven-six majority that the Fundamental Rights form part of the basic structure of the Constitution, which cannot be amended. With this decision the Supreme Court attempted to strike a balance between the supremacy of the legislature on the one hand, and the supremacy of certain parts of the Constitution on the other.⁹⁶ Thus, although parliament was able to amend the Constitution, the amendment was subject to judicial review and the test was whether the basic structure of the Constitution⁹⁷ was affected. However, the court’s decision was also an attempt to balance the relationship between the Fundamental Rights and the Directive Principles

⁹² Ibid at 2050.

⁹³ Constitution 25th Amendment 1971.

⁹⁴ Article 31C provides: “Notwithstanding anything contained in article 13, no law giving effect to the policy of the states towards securing the principles specified in by clause (b) or clause (c) of article 39 shall be deemed to be void on the ground that it is inconsistent with or takes away or abridges any of the rights conferred by article 14, article 19, or article 31; and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect on such policy.”

⁹⁵ AIR 1973 S.C. 1461.

⁹⁶ *De Vos Direktiewe Beginsels* 93.

⁹⁷ The concept of the "basic structure of the Constitution" has not been defined, but it may relate to those sections of the Constitution that ensure the effectiveness of the Constitution in meeting the aims set out in the Preamble. Ibid.

and to stress the functionality of both in the Constitution. Shelat and Grover J declared:

“Both Parts III and IV... have to be balanced and harmonised. Then alone dignity of the individual can be achieved. It was to give effect to the main objectives in the Preamble that Parts III and IV were enacted. Our Constitution-makers did not contemplate any disharmony between the Fundamental Rights and the Directive Principles. They were meant to supplement one another. It can well be said that the Directive Principles prescribed the goal to be attained and the Fundamental Rights laid down the means by which that goal was to be achieved.”

In June 1975 Indira Gandhi declared a state of emergency, during which Article 31C was amended⁹⁸ to the effect that it authorised the state to make law to give effect to “*all or any* of the principles laid down in Part IV.” Such law could not be declared void on the basis that it was inconsistent with or took away or abridged any of the rights conferred by article 14, article 19 or article 31.⁹⁹ This action strengthened the Directive Principles to the extent that they could trump the Fundamental Rights at all times. It is also in terms of this amendment that the state was mandated to protect and promote the environment and the protection of forests and wildlife.

This 42nd amendment was challenged in *Minerva Mills Ltd. v Union of India*.¹⁰⁰ The court used the basic structure principle to decide which parts of the Constitution may be amended. Articles 14 and 19 form part of the basic structure of the Constitution and to amend them would, according to the court, amount to dismantling the pillars of democracy.¹⁰¹ In coming to this conclusion the court once again had to enquire into the relationship between the Fundamental Rights and the Directive Principles. Chandrachud J confirmed the interdependence of Part III and Part IV and recognised the importance of the Directive Principles. He stated, however, that if the guarantees contained in Part III were disparaged in order to give

⁹⁸ 42nd Amendment.

⁹⁹ Constitution 42nd Amendment 1975.

¹⁰⁰ AIR 1980 S.C. 1789.

¹⁰¹ Ibid.

effect to the Directive Principles, it would destroy the basic structure of the Constitution and thus undermine the Constitution as a whole.¹⁰²

In a dissenting judgement Bhagwati J disagreed that the amendment would amount to the destruction of the basic structure of the Constitution, observing that:

“Directive Principles, ... impose an obligation on the state to take positive action for creating socio-economic conditions in which there will be an egalitarian social order with social and economic justice to all, so that individual liberty will become a cherished value and the dignity of the individual a living reality not only for a few privileged persons but for the entire people.”¹⁰³

He held that Directive Principles occupied a high standing in the constitutional scheme and that it was only within the framework of the socio-economic rights structure that the Directive Principles envisaged that Fundamental Rights could become meaningful and significant for poor and deprived people.

Bhagwati J found himself in the company of the majority of the court when the Supreme Court in the *Asian Construction Workers* case¹⁰⁴ decided that the Directive Principles were not secondary to the Fundamental Rights. The court stated that the state was under a constitutional obligation to see that there was no violation of a fundamental right of a person, particularly when he belonged to the weaker sections of the population and was unable to wage a legal battle against a strong and powerful opponent who exploited him. The central government is therefore bound to ensure observance of various social welfare and labour laws enacted by Parliament in compliance with the Directive Principles. With this decision the court entered into a new era where it was prepared to give content and effect to the Directive Principles of State Policy in order to address the very real conditions of poverty in the country.

In conclusion, although the Indian Constitution states that the Directive Principles of State Policy are not justiciable, it has been recognised by the courts that the Directive Principles play a very important role in urging the state to create social

¹⁰² Ibid.

¹⁰³ Ibid.

¹⁰⁴ AIR 1982 S.C. 1473.

conditions within which Fundamental Rights can be effectively protected and promoted. The position of the Directive Principles can be summarised as follows: First, the principles operate equally and in conjunction with the Fundamental Rights and create the framework for the realisation of the Fundamental Rights. Second, if the Fundamental Rights are limited they can only be limited within the framework of the Directive Principles, i.e. the Directive Principles will determine whether a limitation is constitutionally valid. Third, the Directive Principles further the aim of the Constitution to build a social and economic order that provides equal opportunities for all.

5 5 3 The Fundamental Duties in the Constitution

The fundamental constitutional duties for citizens are embodied in Article 51-A of the Constitution and were added by the 42nd Amendment in 1976. This Article for the first time specifies a code of ten fundamental duties. These are the duty to abide by and respect the Constitution,¹⁰⁵ to cherish the ideals which inspired the struggle for freedom,¹⁰⁶ to uphold the sovereignty, unity and integrity of the country,¹⁰⁷ to defend the country and render national service when called upon,¹⁰⁸ to promote harmony among all the people of India and renounce derogatory practices towards women,¹⁰⁹ to value and preserve the composite culture of the country,¹¹⁰ to protect and improve the natural environment,¹¹¹ to develop scientific temper and humanism,¹¹² to safeguard public property¹¹³ and to strive towards excellence in all spheres of individual and collective activity.¹¹⁴

¹⁰⁵ Article 51-A(a).

¹⁰⁶ Article 51-A(b).

¹⁰⁷ Article 51-A(c).

¹⁰⁸ Article 51-A(d).

¹⁰⁹ Article 51-A(e).

¹¹⁰ Article 51-A(f).

¹¹¹ Article 51-A(g).

¹¹² Article 51-A(h).

¹¹³ Article 51-A(i).

¹¹⁴ Article 51-A(j).

The drafters of the 42nd Amendment inserted these duties so that they may serve as a constant reminder to every citizen that, while the Constitution specifically confers on them certain fundamental rights, it also requires citizens to observe certain basic norms of democratic conduct and democratic behaviour.¹¹⁵ The notion of constitutionally enforced duties, although a frequent phenomenon in constitutions of former socialist states, is a novel one in Western constitutions. One of the main reasons for its exclusion is a problem with justiciability. The Fundamental Duties in the Indian Constitution are recognised as statutory duties and are enforceable by law.¹¹⁶ It is argued, however, that the success of Article 52-A will depend on the manner in which and the people against whom these duties would be enforced.

5 5.4 The Fundamental Rights in the Constitution and the Establishment of a Right to a Wholesome Environment

The right to life and liberty enshrined in Article 21¹¹⁷ of the Indian Constitution has taken a central role in constitutional jurisprudence in this country. During the early years of the history of the Indian Supreme Court it gave a restricted interpretation to Article 21.¹¹⁸ In the 1980s, however, the court entered into a period of bold creativity in the interpretation of the rights enshrined in the Constitution and in particular in the interpretation of Article 21. It reinforced and augmented the Fundamental Rights and more specifically it expanded the boundaries of Article 21, the right to life, to include environmental protection. Article 21 was broadened in two ways. First, it required laws affecting personal liberty to pass the tests of Article 14¹¹⁹

¹¹⁵ Pandey *Constitutional Law of India* (1994) 280.

¹¹⁶ Ibid. at 282.

¹¹⁷ Article 21 provides that “No person shall be deprived of his life or personal liberty except according to procedure established by law.”

¹¹⁸ Bhagwati “Foreword” in *Jaswal Role of the Supreme Court with Regard to the Right to Life and Personal Liberty* (1990) v. He notes that during the earlier years the Supreme Court required that “law” in Article 21 meant only enacted laws and the only requirement was that there must be a procedure laid down by an enacted law and it did not matter what kind of procedure was prescribed by law.

¹¹⁹ Article 14 guarantees the right to equality before the law and protects a person against arbitrary or unreasonable state action.

and Article 19¹²⁰ of the Constitution in order to ensure procedural fairness. Second, the Supreme Court derived several residual rights and liberties from the right to life, amongst others the right to a wholesome environment.

5 5 4 1 The right to life in Article 21

The Supreme Court highlighted the importance of the right to life in the decision of *Francis Coralie Mullin v Union Territory of Delhi*¹²¹ when Bhagwati J declared that the fundamental right to life is the most precious human right and forms the basis of all other rights.¹²² In interpreting the right to life a court is faced with the task of giving meaning to the concept “life”. The choice is between, on the one hand, construing it narrowly so that it pertains to mere animal existence and, on the other hand, providing it with a wider meaning so that it also includes the enjoyment and quality of life. The Indian Supreme Court chose to accept the broader construction of “life”, and in the case of *Francis Coralie* said:

“... The question which arises is whether the right to life is limited only to protection of limb or faculty, or does it go further and embrace something more. We think that the right to life includes the right to live with human dignity and all that goes along with it, namely the bare necessities of life such as adequate nutrition, clothing and shelter over the head and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and co-mingling with fellow human beings.”¹²³

In this decision the court accepted that the right to life also included the right to shelter. After the *Francis Coralie* decision, the Supreme Court applied this wide concept of life in various other decisions.¹²⁴ It was really in the momentous decision

¹²⁰ Article 19 protects a number of fundamental rights such as the right to freedom of expression.

¹²¹ AIR 1981 S.C. 746.

¹²² At para. 5.

¹²³ At para. 7.

¹²⁴ In *People's Union for Democratic Rights v Union of India* AIR 1982 S.C. 1473 it was held that rights and benefits conferred on workers by the Contract Labour Act, such as proper living conditions and other facilities, were clearly meant to ensure basic human dignity to the

of *Olga Tellis v Union of India*¹²⁵ though that the Supreme Court put interpretative vigour into the concept of life. A group of pavement dwellers petitioned the Supreme Court to declare that their forcible eviction from their slum dwellings was unconstitutional, having made the pavement their home and workplace. They argued that they couldn't be evicted from their shelters without being offered alternative accommodation. Their argument was based on the right to life, which includes the right to livelihood. They claimed that since they were deprived of their livelihood when they were evicted from their slum and pavement dwellings, their eviction was tantamount to deprivation of their life and was as such unconstitutional.

Chandrachud J agreed, confirming that the sweep of the right to life is wide and far-reaching:

“The right not to be killed is but one aspect of the right to life. An equally important facet of that right is the right to livelihood because no person can live without the means of living, that is, the means of livelihood. If the right to livelihood is not treated as part of the constitutional right to life, the easiest way of depriving a person of his right to life, would be to deprive him of his means to livelihood to the point of abrogation.”¹²⁶

He specifically used the Directive Principles to interpret the right to life by way of implementing Articles 39(a) and 41 of the Constitution. Article 39(a) provides that the State shall direct its policy towards securing that all citizens equally have the right to an adequate means of livelihood and Article 41 provides that the state shall, within the limits of its economic capacity and development, make effective provision for securing the right to work in cases of unemployment and undeserved want. The court argued that the Directive Principles play a fundamental role in the understanding and interpretation of the Fundamental Rights.

The court made it clear, though, that it cannot force the state to fulfil this right in a positive way, but that the court may intervene if the right has been infringed by

workmen and if they are deprived of these it would be violative of Article 21. See also *Board of Trustees, Port of Bombay v Dillip Kumar* AIR 1983 S.C. 109.

¹²⁵ AIR 1987 LRC 351.

¹²⁶ Ibid. at 368.

the state and where the infringement occurs in a manner that is not just and fair in terms of the law:

“The State may not, by affirmative action, be compellable to provide adequate means of livelihood or work to the citizens. But, any person who is deprived of his right to livelihood, except according to just and fair procedure established by law, can challenge the deprivation as offending the right to life conferred by Article 21.”¹²⁷

In a later judgement the court became even bolder and placed a duty on the state to give effect to an expansive interpretation of the right to life. In the case of *State of Himachal Pradesh & Another v Umed Ram Sharma*¹²⁸ the court upheld an order from a lower court that the State had to complete a planned road, which would have granted access to the inhabitants of a remote village to the outside world. The decision was based on the right to life, which the court argued, includes the right to move freely throughout the territory of India. The court did, however, place certain boundaries on the freedom of the court to intrude into the space of the executive. It stated that intrusion may only happen within the framework of the Directive Principles in conjunction with articles 19 and 21 and where the executive fails or takes too long to act.¹²⁹

5 5 4 2 The right to life and the environment

The Supreme Court has used the right to life in the Constitution in various ways to protect the environment and to promote a healthy environment. The right to a wholesome environment was first considered in *Rural Litigation and Entitlement*

¹²⁷ In light of this the court found that the law authorising the municipality to evict the pavement dwellers is not unreasonable or unjust. Ibid.

¹²⁸ AIR 1986 S.C. 847.

¹²⁹ Some scholars have criticised the breadth of the scope given to Article 21 and have specifically noted that “once the right to life is interpreted as the right to livelihood and the means to it, the rights proliferate alarmingly.” Singh “Right to Life: Legal Activism or Legal Escapism” (1986) 28 *JILI* 249 250. He also notes that the scope of Article 21 may be endangered by the wide meaning that is being given to it. He argues that the scope of the article should be limited to such rights that pertain only to needs and not deserts. At 250-251.

Kendra, Dehradun v State of Uttar Pradesh.¹³⁰ In 1983 representatives of the Rural Litigation and Entitlement Kendra, Dehradun, wrote to the Supreme Court alleging that illegal limestone mining in the Mussoorie-Dehradun region was devastating fragile ecosystems. Miners dug deep into the hills to extract limestone, a practice that led to cave-ins and slumping. As a result of the mining activities, forests were cut down and the hills cleared of all vegetation. The resulting landslides killed villagers and destroyed their homes, agricultural lands and animals. Mining debris also clogged river channels, while during the monsoon season heavy flooding occurred. Also as a result of the deforestation, roads needed to be constructed to remove the limestone, which not only had a profound impact on the ecosystem in the hills where the mining took place, but also created traffic hazards for the local population. The Court treated this letter as a writ petition under Article 32¹³¹ of the Constitution that presupposes the infringement of a fundamental right. Since there was no fundamental right to a healthy environment, the court had to derive the right from an existing fundamental right.

Singh J pointed out that concern for the environment was international and that India should share in such concern. The court noted the importance of sustainable development and said that although natural resources need to be tapped for the purpose of social development, the tapping of resources had to be done with requisite attention and care so that the ecology and environment would not be affected in any serious way.¹³² In this respect, the court emphasised the need for long-term planning to keep the national natural wealth from being exhausted in one generation. The court made several orders during the five-year period of the litigation. Although none of the orders indicated that a specific right had been violated, given that the case was dealt with in terms of Article 32 of the Constitution, it can be argued that such a violation was tacitly assumed. It has also been claimed that although Article 21 was not referred to in this case, the Supreme Court read Article 48-A into Article 21 of the

¹³⁰ AIR 1988 S.C. 2187.

¹³¹ Article 32(1) states: "The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this part is guaranteed".

¹³² Ibid. at para. 19.

Constitution and regarded the right to live in a healthy environment as part of life and personal liberty.¹³³

Singh J, came even closer to actually deriving a right to a wholesome environment from the right to life in the case of *M. C. Metha v Union of India*,¹³⁴ also known as the Ganga Pollution case. In 1985 environmental lawyer M. C. Metha filed a writ under Article 32 of the Constitution, claiming that neither the relevant government agencies, nor industry were taking adequate steps to alleviate the flow of pollution into the Ganga River. The writ requested the court to order government authorities and tanneries along the river to suspend the discharge of effluent into the river until appropriate treatment facilities had been installed. The court eventually ordered the closing of 29 tanneries for failing to provide even minimal treatment of their waste. In doing so the court acknowledged that the closing of the tanneries would have a dire economic effect, especially with regard to the loss of revenue and jobs, but it also stated that life, health and ecology had greater importance to the people.¹³⁵

Environmental pollution has triggered various other similar responses by the Supreme Court.¹³⁶ In these responses, the court not only emphasised the environmental obligations of the state in terms of the Directive Principles of State Policy,¹³⁷ but also the mandate contained in Article 51-A¹³⁸ to the citizens of India.

¹³³ Jaswal *Role of the Supreme Court* 391.

¹³⁴ AIR 1988 S.C. 1037.

¹³⁵ Ibid. at 1048.

¹³⁶ In *M. C. Metha v Union of India* (1992) 3 S.C.C. 256 M. C. Metha once again approached the Supreme Court and complained that stone-crushing activities around Delhi caused excessive environmental pollution. The court ordered the ceasing of mechanical stone-crushing activities in and around Delhi, Faridabad and Ballabgarh, and required allotment of sites in alternative “crushing zones” for the stone-crushers who have been directed to halt their activities.

¹³⁷ Article 48A states: “the State shall endeavour to protect and improve the environment and to safeguard the forests and the wild life of this country.”

¹³⁸ “It shall be the duty of every citizen of India –(g) to protect and improve the natural environment including forests, lakes, rivers and wildlife, and to have compassion for living creatures.”

The Supreme Court observed that these were indications of the constitutional recognition of the importance of the environment for life.¹³⁹ Observations such as this have lead authors to believe that the court treated the right to live in a healthy environment as a fundamental right under Article 21 of the Constitution.¹⁴⁰

Several High Courts explicitly recognised the right to a healthy environment as derived from Article 21 during a period when the Supreme Court seemed hesitant to do so.¹⁴¹ The High Court of Rajasthan established that every citizen has a fundamental right to a healthy environment.¹⁴² This right is derived from Article 21 within the context of Articles 48-A and 51-A respectively. The court argued that Article 51-A places a duty on citizens to ensure that the state meets its legal obligations. The maintenance of health and sanitation facilities falls within the scope of the state duties and the non-fulfilment of these duties amounts to a breach of Article 21. It is up to citizens to obligate the state to fulfil its Article 21 duties.

The Supreme Court finally gave formal recognition to a fundamental environmental right in *Subash Kumar v State of Bihar*.¹⁴³ A petition under Article 32 was filed seeking a writ preventing alleged pollution of the Bokaro river from the sludge discharged from the washeries of a steel company. The court held per Singh J that:

“[the] Right to live (sic) is a fundamental right under Article 21 of the Constitution and it includes the right of enjoyment of pollution-free water and air for full enjoyment of life. If anything endangers or

¹³⁹ See *M. C. Metha v Union of India* (1991) 2 SCC 353 where public interest litigation was conducted against vehicular pollution in India.

¹⁴⁰ See discussion of some of these cases in Jaswal *Role of the Supreme Court* 388 – 395.

¹⁴¹ Judges of the High Court of Rajasthan (*L. K. Koolwal v State of Rajasthan* AIR 1988 RAJ 2), Kerala (*Madhavi v Tilakan* 1988 (2) KER. L. T. 730) and Himachal Pradesh (*Kinkri Devi v State of Himachal Pradesh* AIR 1988 HP 4) observed that environmental degradation violates the fundamental right to life.

¹⁴² *L. K. Koolwal v State of Rajasthan* in which the residents of Jaipur approached the court to grant an order impelling the City of Jaipur to pay attention to the worsening sanitation problems of the city.

¹⁴³ (1991) 1 SCC 598.

impairs that quality of life in derogation of laws, a citizen has the right to have recourse to Article 32 of the Constitution for removing the pollution of water or air which may be detrimental to the quality of life.”¹⁴⁴

This view of the Supreme Court was confirmed in *Virender Gaur v State of Haryana*.¹⁴⁵ The court noted that Article 21 encompasses the protection and the preservation of the environment, ecological balance free from pollution of air and water, sanitation without which life cannot be lived and the impossibility to live with human dignity without a humane and healthy environment.

5 5 4 3 The right to livelihood and the environment

The right to livelihood as a revealed aspect of the right to life¹⁴⁶ may be used to restrict government actions with an environmental impact threatening to dislocate poor people and disrupt their culture and lifestyles. The court implicitly did so in *Baawasi Seva Ashram v State of Uttar Pradesh*.¹⁴⁷ The Supreme Court noted that tribes had been using the forests to collect requirements for their livelihood for generations. The court did not explicitly refer to Article 21 in its order, but argued that it relied on the right to livelihood by implication. The court proceeded to set out detailed safeguards to protect forest dwellers that were being displaced from their tribal land by a proposed thermal power project. It permitted the acquisition of land only after the respondent agreed to provide certain facilities to the ousted forest dwellers. In other cases the court also passed interim orders requiring state agencies to resettle and rehabilitate tribal groups that were being displaced by dams.¹⁴⁸

5 5 4 4 The right to equality and implications for an environmental right

¹⁴⁴ Ibid. at para. 7.

¹⁴⁵ (1995) 2 SCC 577.

¹⁴⁶ *Olga Tellis v Bombay* see ft 125 supra.

¹⁴⁷ AIR 1987 SC 374. Forest dwellers challenged the proposed plans for a thermal project on the basis that it would threaten their livelihood.

¹⁴⁸ Ibid. Citing the cases of *Karajan Jalasay Y.A.S.A.S. Samiti v Sate of Gujarat* AIR 1987 S.C. 532 and *Sewa Santhsa v State of Uttar Pradesh* 1986 (Supp) SCC 578.

Article 14 of the Constitution declares that “ (t)he State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India”. Indian scholars have noted that under Indian law the right to equality is no longer restricted to a negative concept that requires that the state refrains from according special privilege in favour of anyone, or a positive concept that denotes equality of treatment in all circumstances.¹⁴⁹ Rather it is understood in the context of the social conditions of Indian society. They maintain that it is universally accepted that governments have a positive duty towards citizens to promote liberty, equality and dignity through the provision of jobs, medical care, housing, etc.¹⁵⁰

Indian courts have placed arbitrariness at the heart of Article 14 and stated that an action that is arbitrary must necessarily involve a negation of equality. The Supreme Court observed in *Maneka Gandhi v Union of India*¹⁵¹:

“Equality is a dynamic concept with many aspects and dimensions and it cannot be imprisoned within traditional and doctrinaire limits. Article 14 strikes at arbitrariness in state action and ensure fairness and equality of treatment. The principle of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades.”

This was re-emphasised in a later decision in which the court noted:

‘It must ... therefore now be taken to be well settled that what Article 14 strikes at is arbitrariness because an action that is arbitrary, must necessarily involve negation of equality.’¹⁵²

Article 14 has not been explicitly referred to in an environmental case, but it has been noted that the importance of article 14 lies in the fact that it prevents the state from making arbitrary decisions regarding the environment.¹⁵³

¹⁴⁹ Diwan and Diwan *Human Rights and the Law* (1996) 76.

¹⁵⁰ Ibid.

¹⁵¹ AIR 1974 SC 1631.

¹⁵² *R.D. Shetty v International Air Port Authority* AIR 1979 SC 1628.

¹⁵³ Rosencranz, Divan & Noble *Environmental Law and Policy in India* 60.

Article 14 can thus be used to prevent urban development with a negative environmental impact, where permission for such development is based on arbitrary municipal decisions. It may also be invoked to challenge government sanctions for mining and other activities with high environmental impact, where permission is arbitrarily granted without adequate consideration of the environmental impact.¹⁵⁴

5 5 4 5 “The right to know” and implications for an environmental right

The right to information is essential for the effective functioning of a democratic government. The citizens of a state need to know not only what the decisions of the state are, but also what those decisions are based on. It is both an important way of ensuring accountability by a government to the people and fundamental to participatory government. Similarly, the right to have access to information is essential in the protection of the environment and in ensuring a healthy environment to all people. People that may be affected by government decisions regarding the environment need to know what the scope of those decisions is and what the scope of the impact on the environment may be. In India this becomes particularly important in the light of the numbers of people that have been replaced by dam and nuclear projects or that have lost their lives in environmental disasters such as the Bhopal event.

The Constitution does not expressly protect the right to have access to information and it thus has to be deduced from an existing right. The rights that are most appropriate in this regard are Article 19 and Article 21 of the Constitution. Article 19 of the Constitution guarantees several freedoms, including freedom of speech. The citizen's right to know was conceived for the first time in *State of Uttar Pradesh v Raj Narain*¹⁵⁵:

“In a government of responsibility like ours, where all the agents of the public must be responsible for their conduct, there can be but few secrets. The people of this country have a right to know every public act, everything that is done in a public way, by their public functionaries. They are entitled to know the particulars of every public

¹⁵⁴ Ibid. Referring to the decision of *Kinkri Devi v State of Himachal Pradesh* ft 141 supra.

¹⁵⁵ AIR 1975 SC 865.

transaction in all its bearing. The *right to know, which is derived from the concept of freedom of speech*, though not absolute, is a factor which should have one way when secrecy is claimed for transactions, which at any rate, have no repercussion on public security, see *New York Times Co. v United States*, (1971) 29 Law Ed. 822 = 403 U.S. 713. To cover with a veil of secrecy, the common routine business, is not in the interest of the public. Such secrecy can seldom be legitimately desired. It is generally desired for the purposes of parties and politics or personal self-interest or bureaucratic routine. The responsibilities of officials to explain and to justify their acts is the chief safeguard against oppression and corruption.”¹⁵⁶ (emphasis added)

The High Court of Rajasthan recognised that the Article 51-A(g) duty of citizens to protect the environment can only be realised if they have access to information.¹⁵⁷

In *Reliance Petrochemicals Ltd. v Proprietors of Indian Express Newspapers Bombay Ltd.*¹⁵⁸ the right to information was found to be emanating from the right to life. The court emphasised that people need to have a right to know in order to be able to take part in industrial life and in democracy and that the right to know is a basic right under Article 21 of the Constitution to which citizens of a free country aspire.¹⁵⁹ This important recognition strengthens the environmental right as conceived in the Indian Constitution.

In *Virender Gaur v State of Haryana*¹⁶⁰ the court stated that the word “environment” is of a broad spectrum, which brings within its ambit hygienic atmosphere and ecological balance, and that it is the duty of both the state and citizens to maintain a “hygienic environment”. In deriving an environmental right from

¹⁵⁶ Ibid. at 884.

¹⁵⁷ *L. K. Koolwal v State of Rajasthan* AIR 1988 RAJ 2.

¹⁵⁸ AIR 1989 SC 190.

¹⁵⁹ Ibid. at 202.

¹⁶⁰ Op cit fn 145 supra.

Article 21 within the context of Article 48-A and 51-A(g)¹⁶¹, the courts accepted that “environment” is an inclusive concept in which one has to take into account the inter-relationship between nature and human beings. This view is in line with the argument made in Chapter Two of this dissertation that proposed a wide approach to the concepts “environment” and environmentalism. In taking such an approach the Indian court was able to bring environmental protection within the framework of human rights protection. It is the contention of this study that a human rights framework is the most effective framework from which to address unequal impacts of environmental degradation.¹⁶²

5 6 PROCEDURAL REMEDIES

5 6 1 Access and Standing

Article 32 of the Indian Constitution provides for those whose rights have been infringed to approach the courts for a remedy. It is, however, only those who have been directly affected that may approach the court, and no provision is made for wider locus standi to an action as an interested group on behalf of others. The Indian judiciary has recognised that this presented a major obstacle that deprived the poor and disadvantaged from access to justice in order to enforce their rights. The first attempt to change this position came in the decision of *Maharaj Singh v Uttar Pradesh*¹⁶³ when the court found that the plea of “no locus standi” would not prevent an interested group from bringing an action in front of the court.¹⁶⁴ The Indian court finally brought a significant change in the status quo when Bhagwati J in *Gupta v Union of India* found:

“... where a legal wrong or legal injury is caused to a person or to a determinate class of persons by reasons of violation of any constitutional or legal right or any burden imposed in contravention of any constitutional or legal provisions or without authority of law or any such legal wrong or legal injury or legal burden is threatened, and

¹⁶¹ See para. 5 5 4 2 supra.

¹⁶² See Chapter Seven.

¹⁶³ AIR 1976 SC 2602.

¹⁶⁴ Ibid at 2609.

such person is by reason of poverty, helplessness or socially or economically disadvantaged position unable to approach the Court for relief, any member of the public can maintain an action for appropriate direction, order or writ.”¹⁶⁵

The conventional strict approach to *locus standi* in terms of which only a person who has been injured or who has a real interest in the case may approach the court, was thereby relaxed substantially. The court went further and also allowed standing where a public-minded person or organisation wants to act where a general interest is at stake. The court stated:

“If public duties are to be enforced and social collective ‘diffused’ rights and interests are to be protected, we have to utilise the initiative and zeal of public-minded persons and organisations by allowing them to move the court and act for a general or group interest, even though they may not be directly injured in their own rights. In litigation – litigation undertaken for the purpose of redressing public injury, enforcing public duty, protecting social, collective ‘diffused’ rights and interests or vindicating public interest -, any citizen who is acting bona fide and who has sufficient interest has to be accorded standing.”¹⁶⁶

This is particularly important in the realm of environmental protection, since it is those who are affected by environmental degradation that are often the politically and socially marginalised. It will then be up to social action groups and other interested individuals with more power to petition the court.¹⁶⁷

The Indian judiciary has also been willing to relax procedural rules to promote access to the courts. Normally actions alleging that a Fundamental Right has been violated may be brought to court only by way of a formal writ in terms of Article 32 of the Constitution. Courts have, however, accepted letters addressed to the court or a

¹⁶⁵ *S. P. Gupta v Union of India* AIR 1982 S.C. 149 at 188.

¹⁶⁶ *Ibid.* at 192.

¹⁶⁷ Environmental justice lawyer M. C. Metha, for example, has brought numerous petitions before court regarding the pollution of the Ganga river by tanneries and municipalities and air pollution caused by factories and motor vehicles. See for example *MC Metha v Union of India* fn 136 above and *MC Metha v Union of India*, fn 139 supra.

judge and have gone as far as converting articles or letters published in a newspaper into a writ.¹⁶⁸ In the *Dehradun Quarrying* case,¹⁶⁹ as already mentioned, the Supreme Court directed a letter from the Rural Litigation and Entitlement Kendra, Dehradun, to be treated as a writ petition under Article 32 of the Constitution.

The court has justified these far reaching moves by relying on the silence of the Constitution in prescribing any particular form of proceedings for the enforcement of fundamental rights.¹⁷⁰ The court also alluded to its own role in opening access to justice to the disadvantaged by stating:

“We have therefore to abandon the *laissez faire* approach in the judicial process ... and forge new tools, devise new methods and adopt new strategies for the purpose of making fundamental rights meaningful for the large masses of people.”¹⁷¹

Abraham¹⁷² maintains that the above cases are evidence of the willingness of the judiciary to meet the social needs of India. Opening up access and standing has furthermore made environmental litigation much easier and has led to numerous successes for those who may normally not have been able to approach the court.

5 6 2 Procedural and Remedial Flexibility and Judicial Participation

The Indian judiciary has changed its traditional role in public interest cases from that of an adversarial institution that concludes proceedings by granting an order, to an institution that involves itself in the ongoing supervision of a matter.

There has been a deliberate move by the courts to abandon its adversarial role in environmental and other public interest litigation. For example, parties and official agencies may be joined or even substituted as the case unfolds and the court may appoint commissioners to gather facts and data or to provide expert opinion. The court may go so far as to take judicial notice of facts, thereby relieving the evidentiary

¹⁶⁸ Cassels “Judicial Activism and Public Interest Litigation in India: Attempting the Impossible?” (1989) *The American Journal of Comparative Law* Vol. 37 495 499.

¹⁶⁹ Op cit fn 130 supra.

¹⁷⁰ *Bandhua Mukti Morcha v Union of India* AIR 1984 S.C. 802.

¹⁷¹ Ibid. at 815.

¹⁷² Abraham *Environmental Jurisprudence in India* (1997) 31.

burden of the complainant.¹⁷³ The court will, for example, be prepared to take judicial notice of the health effects of pollution and the scope of the damage caused by pollution.

The courts have also devised innovative remedies, especially in the area of environmental litigation. The Supreme Court has found injunctive relief, traditionally sought to protect the interests of the parties until a final decision is reached, to be inadequate and inappropriate in terms of addressing public interests grievances, especially where the human rights interests of poor people are affected.¹⁷⁴ In *M. C. Metha v Union of India*¹⁷⁵, also known as the *Shiram Fertilizer Gas Leak* case, the court ordered immediate interim relief, without first deciding whether it had jurisdiction under Article 32 to order relief against a private corporation. The court ordered that the polluting fertiliser plant be closed, set up a victim compensation scheme and specified in considerable detail the manner in which the corporation had to conduct its operations in future.

These kinds of affirmative and forward looking remedies often require substantial administrative involvement by the courts. In the *Dehradun Quarrying* case¹⁷⁶ the court set up a committee to supervise the running of the three limestone mines that had been allowed to continue operations and to monitor deforestation in the area. In reality this could mean that the court would remain involved in the case years after it had made an order. Yet, the Indian Supreme Court has found this to be the only effective way of ensuring active enforcement of judicial decisions in a country where bureaucratic apathy often slows down social transformation.

5 7 JUDICIAL ACTIVISM

The Constitution of India declares a commitment to “justice, social, economic and political liberty of thought, expression, belief, faith and worship; equality of status and opportunity; and to promote among them all fraternity; assuring the dignity

¹⁷³ Rosencranz, Divan & Noble *Environmental Law and Policy in India* 119-126.

¹⁷⁴ Ibid.

¹⁷⁵ AIR 1987 SC 965.

¹⁷⁶ Op cit fn 130 supra.

of the individual and the unity and integrity of the nation.”¹⁷⁷ Poverty and social and economic transformation remain the biggest challenge for India. For many of its citizens the lack of transformation creates an obstacle to access to justice.

The Constitution seems to contain powerful language aimed at restructuring the society along more egalitarian lines. The government, on the one hand, must give effect to that language in order for it to fulfil the promises made. The judiciary, on the other hand, stands as a watchdog over the government to ensure the realisation of the ideal of equality. The novel way in which the courts have construed fundamental rights in the Constitution to give effect to the Directive Principles of State Policy indicates that the judiciary in India fully complies with this obligation.

Moreover, the judiciary has gone beyond this duty and showed a dedication to social justice and transformation, and has brought law into the service of the poor and the marginalised. Through Public Interest Litigation, or Social Action Litigation as it is called in India, the courts have actively sought to rebalance the distribution of resources and to provide access to justice for the disadvantaged. In fact, the public interest movement in India has almost entirely been led by the judiciary.¹⁷⁸

Judicial activism has also added much value to the concept of environmental justice in India. The Supreme Court as well as the High Courts in India has held that the right to live in a healthy environment is a fundamental right under Article 21 of the Constitution. Through judicial activism the court has therefore carved out the right to a healthy environment and made it possible for people to access the court to claim and enforce it. Judges have shown a concern not only for the environment, but also for those who are dependent on it and who are most vulnerable when the environment is degraded.

In developing its environmental jurisprudence the Indian judiciary often had to deal with the conflict between development and environmental protection. In several

¹⁷⁷ Preamble of the Constitution of India.

¹⁷⁸ Bhagwati “Judicial Activism and Public Interest Litigation” 1985 *Columbia Journal of Transnational Law* Vol. 23 561.

cases¹⁷⁹ the court has noted that enforcing an “environmental right” may cause short-term economic loss. It noted, however, that the long-term gains of protecting the environment and human health outweigh these short-term negative outcomes. In the *Ganges Case*¹⁸⁰, for example, it held that whilst closing down tanneries may bring unemployment and loss of revenue, qualities such as life, health and ecology have greater importance to the people. In the *Stone Crushers Case*¹⁸¹ where the court closed down several stone crushing units in Delhi, it similarly stated that

“... [w]e are conscious that environmental changes are the inevitable consequences of industrial development in our country, but at the same time the quality of the environment cannot be permitted to be damaged by polluting the air, water and land to such an extent that it becomes a health hazard for the residents of the area.”

Whilst acknowledging the demands of development, the Indian judiciary has stressed the need for a balance. In this regard it has noted:

“Industrial development is necessary for the economic growth of the country. If, however, industrial growth is sought to be achieved by haphazard and reckless working of the mines, resulting in loss of life, property and basic amenities like the supply of water, creating thereby an ecological imbalance, there may ultimately be no real economic growth and no real prosperity. It is necessary to strike a proper balance.”¹⁸²

The Indian judiciary has also not shown any unwillingness in issuing directions to the state to uphold environmental justice. In general the court’s approach has been to issue detailed directions to the offender on how to appropriately

¹⁷⁹ See for example *Rural Litigation and Entitlement Kendra, Dehradun v State of Uttar Pradesh* AIR 1988 S.C. 2187; *M C Mehta v Union of India* (1992) 3 SCC 256; and *M C Mehta v Union of India* (1987) 4 SCC 463.

¹⁸⁰ (1987) 4 SCC 463.

¹⁸¹ (1992) 3 SCC 256.

¹⁸² *Rural Litigation and Entitlement Kendra, Dehradun v State of Uttar Pradesh* AIR 1988 S.C. 2187.

conduct its operations in the future to avoid environmental damage.¹⁸³ The Supreme Court has also directed the state to make “environment” a compulsory subject in schools, introduce it as a subject in universities and to grant licenses to cinemas on condition that they screen environmental programmes free of charge.¹⁸⁴

The nature of these far-reaching directives resulted in the courts’ continuous involvement in these cases long after judgements were given.¹⁸⁵ In the previously mentioned case of *Rural Litigation and Entitlement Kendra, Dehradun*¹⁸⁶, for example, the court set up a committee to monitor reforestation measures and to oversee the running of some of the limestone mines that were allowed to continue operations. The court also created a “rehabilitation” committee to ensure that mine owners whose quarries were closed, were given alternative sites to continue mining.

Judicial activism is, however, criticised.¹⁸⁷ The main thread of the criticism is that the doctrine of separation of powers demands that the judiciary does not become

¹⁸³ See for example *M C Metha v Union of India* AIR 1987 Supreme Court 965.

¹⁸⁴ *Environmental Awareness Case* (1992) 1 SCC 358.

¹⁸⁵ Du Bois “‘Well-being’ and the ‘Common Man’: A Critical Look at Public Interest Environmental Law in India and South Africa” in Robinson & Dunkley (Eds.) *Public Interest Perspectives in Environmental Law* (1995) 136 149.

¹⁸⁶ See fn 130 supra.

¹⁸⁷ “On the other side the attempts of the judge and the lawyer are watched with sceptical concern by those who see interference by the courts in public interest litigation as a series of quixotic forays in a world of unyielding and harsh reality, whose success in the face of opposition bolstered by the inertia and apathy of centuries is bound to be limited in impact and brief in duration. They see judicial endeavour frustrated by the immobility of public concern and a traditional resistance to change, and believe that the temporary successes gained are doomed to waste away as a mere ripple in the vastness of a giant slow-moving society. Even the optimistic sense danger to the credibility and legitimacy of the existing judicial system, a feeling contributed no doubt by the apprehension that the region into which the judiciary has ventured appears barren, uncharted and unpredictable, with few guiding posts and direction finding principles, and they fear that a traditionally proven legal structure may yield to the anarchy of purely emotional impulse. To the mind trained in the certainty of the law, of defined principles, of binding precedent, and the common law doctrine of stare decisis, the future is fraught with confusion and disorder in the legal world and severe strains in the constitutional system. At the lowest, there is an uneasy doubt about where we are going.” Pathak J in *Bandhua Mukti Morcha v Union of India* AIR 1984 SC 802.

a lawmaker and that it does not involve itself in the administration of the affairs of the country.¹⁸⁸ The Indian judiciary, however, has chosen to go beyond the traditional and Western notions of democracy. In a country where large sections of the population are uneducated, poor and socially and politically disempowered, a tradition-bound judiciary will only maintain the status quo. The court realised that the law needs to respond to the social needs of poor people. It also recognised that if people cannot defend their right to life due to poverty then new remedies must be devised so that the courts do not remain beyond their reach. Moreover, as noted in Chapter One¹⁸⁹, strict separation of powers is not necessarily the rule in modern democracies. This is in line with the more recent development of second and third generation rights that require a review of the interchange between the different organs of state. A more activist judiciary coincides with a modern approach to ensuring accountable and responsible government.

In summary it can be said that environmental justice has benefited from judicial activism in three ways: (i) the creative interpretation of the Fundamental Rights and their relationship to the Directive Principles of State Policy and the Fundamental Duties as discussed above; (ii) the relaxation of rules of access and standing; and (iii) remedial flexibility and judicial participation and supervision of court orders. Whilst the first characteristic has led to the creation of a right to a healthy environment, the latter two characteristics of judicial activism have made it procedurally more convenient to bring environmental actions to court.

5 8 CONCLUSION

The concept of environmental justice is not expressly used in Indian literature or even by Indian activists. Yet, when the relationship between the environment and poverty is analysed, it is clear that the American-derived concept of environmental justice can be applied. As noted¹⁹⁰, there is a very clear relationship between environmental degradation and its skewed impacts on those groups in Indian society that are socially and economically marginalised and disadvantaged. The Indian Constitution has, however, proven to be a powerful instrument to bring about

¹⁸⁸ Du Bois F “‘Well-being’ and the ‘Common Man’” 150.

¹⁸⁹ Para. 1 2.

¹⁹⁰ See in general para. 5 2.

environmental justice to marginalised groups. It is in this respect that South Africa may learn from the Indian experience:

- ❑ It has been understood in India that traditional conceptions of justice, democracy and even environment may be inappropriate in a developing country where the majority of people are poor and do not have access to justice.
- ❑ In this regard the promotion and fulfilment of social and economic rights play a fundamental role in creating social conditions within which civil and political rights can be effectively protected and promoted. The Indian judiciary has sought to achieve this primarily through a generous and an activist reading of the Indian Constitution and specifically the Directive Principles.
- ❑ In addition, the Indian courts have recognised the connection between socio-economic disadvantage and environmental degradation. In articulating the right to a healthy environment, they have recognised that environmental degradation may impact disproportionately on poor people. The judiciary has therefore created avenues for marginalised groups to gain access to the courts and has carved out remedies to address their concerns.
- ❑ In India there has been a shift away from individualism to community orientation. The courts have acknowledged that people are being discriminated against within the context of their group and the courts have consequently interpreted the Constitution in such a way that it promotes the rights of disempowered groups.
- ❑ In addition it has been the position of Indian courts that the judicial process should be available for the benefit of those in society that are poor and oppressed. Indian courts have therefore adopted unconventional methods of procedure to ensure access to justice.
- ❑ Since the Indian courts believe that the traditional role of the court as apolitical is not in line with modern demands, judicial review has taken on an explicitly politically assigned role. The court's role in an ongoing political process is therefore sanctioned even beyond the duration of the litigation itself.

- South Africa could learn from India's unique environmental jurisprudence that has achieved the goal of environmental justice mainly through placing environmental concerns within the framework of the Indian Constitution and through the adoption of an activist approach by the judiciary.

CHAPTER SIX

THE HISTORY OF ENVIRONMENTAL INJUSTICE IN SOUTH AFRICA

“It might appear irreverent to speak of the Maluti mountains and the rolling bushveld when blood is being spilt in our roadways. It would seem inappropriate to lament chimney-smoke pollution when the air is thick with teargas. People who have washing machines have no right to condemn others who dirty streams with their laundry; those who summon up energy with the click of a switch should hesitate before denouncing persons who denude forests in search of firewood. It is undeniably untasteful to spend huge sums on saving the white rhino when millions of black children are starving”.¹

6 1 INTRODUCTION

South Africa is known for its beautiful landscapes, its abundance of wildlife, its bountiful biodiversity and its rich marine life. The reality for millions of South Africans is, however, far removed from this idyllic picture. While most white people associate the environment with conservation, most black people associate it with the denial of access to natural resources, forced removals from land proclaimed as parks and exclusion from recreation opportunities reserved for a privileged minority.

This reality reflects South Africa’s status as both a developed and a developing country. It is a resource rich country with a highly developed economy. It is also a country where the majority of the population does not have access to running water, sanitation or clean energy sources. They are subjected to high levels of pollution and exposed to toxic waste. Blue-collar African workers work in unsafe environments and carry the risk of exposure to harmful environmental practices. This is at odds with the notion of a safe and healthy environment for all South Africans.

¹ Sachs *Protecting Human Rights in a New South Africa* (1990) 139

As was argued in Chapter Two², the concept “environment” is broadly understood for the purposes of this study. The emphasis is on the interconnectedness of relationships that define the environment and the recognition that humans are part of those relationships. The definition of environment used here therefore acknowledges that humans have the ability to change and shape the environment in a way that takes into account considerations of equity in a manner that does not undermine the future viability of the environment. This leads to the belief that for equitable and sustainable development to occur, economic, social, political and environmental development needs to be integrated. In this light South Africa cannot be seen to have achieved environmental justice, as will be explained below.

The policy of apartheid played a significant role in the inequitable distribution of resources and the lack of provision of basic services. The law failed to address these inequities. This chapter therefore seeks to do three things: First, it explores the historic manifestations of environmental injustice in South Africa. Second, the chapter indicates how measures that would have enhanced environmental justice all have failed to do so and explains why these measures have been inadequate. Third, it is argued that given this history, it is necessary to guarantee the right to a healthy environment. To this end this Chapter anticipates the possibility that the Constitution might serve to remedy present deficiencies.

6 2 A HISTORY OF EXCLUSION, DISPOSSESSION AND RESETTLEMENT

“If conservation means losing water rights, losing grazing and arable land and being dumped in a resettlement area without even the most rudimentary infrastructure and services, as was the case when the Tembe Elephant Park (near Kosi Bay) was declared in 1983, this can only promote a vigorous anti-conservation ideology among the rural communities of South Africa”.³

² See para. 2 6.

³ Quote from a rural fieldworker in *The Weekly Mail* 6 October 1989.

In the 1996 census it was estimated that South Africa had a population of approximately 40.6 million people.⁴ The majority (about 70%) is black. Yet, apartheid policies have denied the majority of South Africans access to conservation areas and wildlife reserves. It also relegated black people to the most remote and inaccessible beaches on the coast. Forced removals have accompanied the establishment of game reserves and nature reserves in Africa since the advent of the colonial era. These practices lived on during apartheid, when many South Africans were removed without prior consultation, despite the fact that they were the most visibly adversely affected by conservation policies.⁵ Tribal groups lost ancestral land and sometimes also livestock in the process of relocation. They were relocated to areas that were less fertile and had limited water supplies. People were often not compensated or compensation was given to tribal authorities that failed to pass the benefits on to them.⁶ In addition to being forcibly removed from “conservation areas”, indigenous groups were refused access to the areas they had vacated and were also denied the right to utilise the resources in these conservation areas.⁷ The result of these inequities was that the concept of conservation was not supported and at times even opposed by black South Africans.

South Africa is rich in mineral resources. The South African economy was in fact built on natural resources, with mining and agriculture being the mainstays of the Gross Domestic Product (GDP)⁸. Very few black people have, however, benefited directly from the mineral resources of the country, while agricultural land was in the possession mainly of white people. Access to marine resources has similarly been

⁴ Facts on South Africa as provided in the *State of the Environment Report* issued by the Department of Environmental Affairs and Tourism on 26 October 1999. (URL: <http://www.ngo.grida.no>).

⁵ The Association for Rural Advancement “Animals versus People: The Tembe Elephant Park” in Cock and Koch (Eds.) *Going Green People, Politics and the Environment in South Africa* (1991) 223 225.

⁶ Ibid.

⁷ Ibid.

⁸ *State of the Environment Report* issued by the Department of Environmental Affairs and Tourism on 26 October 1999. (URL: <http://www.ngo.grida.no>.)

withheld from black people. Quotas for the exploitation of marine resources have, for example, been allocated to industries to the detriment of local subsistence fishing communities.⁹

Another apartheid policy that had an impact on both people and the environment was the creation of so called “homelands” and “independent states” and the forced removal of black people to these areas. The “homelands” were for the most part not economically viable and did not have the capacity to support all the people. This resulted in overgrazing and over-cultivation, which eventually led to severe soil erosion. In 1980, for example, the Ciskei Commission reported that 46 percent of the land in that “homeland” was moderately or severely eroded and 39 percent of the veld overgrazed, while in the drier “homelands” like Bophuthatswana and parts of Lebowa, overgrazing ruined grasslands and led to severe bush encroachment.¹⁰ The four causes of soil erosion in the “homelands”, namely poor land, politically enforced overcrowding, labour shortage and poverty, were all linked to apartheid.¹¹ The unequal access to land was therefore also a direct cause of environmental degradation.

What has been termed the “geography of apartheid”¹² has a legacy in patterns of migration. In many rural areas towns were developed in an unplanned and unmanaged fashion. Natural vegetation was cleared, water sources were contaminated or difficult to access and human waste and garbage accumulated.¹³ Formal black urban townships, on the other hand, were removed to the outer edges of the cities where they received only partial services and suffered immense overcrowding. Since the official policy was aimed at relegating black people to certain areas of the country, the government also

⁹ Kidd “The Pursuit of Environmental Justice in South Africa” (1999) *Acta Juridica* 152.

¹⁰ Cooper “From Soil Erosion to Sustainability – Land Use in South Africa” in Cock and Koch (Eds.) *Going Green People, Politics and the Environment in South Africa* (1991) 176 177.

¹¹ Ibid. Quoting Alan Durning an analyst at the World Watch Institute based in Washington.

¹² Butler & Hallows *Environment and Poverty: Background Briefing Paper* (researched for EJNF) (1998) 6.

¹³ Ibid.

failed to provide a basic infrastructure and housing for low-income people in cities, which they considered “white” areas.¹⁴

Despite the existence of influx control and pass laws until 1986, people were not deterred from moving from “homelands” and rural areas into the cities. The urbanisation process is still ongoing and much of the growth in informal settlements since the early 1990s occurred as a result of the lack of economic and employment opportunities in rural areas.¹⁵ The overcrowding of township areas placed immense pressure on the already inadequate housing and service infrastructure. This resulted in enormous health problems and compromised the long-term integrity of the environment.¹⁶ Many of the informal settlements are on land exposed to environmental risks such as flooding and mudslides.¹⁷ Lack of sanitation and waste removal remains a major source of pollution, particularly water pollution, and is associated with diseases such as cholera, hepatitis, bilharzia, malaria and a range of eye and skin infections.¹⁸

Reliance on firewood in the proximity of unserviced towns has further depleted forests and other tree cover, which has had a particularly detrimental effect on women who cover long distances to gather and carry massive loads of firewood. The burning of solid and liquid fuels also creates unbearable levels of pollution. Indoor levels of carbon monoxide have been measured at between 10 and 28 times the acceptable limits, and in Gauteng townships, outdoor pollution levels are amongst the highest in the world.¹⁹ It has been noted that “acute respiratory infections are a leading cause of death

¹⁴ Lawson “The Ghetto and the Greenbelt: The Environmental Crisis in the Urban Areas” in Cock and Koch (Eds.) *Going Green: People, Politics and the Environment in South Africa* (1991) 46 47.

¹⁵ Butler & Hallows *Environment and Poverty* 6.

¹⁶ Ibid.

¹⁷ Butler & Hallows *Environment and Poverty* 6.

¹⁸ Ibid.

¹⁹ Ibid.

in South African children, killing one hundred times more children than in Western Europe".²⁰

Urban planners located black people, who migrated to the cities, in the vicinity of mines, industries and toxic wastes. The underlying rationale for this was to position the workforce as close as possible to their work areas.²¹ The result was, however, that black communities were exposed to excessive levels of pollution stemming from the industries. Kidd cites the example of the community of Durban South on the outskirts of Durban on the East Coast of the country,²² which was located near huge oil and petroleum refineries, a massive paper mill, a chromium processing plant, an airport and a multitude of chemical industries. A high-density residential area has since developed there. Several houses border directly on the factories, while some families live only 20 metres from the oil refineries. The industries in the vicinity have completely disregarded emission standards over the years, with the result that the community has had to endure high levels of sulphur dioxide, nitrous oxide and other volatile organic compounds.

In addition to the direct effects of apartheid, workers in industry are regularly exposed to unsafe practices in their working environment. This is compounded by the fact that environmental, health and safety regulations are lax and seldom enforced.²³ Departmental inspectorates are also under-resourced and restricted by departmental inefficiency. In addition, they are disinclined to challenge the management of perpetrating corporations.²⁴ Many corporations have taken advantage of this situation, often with disastrous results as shown by events that occurred in the early 1990s, in which Thor Chemicals, a British-based company with a number of wholly owned subsidiaries in, amongst others, the USA, Germany and South Africa, was involved.

²⁰ Ibid.

²¹ Department of Environmental Affairs and Tourism (DEAT) 1996 *White paper on Environmental Management Policy* 68.

²² Kidd *The Pursuit of Environmental Justice in South Africa* 3.

²³ Butler & Hallows *Environment and Poverty* 14.

²⁴ Ibid.

The company, which imported mercury wastes into South Africa, established a processing plant at Cato Ridge, KwaZulu Natal, where the mercury was processed. Although Thor Chemicals ceased its operation in the United Kingdom in 1987 after it was found that its Margate plant had airborne levels of mercury that was 20 times higher than the acceptable limit,²⁵ the company was able to continue its mercury operations in South Africa on account of inefficient regulation. In 1991 the Industrial Health Unit conducted tests at Thor Chemicals that indicated that 87% of the workers had mercury levels that were above the safe limit of 50 parts per billion and that the average level was 200 parts per billion.²⁶ In 1992 three workers of Thor Chemicals were hospitalised; two lapsed into a coma, one of them dying in 1993.²⁷ The government appointed a commission of inquiry into Thor Chemicals in 1994. The commission reported in 1997 that, since Thor was allowed to import and stockpile more than 3000 tons of toxic waste, blame should be placed on both the company and the previous government.²⁸ It also found that there was a total absence of co-ordination between the responsible government departments, which the commission described as “an inexplicable inefficiency and unexplained omission.”²⁹ The incident at the Thor chemical plant proves the inextricable connection between unsafe conditions of workers, their health and the environment.

The environmental exposure of poorer communities to toxic waste and pollution stems from the proximity of their housing to these polluting mines and industries. In the Thor disaster, for example, surrounding communities were adversely affected. In 1988, the levels of mercury discovered in the Umgeni River, 15 kilometres downstream from Thor, were 1000 times higher than the drinking water standard set by the World Health

²⁵ Butler “Lessons from Thor Chemicals – the Link between Health, Safety and Environmental Protection” in Bethlehem & Goldblatt (Eds.) *The Bottom Line: Industry and the Environment in South Africa* (1997) 194 195.

²⁶ Ibid. at 200.

²⁷ Ibid. at 201.

²⁸ Ibid. at 205.

²⁹ Ibid.

Organisation.³⁰ It was clear that mercury had leaked from Thor's processing plant into the river, a source of drinking water for the nearby community. Workers at these mines and industries are therefore frequently doubly exposed to environmental risks – at their workplace and in their communities.

Other unsafe practices and the lack of regulation and enforcement have been found in the mining industry. Although mining has declined in the last few years, it remains a major force in the South African economy. It has been argued that mining achieved its dominance in the South African economy through cheap energy, cheap water, cheap labour and disregard for the environment.³¹ Mining has been one of the biggest polluters in industry and this has had detrimental effects on the environment, on workers and on communities. South Africa, for example, once had some of the richest deposits of blue and white asbestos, the most dangerous of the asbestos varieties. When the dangers of asbestos were realised, countries such as the United States and Britain started to regulate the industry. Although asbestos was mined in South Africa by mainly British-owned firms, the industry was not regulated here. Since South Africa did not have sufficient safety standards at the time, many mining companies were also relocated from Britain to this country. These companies ran appallingly unsafe operations, not bothering to give any protection to their workers against the dangerous asbestos dust.³² The result is that South Africa now has the highest rate in the world of mesothelioma, an almost always-fatal cancer caused exclusively by asbestos.³³

³⁰ Ibid.

³¹ Butler & Hallows *Environment and Poverty* 15.

³² Felix, Leger & Ehrlich, "Three Minerals, Three Epidemics - Asbestos Mining in South Africa" in Mehlman and Upton (Eds) *The Identification and Control of Environmental and Occupational Diseases: Colon, Asbestos and Cancers* 1994 *Advances in Modern Environmental Technology* Vol. 22 266.

³³ In the town of Prieska in the Northern Cape, an estimated 12 people die every month of asbestos-related diseases. The victims of these diseases worked for Cape Asbestos, a British based multinational corporation that not only failed to implement the required safety standards, but also dumped asbestos at a mill in the centre of the town. For years the mines were not rehabilitated and asbestos fibres continued to be dispersed into the environment. See Feris "The Asbestos Crisis –

In addition to the above, the apartheid government's agricultural policies and programmes were designed to benefit white farmers. The emphasis on high input commercial agriculture³⁴ led to policies that were not only environmentally damaging and unsustainable, but also inequitable. It also led to mechanisation, which resulted in the loss of many jobs. Another environmental problem that occurred on farms where pesticides were used is that workers were frequently not trained in their use or supplied with the correct safety equipment. Pesticides do not only pose a risk to the natural environment, therefore, but may also be harmful and even fatal to those administering them.³⁵

The above examples illustrate the link between race and environmental degradation in South Africa. Discrimination has come to bear through the denial of access to natural resources and inequitable exposure to environmental degradation. The examples furthermore indicate that in South Africa environmental destruction is connected to inequalities in socio-economic status, a situation that endures. This suggests social patterns of discrimination and systemic disadvantage. Therefore, the claim of this study that environmental justice needs to be understood as both an environmental and an equality issue must be emphasised here.

6.3 DEFICIENCIES OF THE LAW IN ADDRESSING ENVIRONMENTAL PROBLEMS

To date the law has not played a significant part in preventing environmental degradation and the detrimental effect it has had on especially vulnerable groups in this country. This may be ascribed to two things: inadequate environmental protection legislation and the ineffective use and enforcement of existing legislation.

The Need for Strict Liability for Environmental Damage" (1999) *Acta Juridica* 291. Prieska residents filed suit against Cape Asbestos in an UK court in 1997 and on July 20 2000, Britain's House of Lords upheld an appeal by the Prieska residents against a lower court's refusal to hear their case in Britain. URL <http://www.planetark.org/dailynewsstory.cfm?newsid=7682>

³⁴ Butler & Hallows *Environment and Poverty* 21.

³⁵ Ibid. at 14.

Before the adoption of the Interim Constitution in 1994, environmental law could be divided into three categories: common law, statutory law and administrative law. Each of these areas is briefly reviewed below to determine the extent to which it failed to address environmental degradation.

6 3 1 The Common Law

The two main common-law remedies suitable for use in an environmental context are interdicts and actions for damages. Interdicts may be used to prevent a certain course of action from continuing. In this regard, nuisance law has proved to be the most effective for obtaining an interdict to prevent further noise, smoke or water pollution. The courts have essentially established the rule that, in so far as a landowner's conduct on

his or her property infringes the right of others, it may be limited.³⁶ An action for damages, on the other hand, may be used to obtain compensation for harm to health or property caused by a specific course of action. The Aquilian action, for example, is a common law action for damages and may appropriately be relied on when seeking damages for the adverse effects of pollution or toxic waste.

It is, however, not easy to use common-law remedies to obtain environmental relief. A plaintiff normally has to prove a wrongful act or omission, fault (intention or negligence), causation and, in the case of an action for damages, also patrimonial loss.³⁷ These elements, especially fault and causation, can be extremely difficult to prove when dealing with an environmental case. The plaintiff seldom has sufficient access to

³⁶ In *Regal v African Superslate (Pty) Ltd* 1963 (1) SA 102 (A) the appellant alleged that the previous owner of respondent's land, which bordered on his, in quarrying for slate, had left slate waste where the flood waters of the Elands River could reach it, that it had been washed to the bed of the river on appellant's ground, and that the respondent had failed to take the necessary steps to deflect the further carrying of slate by flood water from his land to the appellant's land. The appellant furthermore alleged that he had the right to an order proscribing the respondent from continuing or renewing the nuisance. He asked that the respondent be prevented by way of interdict from allowing the slate waste to be washed by the river water across the boundary between the two farms towards appellant's land. The court held that if it was reasonably practicable to avert the still threatening damage by a wall on respondent's - not appellant's - land, then the failure to do so would be unlawful. It also said that the appellant would have a basis for a petition for an interdict and possibly also for a claim for compensation for damages which he might suffer. In *De Charmoy v Day Star Hatchery (Pty), Ltd* 1967 (4) SA 188 (D) the defendant bought a property adjacent to the plaintiff's property and started a business producing chickens for sale. The constant clucking and crowing, as well as the smell, caused a nuisance to the plaintiff. The respondent furthermore turned the lights on at two o'clock in the morning in an attempt to increase production. The plaintiff asked for an order directing the defendant to abate the nuisance and an interdict restraining the defendant from continuing the said nuisance. The court found in favour of the plaintiff and ordered the defendant to close their existing breeding pens and cockerel pens. The court confirmed that "[t]he principle in our law is this: although an owner may normally do as he pleases on his own land, his neighbour has a right to the enjoyment of his own land. If one of neighbouring owners uses his land in such a way that material interference with the other's rights of enjoyment results, the latter is entitled to relief."

³⁷ Boberg *The Law of Delict* (1984) 194

scientific expertise to prove that the pollution complained of has in fact been caused by the defendant, that it has caused harm, that there is a causal link between the harm and the actions of the defendant, and that it can reasonably be stopped.

Common-law remedies generally serve the interests of private litigants.³⁸ Even when the public interest is pursued, the high cost of litigation combined with the evidentiary difficulties, do not make it financially viable to proceed. Since it is mostly poor people whose rights are affected, expensive litigation is a particular obstacle to access to environmental justice. Common-law remedies therefore play a limited role in environmental protection.

6 3 2 Statutes and Regulations

South Africa had a range of laws that regulated the environment during the apartheid era. Some of the most important laws that controlled conservation and pollution control before 1994 were the Water Act,³⁹ the Atmospheric Pollution Prevention Act,⁴⁰ the Mining Rights Act,⁴¹ the Sea Fishery Act,⁴² the Conservation of Agricultural Resources Act,⁴³ the Health Act,⁴⁴ the Hazardous Substances Act⁴⁵ and the Environment Conservation Act.⁴⁶ Together with the regulations published in terms of these acts, these laws attempted to address some of the main environmental concerns in

³⁸ Rabie et al "Implementation of Environmental Law" in Fuggle & Rabie (Eds.) *Environmental Management in South Africa* (1996) 120 137.

³⁹ 54 of 1941 – partially repealed and replaced by the National Water Act No. 36 of 1998.

⁴⁰ 45 of 1965.

⁴¹ 20 of 1967 - repealed and replaced by the Mineral and Energy Laws Rationalisation Act, 1994 No. 47 of 1994.

⁴² 12 of 1988 - repealed and replaced by the Marine Living Resources Act No. 18 of 1998.

⁴³ 43 of 1983.

⁴⁴ 63 of 1977.

⁴⁵ 15 of 1973.

⁴⁶ 73 of 1989. The National Environmental Management Act No. 107 of 1998 has amended this Act and will eventually replace it.

South Africa. Despite a wealth of legislation, however, the environment and people living in the environment were not adequately protected.

6 3 2 1 Ineffective enforcement

Critics agree that insufficient enforcement has been the main reason for the ineffectiveness of environmental protection through legislative means.⁴⁷ The most common methods of enforcing environmental laws are through criminal sanction, administrative action and civil litigation. None of these were effectively implemented during the Apartheid era and the situation has not really improved beyond 1994. Ineffective reliance on criminal sanctions, for example, has been ascribed to the following factors:⁴⁸

- Prohibited activities are not adequately policed. This, in turn, is due to a shortage of police officials and a lack of knowledge by the police about the existence of environmental crimes.
- Relatively little public awareness exists about threats to the environment and what constitutes an environmental offence.
- The investigation of environmental offences is difficult and officials require environmental knowledge and legal training.
- Prosecutions of environmental offenders often fail due to a lack of knowledge about environmental criminal law. In addition, the required criminal standard of proof, namely proof “beyond all reasonable doubt”, is a difficult burden to meet in environmental criminal law.
- The effect of a conviction is often minimal, since punishment is laid down in the form of a fine rather than imprisonment and fines are generally too low to be an effective deterrent.

Administrative enforcement of environmental laws has been equally lax. It has been noted that some of the worst air polluters have been defined as “scheduled

⁴⁷ See for example Loots “Making Environmental Law Effective” (1994) *SAJELP* Vol. 1 No. 1 17.

⁴⁸ *Ibid.*

processes” and exempted from control by local authorities.⁴⁹ Industries that are scheduled fall under national control, whilst those that are not scheduled are controlled by local authorities. However, in the 1980s only seven Department of Health inspectors was appointed for the entire country to monitor air pollution by the scheduled industries. Also, few municipalities have the necessary monitoring equipment to prove that an offence has been committed. Such a situation makes it almost impossible to control scheduled processes.

Although administrative officials were given extensive powers, they did not always use these powers effectively. Loots argues that the officials often adopted a conciliatory rather than a confrontational approach towards polluters with the result that no action was ever taken against offenders.⁵⁰ The state has also in the past failed to act in a preventative manner when the environment was threatened. Administrative bodies had no legislative mandate to take account of environmental factors or impacts in their decision-making. Rabie shows that one possible implication is that, where officials might have wanted to support a conservational objective, their action could have been set aside on review for taking irrelevant factors into consideration or for pursuing an unauthorised purpose.⁵¹

According to a report by the President’s Council in 1989, the fragmented nature of environmental legislation and the division of responsibilities for the administration and enforcement of such legislation was identified as one of the most serious problems relating to environmental law in South Africa.⁵² Responsibility for regulating the environment was divided between national governmental departments, provincial administrations and local municipalities. At national level the responsibility was equally fragmented. Different governmental departments controlled different matters, such as

⁴⁹ White “The Teeth Need Sharpening” in Cock & Koch (Eds.) (1991) *Going Green: People, Politics and the Environment in South Africa* 246.

⁵⁰ Loots “Making Environmental Law Effective” 22.

⁵¹ Rabie “Environment Conservation Act” 110. He cites the case of *Administrator, Cape v Associated Buildings Ltd* 1957 (2) SA 317.

⁵² Report of the President’s Council on a National Environmental Management System at para. 6 4 4.

water or air pollution.⁵³ This fragmented control made it impossible to regulate environmental problems in a co-ordinated fashion. As environmental protection was not the primary objective of the different state departments dealing with the implementation of environmental law, a conflict of interests often arose. Finally, fragmented control proved to be an economically unsound way of regulating the environment since each department that is involved requires human and monetary resources.

The Environment Conservation Act of 1989⁵⁴ initially seemed to be a step in the right direction. The Act authorised the Minister of Environmental Affairs to identify timeously and subject to control actions that may have a detrimental effect on the environment.⁵⁵ The intention of the Act was not to prohibit actions that may have a detrimental effect on the environment, but rather to ensure that they would be performed with the necessary respect for the environment.⁵⁶ The Act consequently made provision for the Minister to make and publish enforceable environmental policy. This seemed like the most significant improvement brought about by the Act. Despite the good intentions of the Act, however, the reality is that administrative determination of environmental policy makes the policy vulnerable to political whim and it may change as administrations change. A better approach may have been to determine national environmental policy by way of legislation.⁵⁷

⁵³ Loots illustrates this by citing the example of pollution that was fragmented between the Departments of Health and Population Development (air pollution), Water Affairs (water pollution) and both Transport and Trade and Industry (marine pollution). Loots "Making Environmental Law Effective" 22.

⁵⁴ Act 73 Of 1989. Further amendments were made in 1992.

⁵⁵ Rabie "Environment Conservation Act" 110.

⁵⁶ Ibid.

⁵⁷ Glavovic "Some Thoughts of an Environmental Lawyer on the Implications of the Environmental Conservation Act 73 of 1989: A Case of Missed Opportunities" (1990) *SALJ* Vol. 107 107 108. The problem has since been remedied by the National Environmental Management Act 107 of 1998.

Section 21 of the Act gives the Minister the power to identify those activities which in his opinion may have a detrimental effect on the environment. In terms of section 22 no person is permitted to undertake such an activity without written authority from the Minister or his delegated official. Written authority can only be issued after consideration of reports concerning the impact of the proposed activity on the environment.⁵⁸ The penalty for carrying on such an activity without permission is a maximum fine of R100 000 and/or ten years imprisonment. By 1991, however, not a single hazardous activity had been identified by the Minister, the result of which was that numerous hazardous industrial enterprises were established without proper regulation.⁵⁹ It was only in 1997 that regulations concerning environmental impact statements were published.⁶⁰

6 3 2 2 Limited locus standi

One of the major shortcomings of the Environment Conservation Act was that it did not address the problem of locus standi. Most decisions affecting the environment in South Africa are made by government officials and administrative bodies and not by the legislature.⁶¹ Where a decision or action by a government official or administrative body unreasonably affects the rights of an individual, such a decision may be taken on review in the Supreme Court. In terms of common law, however, only a person who can prove an interest in the matter has standing to bring legal proceedings.

A person who seeks to claim relief in the form of an interdict or a declaratory order or who requests the court to review an administrative decision must show that he or she is personally harmed by the action that is challenged⁶². Alternatively, the person

⁵⁸ Section 22(2) of the Environment Conservation Act.

⁵⁹ White "The Teeth need Sharpening" 247.

⁶⁰ GN R1182 and R1183 GG 18261 5 September 1997.

⁶¹ See Rabie and Eckard "Locus Standi: The Administration's Shield and the Environmentalist's Shackle" (1976) 11 *CILSA* 141

⁶² *Patz v Greene & Co* 1907 TS 427; *Director of Education Transvaal v McCagie* 1918 AD 616; *Milani v South African Medical and Dental Council* 1990 (1) SA 899 (T).

must show that his or her legal rights are affected.⁶³ In the environmental context, however, a private litigant may want to use the courts to stop an action that may be harmful to another person or group or to the public at large. Relief may not be claimed on the basis that the defendant or respondent is doing something that is contrary to the law and that it is in the public interest to prevent or stop it.⁶⁴ Litigants have been able to persuade South African courts to grant them standing to litigate against state administration in the interest of others only where the life or liberty of the others has been in danger.⁶⁵ The courts have, however, restrictively interpreted the requirement of personal harm, holding that in order to prove harm the litigant must show that the harm violated a legally enforceable right.⁶⁶ The courts have in the past only accepted financial harm or physical damage as kinds of harm that violate a legally enforceable right.⁶⁷

The restrictive provisions on locus standi have made it very difficult to challenge government or private conduct that is environmentally unsustainable.⁶⁸ Direct physical harm may not be easy to prove and environmental degradation often affects the quality of life, a “harm” that has not been recognised by the courts. Furthermore, litigation is expensive and very few individuals have the kind of resources required by extensive and complicated litigation. In the South African context, people that are affected by

⁶³ *Dalrympie v Colonial Treasurer* 1910 TS 372; *Bamford v Minister of Community Development and State Auxiliary Services* 1981 (3) SA 1054 (C).

⁶⁴ *Bagnall v Colonial Treasurer* 1907 (24) SC 470, *Patz v Greene & CO.* fn 55 and 56 above; *Von Molkte v Costa Areosa (Pty) Ltd* 1975 (1) SA 255.

⁶⁵ *Ahmadiyya Anjuman Ihaati-Islam Lahore (South Africa) v Muslim Judicial Council (Cape)* 1983 (4) SA 855 (C); *Parents Committee of Namibia v Nujoma* 1990 (1) SA 873 (A).

⁶⁶ *Dalrympie v Colonial Treasurer* fn 56 above; *Bagnall v Colonial Treasurer* fn 57 above; *Roodepoort-Maraisburg Town Council v Eastern Properties (Prop) Ltd* 1933 AD 87; *Milani v South African Medical and Dental Council* fn 55 above; *Aucamp v Nel NO* 1991 (1) SA 220.

⁶⁷ In earlier case law, however, a threat to health has also been accepted as constituting a legally enforceable right. *Dell v Town Council of Cape Town* 1879 (9) Buch 2.

⁶⁸ See generally Bray “Locus Standi in Environmental Law” (1989) 24 *CILSA* 33. See also Loots “Locus Standi to Claim Relief in the Public Interest in Matters Involving the Enforcement of Legislation” (1987) 104 *SALJ* 131.

environmental degradation are generally poor, which prevents them from gaining access to courts. Public interest organisations consequently take up the task of litigating on behalf of vulnerable groups. The requirement of a legally recognised right made it very difficult to bring an action on behalf of groups⁶⁹ that might have been affected by unsustainable environmental practices, or in the public interest. Public interest groups were, for example, not given a hearing unless they could prove that a legally enforceable right of the group has been infringed. This means that within the scope of environmental protection, the law provided scant opportunity to promote a sustainable environment.

6 3 3 Judicial Review of Administrative Action

It has in the past not been easy for people to challenge administrative actions. Not only did the government have expanded discretionary powers, but the grounds on which any administrative acts may be challenged were also extremely narrow. As a rule, courts were not able to decide on the merits of an administrative act. They could only determine whether administrative bodies had acted within the scope of their powers.

Judicial review is the common remedy aimed at determining whether the actions of administrative bodies are valid.⁷⁰ It is only where legislation empowers a court to do so that it can hear an appeal against an administrative decision that would enable it to consider the merits of the decision.⁷¹ In the absence of such legislation South African courts had the power only to “review” administrative acts for legality, that is, to determine whether the acts in question are covered by legislative authority.⁷² Before 1994, South African legislation, however, made no provision for appeals against

⁶⁹ In *Natal Fresh Produce Growers Association v Agroserve (Pty) Ltd* 1990 (4) SA 749 (N) the court held that an organisation may not have standing to represent the interests of its members, but must show that its own interests, distinct from those of its members, have been infringed.

⁷⁰ Rabie et al “Implementation of Environmental Law” 138.

⁷¹ Du Bois F “Sustainable Development, Democracy and the Courts in a Democratic South Africa” in Cole (Ed.) *Sustainable Development for a Democratic South Africa* (1994) 87 91.

⁷² Baxter *Administrative Law* (1984).

administrative decisions.⁷³ It was therefore impossible to challenge the merits of an environmentally unsustainable administrative decision.

The executive itself can exercise control over administrative action in the form of internal control by a higher body in the same administrative hierarchy.⁷⁴ All aspects of administrative action are subject to control, including the question whether or not the action is environmentally sound. Rabie⁷⁵ argues that the value of this form of control was restricted, since it was not exercised by an independent body and was available only to persons aggrieved by a particular administrative decision. Even though a public interest organisation would have been able to bring such an appeal, the requirements of *locus standi* may have led to the conclusion that only those with common law standing can be regarded as aggrieved persons. Whilst most of the independent administrative control bodies had extensive powers, only a few of these were established by legislation.⁷⁶

From the above it appears that the law has not proven to be an effective tool to alleviate inequities in the environment or to provide for a sustainable environment. Under such circumstances, the principle of environmental justice should be developed within the framework of the South African Constitution, which not only specifically provides that the common law and legislation be developed so as to promote the spirit, purport and objects of the Bill of Rights⁷⁷, but also provides for an environmental right.⁷⁸ If the Constitution guarantees environmental justice, all law will be required to adhere to the notion in future.

⁷³ Rabie et al "Implementation of Environmental Law" 138. See also Rabie "Aspects of Administrative Appeals to Environmental Courts and Tribunals" (1995) *Stell LR Vol.3* 369.

⁷⁴ *Ibid.*

⁷⁵ *Ibid.*

⁷⁶ For a more comprehensive discussion of environmental tribunals and their powers see Rabie et al "Implementation of Environmental Law" 139 as well as Rabie "Aspects of Administrative Appeals to Environmental Courts and Tribunals" 1995 *Stell LR* 369; 1996 *Stell LR* 61.

⁷⁷ Section 39.

⁷⁸ Section 24.

6 4 CONCLUSION

Given the poor administration and enforcement of environmental laws in South Africa and given the environmental injustice that has occurred during the apartheid era, it is of vital importance that the necessary conditions, mechanisms and institutions are put in place to give effect to environmental justice. It has been argued in Chapter Two of the study that the concept “environment” should be given a broad interpretation, in other words one that is in line with the notion of sustainable development. As argued in Chapter Three, environmental justice is based on the theory of social justice, which in the South African context demands that the distribution of environmental benefits and burdens be addressed. In the South African context this means that whilst the country will have to meet the demands of technological development for economic growth, it will have to meet the demands of poor and disadvantaged people. In meeting these diverse demands the state has to ensure that the environment is conserved in order to provide for the needs of future generations. In this respect the South African Constitution may provide a solution.

South Africa’s first democratic Constitution was adopted in 1993.⁷⁹ Most notably it guaranteed and protected the human rights of the people of South Africa. One of the rights guaranteed in the Constitution, was a so-called “environmental right”. The inclusion of an environmental right was in line with the trend in many other countries to lend constitutional protection to the right to a healthy environment.⁸⁰ Section 24 of the Final Constitution⁸¹ likewise incorporates an environmental right.

The Bill of Rights provides a framework for environmental justice in South Africa. In terms of this framework, the right to a healthy environment serves as the point

⁷⁹ Constitution of the Republic of South Africa No. 200 of 1993.

⁸⁰ Similar provisions have been enacted in many countries, including Ireland, Spain, Peru, Ethiopia and Namibia. Glazewski “The Environment and the New Interim Constitution” 1994 (1) *SAJELP* 4.

⁸¹ Constitution of the Republic of South Africa No.108 of 1996.

of departure. It is not, however, the only right that plays a role in the conceptualisation of environmental justice, and other rights also need to be considered.⁸²

Several rights in the Bill of Rights can be identified that need to be taken into account. These are the rights to equality,⁸³ access to information⁸⁴ and just administrative action.⁸⁵ In addition, the extended locus standi provision and the potential horizontal application of the environmental right need to be considered. These rights will be analysed in Chapter Seven with reference to the lessons learnt from the USA and India.

⁸² For a full discussion see Chapter 7, para. 7 2.

⁸³ Section 9.

⁸⁴ Section 32.

⁸⁵ Section 33.

CHAPTER SEVEN

AN ENVIRONMENTALLY JUST FUTURE FOR SOUTH AFRICA

7.1 INTRODUCTION

Both the United States and South Africa have racially diverse populations. While it is a home to various minority groups, white people constitute the majority of the population in the United States. South Africa differs in that black people¹ are in the majority. Both countries have a history of racism. They also share a history of environmental racism. In the USA, African Americans, Latino Americans and Native Americans can testify to experiences of environmental racism. In South Africa, black people have also borne the brunt of environmental inequities. In both countries, therefore, specific groups of people were disproportionately exposed to environmental hazards.²

In spite of these similarities, the situation is not uncomplicated at all. It has been shown that in both countries, race was not the only factor to determine the maldistribution of inequities. In both countries poor people have carried a higher burden of environmental degradation than middle or higher income people. In the USA, as in South Africa, race is intrinsically tied to socio-economic status. This study has argued that racism has perpetuated poverty among minorities.³ Consequently they are the casualties of environmental injustice both because of their race and their socio-economic position.

The perpetual and systemic economic disempowerment encountered by black people during and even before apartheid in South Africa, meant that they have economically and socially been the most disadvantaged segment of society. In the six years of democratic government since 1994, very little has changed in this regard.

¹ “Black” is used inclusively and incorporates coloureds and Indians.

² See Chapter Four, para. 4.2 and Chapter Six, para. 6.2 for a review of environmental racism in these countries.

³ See Chapter Four, para. 4.2.3.

Black South Africans, like minorities in the USA, are caught up in the interstices of race and socio-economic status.

Unlike in South Africa, or the USA, systemic racial hierarchy and racism have never been part of the social structure in India. However, for centuries India has had a caste system that promotes social inequity. The castes that fill the top ranking positions in the social order disproportionately benefit from the distribution and control of economic goods. As noted in Chapter Five⁴, access to and control of land and other resources remain in the hands of the upper castes. Lower castes and tribes on the other hand, are the poorest and most vulnerable sections of Indian society. It is also these groups that are the most likely to be exposed to environmental hazards such as poor water quality, excessive air pollution, degraded land, deforestation and displacements. In India, environmental inequity therefore comes to bear in the context of the close relationship between social and cultural status and environmental degradation. In this respect it shares common ground with both South Africa and the USA.

India and the USA have opted for divergent approaches to address environmental injustice. Lessons can be learnt from both countries in this regard, and their divergent approaches can be of instructive value for the attainment of environmental justice in South Africa.⁵ This dissertation suggests that in South Africa environmental justice can best be achieved primarily by using the Constitution. In contradistinction to the USA and India, in South Africa the Constitution explicitly includes an environmental right in section 24.⁶ It will, however, be argued that section 24 alone is not sufficient to for the full realisation of environmental justice.

Human rights are indivisible and operate in relation to one another.⁷ The Indian Supreme Court has thus assumed the position that rights are interrelated and

⁴ See Chapter Five, para. 5 3.

⁵ See Chapter four, para. 4 5 and Chapter five, para. 5 8.

⁶ Constitution of the Republic of South Africa No. 108 of 1996.

⁷ De Vos "Pious Wishes or Directly Enforceable Human Rights? Social and Economic Rights in South Africa's 1996 Constitution" 1997 *SAJHR* Vol. 13 (1) 67. The author makes the argument specifically with reference to the relationship between socio-economic rights and civil and political rights. It can, however, be argued that a similar relationship exists between

that one group of rights should not necessarily be held to trump another group of rights.⁸ From this it follows that the environmental right should not be compartmentalised, but should be construed in the broad context constituted by the Constitution, i.e. in relation to other constitutionally entrenched rights.

A number of provisions in the Constitution such as the Preamble, the founding provision⁹, the rights provision¹⁰, the application clause¹¹ and the locus standi clause¹² provide the constitutional framework within which environmental justice is situated. In addition to the environmental right, the rights to equality¹³, life¹⁴, human dignity¹⁵, access to information¹⁶ and just administrative action¹⁷ serve to promote environmental justice, albeit indirectly.¹⁸ Finally it is contended that environmental justice in South Africa should always be understood with reference to a history of

third generation and other rights. Ksentini argues that the Stockholm Declaration of 1972, for example, is an affirmation of the link between environmental and civil and political rights and between environmental rights and social and economic rights. Ksentini "Human Rights, Environment and Development" in Lin & Kurukulasuriya (Eds.) *UNEP's New Way Forward: Environmental Law and Sustainable Development* (1995) 95 96.

⁸ See Chapter Five para. 5 5 2 2.

⁹ Section 1 of the Constitution.

¹⁰ Section 7 of the Constitution.

¹¹ Section 8 of the Constitution.

¹² Section 38 of the Constitution.

¹³ Section 9 of the Constitution.

¹⁴ Section 11 of the Constitution.

¹⁵ Section 10 of the Constitution.

¹⁶ Section 32 of the Constitution.

¹⁷ Section 33 of the Constitution.

¹⁸ The enumerated provisions are of particular importance to the attainment of environmental justice. Arguably other rights can be identified that may also assist in realising the stated goal. Rights to access health care, water, food and property may be of significance. These provisions are, however, not discussed in any detail in this study.

racism and disadvantage for specific groups in South Africa as described in Chapter Six of this study.¹⁹

In this concluding Chapter the provisions in the Constitution that provide both the framework and mechanisms that can be employed to develop a workable theory of environmental justice will be analysed, drawing on lessons from the USA and India.

7 2 A CONSTITUTIONAL FRAMEWORK FOR SECURING ENVIRONMENTAL JUSTICE

7 2 1 Constitutional Values

In Chapter Three of this study it was concluded that a commitment to social justice is a precondition to the attainment of environmental justice.²⁰ In this regard it was observed that an egalitarian theory of social justice promotes the notion of equal distribution of environmental costs and benefits. The aspiration towards establishing a society based on social justice is similarly envisioned in the South African Constitution. The Preamble notes that the aim of the Constitution is to “heal the divisions of the past and establish a society based on democratic values, *social justice* and fundamental human rights” (author’s emphasis).

Section 1 of the Constitution sets out the founding values of the Republic of South Africa and describes South Africa as “one sovereign, democratic state founded on the values of human dignity, the achievement of equality and the advancement of human rights and freedoms.”²¹ The values endorsed by the Constitution give content to its vision, namely that of transformation.²² One of the goals of transformation is to establish a society based on social justice and that the Constitution embodies this goal. The Constitution therefore sets the stage for a conceptualisation of environmental justice.

7 2 2 State Obligations

¹⁹ See Chapter Six para. 6 2.

²⁰ See Chapter Three para. 3 5.

²¹ Section 1(a) of the Constitution.

²² Albertyn & Goldblatt “Facing the Challenge of Transformation: Difficulties in the Development of an Indigenous Jurisprudence of Equality” (1998) *SAJHR* Vol. 14 248 249.

Section 7(2) of the Constitution, introducing the Bill of Rights, proposes a strategy for the interpretation of the state's obligation with regard to the rights entrenched in the Bill of Rights. The said subsection asserts that the state must "respect, protect, promote and fulfil the rights in the Bill of Rights".

The term "respect" is commensurate with the traditional conception that the state has the legal obligation to refrain from interfering with the rights of the individual.²³ As to the fulfilment of socio-economic rights the Constitutional Court has conceded that these rights can at least be "negatively protected from improper invasion".²⁴ Consequently, with reference to section 24, it can be said that the state may not take any unreasonable measures, legislative or other, that may be harmful to the environment and thus also to the health or well-being of any person. The duty to "respect" fundamental rights furthermore implies that any measure on the part of the state that causes environmental harm should be terminated.²⁵ The state may also not unfairly discriminate by permitting projects that may be more harmful to the health and well-being of one group of persons than to that of another.

The obligation to "protect" the rights in the Bill of Rights requires that the state must ensure that the rights of an individual are not unduly infringed or interfered with by other individuals or groups.²⁶ In relation to the environment this could, for instance, mean that the state must protect individuals and groups living in the vicinity of industries against pollution detrimental to their health and well-being caused by such industries. The effective protection of rights also requires an adequate legislative and institutional framework, the proper implementation of legislation, as well as provision for appropriate judicial and other remedies for violations.²⁷ Section 24(b) alludes to this duty by explicitly providing for measures to protect the environment. It can, however, be stated that section 7(2) goes further providing, by

²³ Liebenberg, "Socio-Economic Rights" in Chaskalson et al *Constitutional Law of South Africa* (Revision Service 5 1999) 41-25.

²⁴ *Ex Parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa 1996* 1996 (10) BCLR 1253 CC, para. 78.

²⁵ Liebenberg, "Socio-Economic Rights" 41-28.

²⁶ Liebenberg, "Socio-Economic Rights" 41-27.

²⁷ Liebenberg, "Socio-Economic Rights" 41-32.

implication, for measures that would not only protect the environment, but would also protect citizens from having their health and well-being threatened. Legislative measures should, for instance, ensure that environmental impact standards take into account the impact that a proposed project may have on the health and well-being of people.

The duties to “promote and fulfil” the rights in the Bill of Rights carry the state’s obligation into the realm of positive fulfilment.²⁸ The state needs to take positive measures, legislative and other, to ensure a safe and healthy environment for everyone in an equitable manner and to ensure that the environment is protected. The state is also obliged to find ways and means to effectively implement legislation dealing with environmental protection and to ensure compliance with such legislation and other protective measures.

Section 7(2) unequivocally obliges the state to ensure that the rights in the Bill of Rights will be meaningful for ordinary citizens. From an environmental point of view section 7(2) demands that the state should not only ensure that the environmental right but also rights operating in relation to section 24 will be respected, protected, promoted and fulfilled.

7 2 3 The Environmental Right in the South African Constitution

Section 24 of the Constitution provides the foundation for environmental justice in South Africa. It states that:

“Everyone has the right –

- (a) to an environment that is not harmful to their health or well-being; and
- (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that –
 - (i) prevent pollution and ecological degradation
 - (ii) promote conservation; and

²⁸ Liebenberg, “Socio-Economic Rights” 41-330.

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

7 2 3 1 The aim of section 24

Section 24 presumably has two general aims. Subsection (a) guarantees a healthy environment to everyone in general while subsection (b) mandates the state to take certain measures in order to realise the guarantee proclaimed in subsection (a).²⁹ Subsection (b) also affords protection against any state action that negates environmental protection or that it is any way harmful to the environment.³⁰ These aims serve the broader transformational goals of the Constitution and in view of the peculiarly South African history of environmental racism and the deliberate denial of access to environmental resources,³¹ and also serve the objective of attaining environmental justice.

7 2 3 2 The framing of the right

In contradistinction to the way in which environmental rights have been formulated in some international instruments, section 24 has been couched as an individual and not as a collective right.³² It would be significant to consider the environmental right as a collective right in view of the fact that environmental degradation often affects groups of people. In this respect Gutto argues that since the Constitution opens a wider scope for representative class and public interest litigation,

²⁹ De Waal, Erasmus & Currie *The Bill of Rights Handbook* (1999) 390.

³⁰ Ibid. The authors refer to *Ex Parte Chairperson of the Constitutional Assembly: in re Certification of the Constitution of the Republic of South Africa 1996* op cit fn 24 supra, where it was noted that socio-economic rights can be negatively protected from improper invasion. At para. 78.

³¹ See discussion in Chapter 6, para. 6 2.

³² Article 24 of the African Charter on Human and Peoples' Rights (1981) recognises the right of *all peoples...* “to a generally satisfactory environment favourable to their development”. Glazewski notes that since environmental rights fall within the scope of third generation rights, they cannot be exercised by individuals per se, but rather by groups of people. Glazewski “The Environment, Human Rights and a New South African Constitution” (1991) *SAJHR* 167 172.

the rights of individuals may be exercised collectively.³³ Groups may therefore utilise the expansive standing provisions of the Constitution to enforce the environmental right where its infringement affects them.

The section on the environmental right should be understood positively so as to “ensure that it is no less important than other rights and to place a positive duty on the state to improve or protect the environment”.³⁴ Section 24 is, however, phrased negatively. Commentators have criticised the way in which the right has been couched.³⁵ It is argued that almost without exception rights in the Constitution are framed as non-absolute, positive entitlements. A court interpreting the environmental right, will have to offset it against positively couched, competing rights and interests. A court called upon to assess two competing rights, one of which is framed negatively, will be inclined to defer to the rights proclaimed positively. On the other hand it may be argued that a positively framed environmental right would disproportionately have competed with (and thus enervated) conventionally recognised constitutional rights.³⁶

When they interpret the Bill of Rights, courts are enjoined to promote the values underlying the Constitution.³⁷ In this process they must often weigh competing rights against one another and decide whether an alleged infringement is sufficiently serious to undermine human dignity, equality or freedom as basic constitutional tenets. Viewed from this perspective, the fact that the environmental right in the Constitution is negatively framed should not mean that it enjoys less protection than any other constitutional right. Glazewski argues, in defence of this

³³ Gutto “Environmental Law and Rights” in Chaskalson et al (Eds.) *Constitutional Law of South Africa* (Revision service 2 1998) 32-1 32-2.

³⁴ Asmal “Environment and the Constitution” (1996) *SAJELP* 3 90 96.

³⁵ See Winstanley “Entrenching Environment Protection in the New Constitution” (1995) *SAJELP* Vol. 1 85 93.

³⁶ Ibid.

³⁷ Section 39 of the Constitution states:

“(1) When interpreting the Bill of Rights, a court, tribunal or forum –

(a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom.”

position that the effect of the negative phrasing of the environmental right is simply meant to suggest a minimum standard of environmental quality rather than a limitless and unrealistic right to environmental integrity.³⁸

7 2 3 3 The scope of the concept “environment”

When interpreting section 24, courts will have to determine the scope of the concept “environment”. It is argued in Chapter Two of this study that the term “environment” should not be limited to the non-human natural environment, but should be defined broadly enough to specifically include inter-relationships between humans and the natural environment.³⁹ A similar viewpoint is adopted by other commentators who suggest that “environment” should not be limited to the natural environment, but should also include objects made by humans as well as cultural and historical heritage.⁴⁰ This, they argue, would expand the general scope of protection of the right.

In interpreting section 24, due respect should also be paid to the traditional rights, needs, values and dignity of indigenous cultures and communities.⁴¹ In India projects such as dam building schemes, for example, generally lead to the huge-scale relocation and displacement of indigenous groups and local communities, whilst in South Africa the declaration of national parks meant that whole communities were moved.⁴² In the process, cultural and historical sites are destroyed or lost. An expanded definition of “environment” could be invoked to prevent the displacement and relocation of indigenous groups on the basis that the loss of culturally or historically significant sites violates section 24.

Both in India and the USA a generous interpretation of “environment” has been adopted. Reference can for example be made to the broad interpretation given to

³⁸ Glazewski “The Environment and the new Interim Constitution” 1994 (1) *SAJELP* 3 5. See also Glazewski “Environmental Provisions in a new South African Bill of Rights” 1993 *JAL* 177 180.

³⁹ See Chapter Two, para. 2 6.

⁴⁰ De Waal, Erasmus & Currie *The Bill of Rights Handbook* (1999) 393.

⁴¹ Glavovic “Environmental Rights as Fundamental Human Rights” (1996) 3 *SAJELP* 71 72.

⁴² See in this regard Chapter Five para. 5 4. See also Chapter 6 para 6 2.

“environment” in the National Environmental Protection Act (NEPA) in the USA, which refers to human relationships in the environment, including “the need to preserve historical and cultural aspects of national heritage”.⁴³ US courts have furthermore considered issues such as the possibility of increased crime in the area, the aesthetic impact of a building and other socio-economic effects as environmental impacts to be taken into account when planning a new development.⁴⁴ The Indian courts have constructed the concept in a similarly generous fashion. It found that the right to life, and thus also the right to a healthy environment, was infringed by actions that violated the health and well-being of people and not just the natural environment.⁴⁵ From this it can be inferred that the Indian Court views human beings as an integral part of the environment.

In the South African context, the legislature has adopted an equally broad approach in statute law. In the National Environmental Management Act⁴⁶ for example “environment” means “...[t]he surroundings within which humans exist and that are made up of

- (i) the land, water and atmosphere of the earth;
- (ii) microorganisms, plant and animal life;
- (iii) any part or combination of (i) and (ii) and the interrelationships among and between them; and
- (iv) the physical, chemical, aesthetic and cultural properties and conditions of the foregoing that influence human health and well being”.

The Environment Conservation Act⁴⁷ also defines “environment” widely as “the aggregate of surrounding objects, conditions and influences that influence the life and habits of man or any other organism or collection of organisms”. These instances show that enough support exists for an inclusive interpretation of “environment”.

⁴³ See Chapter Four para. 4 4 2 for a discussion of NEPA.

⁴⁴ *Hanly v Mitchell* (2d Cir. 1972).

⁴⁵ See Chapter Five, para. 5 5 4 2.

⁴⁶ 107 of 1998.

⁴⁷ No. 73 of 1989.

7 2 3 4 The concepts “health” and “well-being”

The concepts “health” and “well-being” are central to the purpose of section 24. “Health” clearly relates to human health and generally incorporates both mental and physical integrity. Health has consequently been defined by the World Health Organisation as a “state of complete physical, mental and social well being”.⁴⁸ Kidd argues that the guarantee of a “healthy” environment will be significant largely for groups that are socio-economically disadvantaged since they have to rely much more on the natural environment for basic needs such as drinking water.⁴⁹

Liebenberg notes that “well-being”, on the other hand, is a more elusive term and that it appears to have largely subjective dimensions.⁵⁰ She argues that while harm to “well-being” need not amount to mental or physical ill health, something more is required than a sense of emotional insecurity or aesthetic discomfort before the section becomes applicable.⁵¹ By contrast, De Waal, Erasmus and Currie⁵² and Glazewski⁵³ view well-being as inclusive of spiritual or psychological aspects such as the individual’s need to be able to communicate with nature. Human well-being therefore depends on conservation and the maintenance of wilderness areas and biodiversity.

The concept of well-being could also be useful to those individuals who wish to employ the right in situations where it is difficult to substantiate a claim that someone’s health has been affected.⁵⁴ Since it is a broader concept, infringement of well-being may be easier to substantiate. In addition to its spiritual and psychological meanings, it is submitted that “well-being” may also encompass social and economical dimensions. Many indigenous groups, for example, depend on

⁴⁸ World Health Organization, Preamble of Constitution (1978).

⁴⁹ Kidd *Environmental Law A South African Guide* (1997) 36.

⁵⁰ Liebenberg “Environment” in Davis, Cheadle and Haysom (Eds.) *Fundamental Rights in the Constitution – Commentary and Cases* (1997) 256 259.

⁵¹ Ibid.

⁵² De Waal, Erasmus & Currie *The Bill of Rights Handbook* 394.

⁵³ Glazewski “The Environment and the New Constitution” (1994) *SAJELP* Vol.1 3.

⁵⁴ Kidd *Environmental Law A South African Guide* (1997) 36.

biodiversity as a source of nutrition and for its medicinal and cultural value. These groups would be able to argue that the destruction of biodiversity is harmful to their well-being.

7 2 3 5 Intergenerational equity

Section 24(b) of the Constitution imposes a duty on the state to protect the environment for the benefit of both the present and future generations. This study maintains that the reference to future generations is in line with the notion of intergenerational equity.⁵⁵ Since a precondition to intergenerational equity is sustainability, the environment should be used in a manner that will not only meet the needs of the present generation but will also provide for the needs of future generations.⁵⁶

Weiss argues that each generation receives a natural and cultural legacy in trust from previous generations and that there is an obligation on each generation to preserve the natural and cultural resource base for future generations.⁵⁷ This legacy imposes a set of planetary obligations upon members of each generation and also gives them planetary rights.⁵⁸ There is no constitutional duty on individuals, i.e. the present generation, to protect the environment, but it is contended that the state acts as a guarantor on behalf of the present generation to fulfil planetary obligations to future generations.⁵⁹

Since future generations do not have legal standing, the question that may be asked is how future generations would claim their planetary rights. One possible

⁵⁵ See Chapter Three, para. 3 3 3 3.

⁵⁶ Principle 3, *Rio Declaration on Environment and Development* United Nations Earth Summit Press Summaries 1-12 June 1992.

⁵⁷ Weiss *In Fairness to Future Generations: International Law, Common Patrimony and Intergenerational Equity* (1992) 2.

⁵⁸ Weiss *In Fairness to Future Generations* 47-108. Planetary obligations refer to duties of use, such as the duty to conserve resources, avoid adverse impacts, prevent disasters and compensate for environmental harm. Planetary rights are linked to the conditions of the biosphere and those resources essential to the continued sustainability of the earth's ecosystem.

⁵⁹ Weiss *In Fairness to Future Generations* 86.

argument is that it is in the interest of present generations to manage the environment in a sustainable manner – thereby also having regard to the rights of future generations. Weiss goes further, however, and advocates the institution of a representative or a guardian *ad litem* for future generations. This, she argues, could take the role of an ombudsman who will have standing on behalf of future generations.⁶⁰ This proposal provides a workable way for enforcing the rights of future generations and that section 38(d) is sufficiently inclusive to cater for the standing of such a representative acting in the public interest.

7 2 3 6 State obligations

Section 24(b) provides that everyone has the right to have the environment protected through reasonable legislative and other measures.⁶¹ In particular, the state is mandated to prevent pollution and ecological degradation, to promote conservation and to secure ecologically sustainable development and the use of natural resources while promoting justifiable economic and social development.⁶²

The state will need to establish a regulatory framework to give effect to this provision. Environmental laws and regulations should not only provide for the substantive aspects of environmental protection, but should also provide for related procedural safeguards such as standing, access to information and just administrative action.⁶³ It can also be argued that section 24 imposes an obligation on the state to bring current legislation in line with the Constitution. The reference in the section to “other measures” includes action of an administrative, technical, financial and educational nature.⁶⁴

Section 24(b) is, however, qualified by the requirement of “reasonableness”. State action will therefore be measured by this standard to determine whether there has been an infringement of section 24. This becomes particularly significant where the state fails to take action. An applicant challenging state inaction will have to

⁶⁰ Ibid.

⁶¹ Section 24(b).

⁶² Section 24(b)(i), (ii) and (iii).

⁶³ Ksentini “Human Rights, Environment and Development” 108.

⁶⁴ Liebenberg “Environment” 261.

prove that the state's failure to act was unreasonable. It is, however, not clear when such an omission will be unreasonable. The state could well justify its failure to prevent pollution or ecological degradation by arguing that it lacks the necessary resources. Sections 26 and 27 of the Constitution, dealing with socio-economic rights, contain a specific proviso regarding *reasonable* measures relating to availability or resources. The Constitutional Court has indicated that these rights are limited and that the degree of access to them is determined by the availability of state resources:

“What is apparent from these provisions is that the obligations imposed on the state by sections 26 and 27 in regard to access to housing, health care, food, water and social security are dependent upon the resources available for such purposes, and that the corresponding rights themselves are limited by reason of the lack of resources. Given this lack of resources and the significant demands on them that have already been referred to, an unqualified obligation to meet these needs would not presently be capable of being fulfilled.”⁶⁵

In a more recent decision the court emphasised *reasonableness* as the yardstick to determine whether the state has fulfilled its obligations⁶⁶. The court thus stated:

“To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right. It may not be sufficient to meet the test of reasonableness to show that the measures are capable of achieving a statistical advance in the realisation of the right. [I]f the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test.”⁶⁷

⁶⁵ *Soobramoney v Minister of Health (Kwazulu-Natal)* 1998 (1) SA 765 (CC) para. 11.

⁶⁶ *Government of South Africa and Others v Grootboom and Others CCT 4 October 2000* (unreported) at para. 33.

⁶⁷ *Ibid.* at para 44.

This implies that insufficient resources may not in every instance be the appropriate justification for failure to fulfil state obligations.

7 2 3 7 Sustainable development

Given the levels of poverty in South Africa, the need for development is beyond dispute.⁶⁸ Such development should, however, occur in a controlled and sustainable manner. In Chapter Two of this study an argument was made that the concept “environment” should be understood in relation to the notion of “sustainable development”.⁶⁹ The claim to the right to a satisfactory environment can therefore not be separated from the claim to the right to development.⁷⁰

Section 24(b)(iii) indeed provides for the right to have the environment protected in a sustainable manner. This provision brings the South African Constitution in line with international standards in that it recognises the connection between human rights, the environment and development. The concept “sustainable development” developed as a result of an awareness of the global character of environmental problems that create hazards for the planet, threaten the living conditions of human beings and impair their fundamental rights and needs. It has been argued that although developed in international law, the principle of sustainable development is one that needs to be interpreted, applied and achieved primarily at a national level.⁷¹

In interpreting section 24(b)(iii), “sustainable development” should be linked to a reduction in poverty. As argued in Chapter Two, poverty is a result of underdevelopment.⁷² Poverty in turn causes degradation of the environment and a degraded environment exacerbates the problems related to underdevelopment.⁷³ In all three countries examined in this study it has been shown that marginalised sections of

⁶⁸ Glavovic “Environmental Rights as Fundamental Human Rights” 74.

⁶⁹ Chapter Two, paras. 2 5 5 and 2 6.

⁷⁰ Ksentini “Human Rights, Environment and Development” 97.

⁷¹ Boyle and Freestone *International Law and Sustainable Development – Past Achievements and Future Challenges* (1999) 7.

⁷² See Chapter Two para. 2 5 2.

⁷³ Ibid.

the population as well as minority groups are the most affected by poverty, and that there is a link between poverty and environmental destruction.⁷⁴ This relationship has a direct impact on the enjoyment, realisation and improvement of other human rights and fundamental freedoms. Most profoundly it can be argued that adverse environmental impacts such as exposure to toxic waste, degradation of living conditions, forced removals, discrimination, exclusion, non-participation in decision-making, etc. infringes upon the rights to quality of life, human dignity and equality of people. The United Nations Special Rapporteur on the environment also states that it is impossible to isolate the claim to the right to sustainable development from the issue of poverty, which implies a concentration of efforts to combat poverty and underdevelopment⁷⁵.

The principles of the Rio Declaration, as discussed in Chapter Two,⁷⁶ may also serve as guidelines in the interpretation of section 24(b)(iii). Principles 3 and 4 in particular constitute the core of the principle of sustainable development.⁷⁷ In terms of these principles a careful balance should be struck between individual rights of consumption and development and the wider interests of present and future generations. Development decisions should therefore not discard environmental considerations. One way of ensuring this is for the legislature to require environmental impact assessments (EIA) for all developmental projects.⁷⁸ The Environment Conservation Act currently provides for such assessments. It could be argued that failure to implement EIAs amounts to a violation of section 24(b)(iii) rights. In addition, Principle 8 refers to the need to “reduce and eliminate

⁷⁴ See Chapter Four para. 4 2, Chapter Five para. 5.2 and Chapter Six para. 6 2.

⁷⁵ Cited in Liebenberg “Environment” at 261.

⁷⁶ See Chapter Two para. 2 5 2. These principles refer amongst others to the right to development, poverty alleviation and capacity building.

⁷⁷ Principle 3: The right to development must be fulfilled so as to meet developmental needs of present and future generations equitably.

Principle 4: In order to achieve sustainable development, environmental protections shall constitute an integral part of the development process and cannot be considered in isolation from it. Robinson (Ed.) *Agenda 21 and the UNCED Proceedings* (1992) Volume 1 cxi.

⁷⁸ Boyle and Freestone *International Law and Sustainable Development* 10.

unsustainable patterns of production and consumption.”⁷⁹ Sustainable development therefore sets some limits to the utilisation of natural resources.⁸⁰

The principle of “sustainable development” contains both substantive and procedural elements.⁸¹ It is thus also linked to participation in decision-making regarding development strategies that involve risk for the environment and to the right of access to information regarding such strategies.⁸² It has been noted that “what constitutes development is largely subjective, and in this respect development strategies must be determined by peoples themselves and adapted to their particular conditions and needs.”⁸³

7 2 3 8 Guidelines for the interpretation of section 24 in the light of the comparative study

Since the USA Constitution does not include an environmental right, there are but few constitutional lessons to be learnt from this country. The Indian Constitution also makes no direct reference to an environmental right. It does, however, impose a duty on the state to protect the environment.⁸⁴ The Indian courts have relied on this obligation to uphold Indian citizens’ right to a healthy environment.

Like South Africa, India is also in need of development. The Indian judiciary has, however, recognised the need for environmentally sound development. The important lesson for South Africa is that Indian courts have recognised the connection between socio-economic disadvantage and environmental degradation. In articulating the right to a healthy environment they have recognised that environmental degradation that stems from unsustainable development may impact disproportionately on poor people. They have therefore implicitly accepted that a healthy environment is one in which poor people can have a better quality of life.

⁷⁹ Robinson (Ed.) *Agenda 21 and the UNCED Proceedings* (1992) Volume 1 cxi.

⁸⁰ Boyle and Freestone *International Law and Sustainable Development* 9.

⁸¹ Ibid.

⁸² Ksentini “Human Rights, Environment and Development” 98.

⁸³ *The Realisation of the Right to Development* Global Consultation on the Right to Development Geneva, 8-12 January 1990, HR/PUB/91/2.1991.

⁸⁴ See Chapter Five paras. 5 5 2 1 and 5 5 4.

Given the context of disadvantage in South Africa, this approach should be strongly considered when interpreting section 24.

7 2 4 The Equality Provision

In Chapter Six it was pointed out that racial discrimination played an important role in the inequitable distribution of resources and the disproportionate environmental burdens carried by black people in South Africa.⁸⁵ Although the political context in South Africa has changed considerably, racism and the effects of past systemic discrimination have remained. It therefore follows that environmental justice must be linked to the transformational goal of equality as embodied in the Constitution.

Section 9 of the Constitution provides that:

- (1) “Everyone is equal before the law and has the right to equal protection and benefit of the law.
- (2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality legislative and other measures, designed to protect or advance persons, or categories of persons disadvantaged by unfair discrimination, may be taken.
- (3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.
- (4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.
- (5) Discrimination on one or more grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.”

⁸⁵ See Chapter Six para. 6 2.

Equality is central to the process of redress and transformation in South Africa. In this respect the Constitutional Court has noted:

“The South African Constitution is primarily and emphatically an egalitarian Constitution. The supreme laws of comparable constitutional states may underscore other principles and rights. But in the light of our own particular history, and our vision for the future, a Constitution was written with equality at its centre. Equality is our Constitution’s focus and its organising principle.”⁸⁶

“Equality” is included in the Constitution both as a central constitutional value and as a right.⁸⁷ As a value equality gives substance to one of the prime objectives of the Constitution, namely the transformation of the country into a democratic state.⁸⁸ As a right it provides legal mechanisms for achieving *substantive* equality, thereby entitling groups and persons to claim the fulfilment of the right to equality (in accordance with section 7(2)) as well as the means to achieve it.⁸⁹

Given the omnipresence of systemic social disadvantage in South Africa, it is in fact critical to contend for substantive rather than merely formal equality. Formal equality implies that everyone is treated the same regardless of their circumstances while substantive equality takes into account the circumstances of people in order to

⁸⁶ *The President of the RSA v Hugo* 1997 (4) SA 1 (CC) at para.74.

⁸⁷ As a value it appears in several constitutional provisions. Section 1 of the Constitution declares that South Africa is a sovereign, democratic state founded on certain values. Amongst other, these values included human dignity, *the achievement of equality* and the advancement of human rights and freedoms. The Bill of Rights is described in section 7(1) as “a cornerstone of democracy [that] ... affirms the democratic values of human dignity, *equality* and freedom. Section 36 concerns the limitation of rights and states that rights may only be limited if the limitation is “reasonable and justifiable in an open and democratic society based on human dignity, *equality* and freedom.” Finally, the interpretation clause, section 39, instructs courts, tribunals and other forums that in the interpretation of the Bill of Rights they must promote the values that underlie an open and democratic society based on human dignity, *equality* and freedom. (Writer’s own emphasis throughout).

⁸⁸ Albertyn & Goldblatt “Facing the Challenge of Transformation” 248.

⁸⁹ *Ibid.*

ensure an equilibrium in outcome.⁹⁰ This implies that the particular situation of a person, including his or her socio-economic circumstances, must be considered when determining how he or she should be treated. It can therefore be said that the right to substantive equality addresses systemic discrimination and the resulting social disadvantage.

In *President of the Republic of South Africa v Hugo* the South African Constitutional Court noted that equality cannot be achieved if it is reduced to identical treatment for all:

“We need ... to develop a concept of unfair discrimination which recognises that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before that goal is achieved. Each case, therefore, will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not. A classification which is unfair in one context may not be unfair in a different context.”⁹¹

Another important feature of substantive equality is that it is geared at protecting not only individuals, but also groups. The Constitutional Court has recognised that groups are often the targets of discrimination. In interpreting the right to equality under the Interim Constitution, O’Regan J, for example, held:

“Section 8 was adopted ... in recognition that discrimination against people who are members of disadvantaged groups can lead to patterns of group disadvantage and harm. Such discrimination is unfair: it builds and entrenches inequality amongst different groups in society.”⁹²

⁹⁰ De Waal, Erasmus & Currie *The Bill of Rights Handbook* 190.

⁹¹ 1997 (6) BCLR 708 (CC) at para. 41.

⁹² *Brink v Kitshoff NO* 1996 (6) 752 (CC) at para. 42.

The primary purpose of the equality provision is to prohibit such patterns of discrimination.⁹³

Section 9 furthermore proscribes both direct and indirect discrimination. In *City Council of Pretoria v Walker*⁹⁴ the court noted that the inclusion of both direct and indirect discrimination evinces a concern for the consequences rather than the form of conduct.⁹⁵ The court recognised that conduct that may appear to be neutral and non-discriminatory may nonetheless result in discrimination, and if it does, should be scrutinised under the equality provision.⁹⁶ Finally, the equality provision also aims to rectify the disadvantages resulting from discrimination. It has been suggested that in this respect equality has a restitutionary nature:

“Particularly in a country such as South Africa, persons belonging to certain categories have suffered considerable unfair discrimination in the past. It is insufficient for the Constitution merely to ensure, through its Bill of Rights, that statutory provisions which have caused such unfair discrimination in the past are eliminated. Past unfair discrimination frequently has ongoing negative consequences, the continuation of which is not halted immediately when the initial causes thereof are eliminated, and unless remedied, may continue for a substantial time and even indefinitely. Like justice, equality delayed is equality denied.... One should refer to such equality as remedial or restitutionary equality.”⁹⁷

A substantive view of equality furthers the goal of environmental justice. It takes into account that environmental racism has taken place in a specific political and historical context. It also takes into account the systemic nature of prejudice and disadvantage experienced by people as a group and not only as individuals. It furthermore considers the fact that environmental discrimination will not always be

⁹³ Ibid.

⁹⁴ 1998 (3) BCLR 257 (CC).

⁹⁵ At para. 31.

⁹⁶ Ibid. at para. 32.

⁹⁷ *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 (12) BCLR 1517 (CC) para. 60-1.

intentional, but will more often be of an indirect nature and may even seem advantageous from an economic point of view. Yet, the impact may disproportionately and unfairly burden a specific group of people. In interpreting section 24 the historical context of environmental racism and the resulting social disadvantage should therefore be considered. Regard must be had of the fact that the distribution of resources in South Africa occurred on an inequitable basis and that black people have specifically been prevented from benefiting in a material way from the environment. A substantive view of equality will, in other words, enhance the protection afforded under section 24.

By contrast, a formal approach to equality may inevitably defeat the object of attaining environmental justice. The USA experience of environmental justice serves as a testimony to this.⁹⁸ Environmental justice challenges in the USA have been brought to the courts primarily as complaints against discrimination. The evidence in these cases clearly suggests discrimination either on the basis of race, social and economic status or both, which makes it imperative to couch claims as a violation of equal rights.⁹⁹ In addition, the evidence also indicates that environmental racism in the USA is systemic and historical in nature.¹⁰⁰

US Courts have, however, insistently focused on disparate treatment when interpreting equality.¹⁰¹ In bringing an environmental justice claim based on alleged discrimination, the plaintiff has to prove that he or she had been accorded worse treatment than any other person in a similar situation. Furthermore, a violation of the Equal Protection Clause requires discriminatory intent or purposeful conduct employing, for instance, race to dominate or oppress another. Disparate effect in itself is insufficient to prove discrimination. It is, however, extremely difficult to

⁹⁸ See Chapter Four para. 4 5.

⁹⁹ No claim has however been framed as a discrimination based on income or socio-economic status, since the US Supreme Court has not recognised poverty as a classification which contravenes the equal protection of the Constitution. See *San Antonio Independent School District v Rodriguez* 411 US 1 (1973).

¹⁰⁰ See Chapter Four para. 4 4 1 1.

¹⁰¹ Ibid.

prove something as subjective as intent. The “intent requirement” has therefore been an obstacle to the success of equal protection claims in the USA.

The USA position stands in stark contrast to the position adopted by the South African Constitutional Court. In fact, it can be argued that the Constitutional Court has adopted an activist position in its interpretation of equality. Like the Indian courts, the Constitutional Court has viewed equality not only as a generous concept, but also as a dynamic concept that cannot be imprisoned within traditional limits.¹⁰² The Court has recognised that the law or action may burden people who have been victims of past patterns of discrimination in a manner that is considered to be unfair. It has also recognised the harm of discriminatory impact and the historical nature of discrimination. This form of activism bodes well for the development of an environmental justice jurisprudence that incorporates a link with equality. Based on an assessment of the equality jurisprudence of the Constitutional Court thus far, it can be argued that it would be easier to bring a claim of environmental racism in South Africa than in the USA.

7 2 5 The Right to Life

Section 11 of the Constitution reads:

“Everyone has the right to life”

The right to life is deemed to be one of the most basic entitlements protected in the Constitution.¹⁰³ The Constitutional Court has argued that in the absence of the right to life no other right can be meaningfully exercised.¹⁰⁴ It needs to be considered, however, what the scope of “life” is.

¹⁰² See Chapter Five para. 5 5 4 4. Although the Indian courts have not interpreted equality in relation to the environment it has shown a reluctance to adopt a formal view of equality in other issues.

¹⁰³ See Chaskalson P in *S v Makwanyane & another* 1995 (3) SA 391 (CC) at para. 144: “The rights to life and dignity are the most important of all human rights and the source of all other personal rights.”

¹⁰⁴ Ibid.

In a narrow, biological sense “life” refers to existence in a visceral sense.¹⁰⁵ In other words it refers to being able to breathe and as such being alive. Indian courts have, however, construed the right to life broadly so as not only to include life in a biological sense, but also quality of life.¹⁰⁶ The basic premise is that without the basic necessities of life such as water, food, clean air etc the value of life is reduced.

A broad construction of “life” such as the one adopted by the Indian Supreme Court takes into account the social and economic context within which people live and aims to eradicate the social and economic disparities that result from unequal treatment. It follows that a generous construction is in line with the goal of environmental justice. A healthy environment and access to environmental resources such as running water and clean air is fundamental to a decent quality of life.

The broad interpretation of the right to life and the nature of the orders made by Indian courts, mandating the state to take positive action to fulfil the right to life, has had a profound impact on those Indian citizens who are not in control of their material circumstances. In the South African context such a positive interpretation is necessary to promote and fulfil the right to life in an expanded form.¹⁰⁷ This is in line with the mandate placed on the state by section 7(2) to promote and fulfil the rights in the Bill of Rights.¹⁰⁸

The question is whether the South African Constitutional Court will interpret the right to life in an equally generous way. In *S v Makwanyane & another*¹⁰⁹ O’Regan J remarked that:

“The right to life is, in one sense, antecedent to all other rights in the Constitution. Without life in the sense of existence, it would not be possible to exercise rights or to be the bearer of them. But the right to

¹⁰⁵ Fedler “Life” in Chaskalson et al *Constitutional Law of South Africa* (Revision service 5 1999) 15-2. In *S v Makwanyane* it was similarly stated that at the core of the right to life is the right not to be put to death by the state. Op cit fn 103 supra at para. 83.

¹⁰⁶ See Chapter Five, para. 5 5 4 1.

¹⁰⁷ See also Fedler “Life” 15-4.

¹⁰⁸ See para. 7 2 2.

¹⁰⁹ Op cit fn 103 supra at para. 326-7.

life was included in the Constitution not simply to enshrine the right to existence. It is not life as mere organic matter that the Constitution cherishes, but the right to human life: the right to share in the experience of humanity. This concept of human life is at the centre of our constitutional values. The Constitution seeks to establish a society where the individual value of each member of the community is recognised and treasured. The right to life is central to such a society.”

It has been noted that this construction of the right to life incorporates the right to dignity, and that these two rights function in relationship with one another so that without dignity, human life is substantially diminished; and without life there can be no dignity.¹¹⁰

In *Soobramoney v Minister of Health (Kwazulu-Natal)*,¹¹¹ the court had to determine whether denial of medical services infringed the right to life of the applicant. The court concluded that the right to life was not at stake in this particular instance and indicated that the Constitutional Court was unlikely to adopt the Indian jurisprudence on the right to life without qualification. The court stated that:

“Unlike the Indian Constitution ours deals specifically in the Bill of Rights with certain positive obligations imposed on the state, and where it does so, it is our duty to apply the obligations as formulated in the Constitution and not draw inferences that would be inconsistent therewith.”¹¹²

Liebenberg notes that this approach is at odds with the principle of the interdependency of rights that requires that rights in the Bill of Rights be interpreted in ways that reinforce and complement each other.¹¹³ She notes, “the express inclusion of the socio-economic rights should not have the effect of draining the right to life and human dignity of substantive content.”¹¹⁴

¹¹⁰ De Waal, et al *The Bill of Rights Handbook* 227.

¹¹¹ Op cit fn 65 supra at para. 15.

¹¹² At para. 15.

¹¹³ Liebenberg, “Socio-Economic Rights” 41-31.

¹¹⁴ Ibid.

The Indian approach to the right to life should be strongly considered by the Constitutional Court given the similarities in systemic disadvantage in both countries and the history of environmental injustice in South Africa. In order for South Africans to live a qualitative life a broad conception of the right to life is essential.

7 2 6 The Right to Human Dignity

Section 10 of the Constitution states that:

“Everyone has inherent dignity and the right to have their dignity respected and protected.”

Like the right to life, human dignity has been described by the Constitutional Court as the most important of all human rights and the source of all other personal rights in the Bill of Rights.¹¹⁵ The court observed that:

“The importance of dignity as a founding value of the new Constitution cannot be overemphasized. Recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. This right therefore is the foundation of many of the other rights that are specifically entrenched in chapter 3 ... [H]uman dignity is important to all democracies. In an aphorism coined by *Ronald Dworkin*, because we honour dignity, we demand democracy.”¹¹⁶

Dignity has not been clearly defined, but has been connected to considerations of worth and value by others.¹¹⁷ Dignity has also been related to equality and the concept of equal dignity has been used in this regard.¹¹⁸ In *Prinsloo v Van der*

¹¹⁵ *S v Makwanyane* op cit fn 103 supra at para. 326-7.

¹¹⁶ *Ibid.* at paras. 328-30.

¹¹⁷ In *National Coalition of Gay and Lesbian Equality v Minister of Justice* op cit fn 97 supra the court held that “it is clear that the constitutional protection of the violation of the right to dignity requires us to acknowledge the value and worth of all individuals as members of our society.” At para. 28.

¹¹⁸ In *President of the Republic of South Africa v Hugo* 1997 (4) SA 1 (CC) para. 41 the court has stated as follows:

“At the heart of the prohibition of unfair discrimination lies a recognition that the purpose of our new constitutional and democratic order is the establishment of a

Linde,¹¹⁹ the court specifically acknowledged the centrality of dignity to equality and stated that unfair discrimination means “treating persons differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity”.¹²⁰

The Indian courts have not explicitly referred to the right to human dignity in their amplification of the right to life to include environmental protection. It can however be argued that a generous construction of the right to life so as to ensure environmental health and well-being requires considerations of human value and respect for those who have been adversely affected by environmental harm.¹²¹

In an environmental context it can therefore be argued that when a specific group of people are disproportionately exposed to environmental degradation, such exposure not only amounts to unfair discrimination, but it also fundamentally impairs the dignity of each member of the group. Environmental justice therefore requires equal dignity through the equitable distribution of environmental costs and benefits.

7 2 7 The Right to Access to Information

People or groups who may want to challenge conduct that is hazardous to the environment will need the necessary information to bring such an action. As a rule, such information is not automatically granted when requested. In this respect the right to access to information is of the utmost significance to prospective litigants. It therefore forms part of the “group of rights” that ensures environmental justice in the Constitution. As noted by Asmal:

“...[t]he guarantee of environmental rights is dependent on the right of individuals and groups to access to information. Without access to the

society in which all human beings will be accorded *equal dignity* and respect regardless of their membership of particular groups. The achievement of such a society in the context of our deeply inegalitarian past will not be easy, but that that is the goal of the Constitution should not be forgotten or overlooked. (Writer’s emphasis).

¹¹⁹ 1997 (3) SA 1012 (CC).

¹²⁰ At para. 31.

¹²¹ See Chapter Five para. 5 5 4 1.

relevant information the environmental clause is a useless and empty promise.”¹²²

In order for members of the public to enforce environmental law, they would need to have access to certain information. In addition it has been noted that access to information is a precondition to participation in sustainable development.¹²³ Principle 10 of the Rio Declaration on Environment and Development therefore recognises the need to have access to information in order to protect the environment, and notes:

“At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes.”¹²⁴

In Chapter Five it was noted that in light of the numbers of people that have been affected by government decisions regarding the environment, it is essential for people to be able to gain insight into what the scope of government decisions is and what the scope of the impact on the environment may be.¹²⁵ As the Indian Constitution does not expressly protect the right to have access to information, the courts have derived that right from the right to freedom of speech and the right to life.¹²⁶ The Indian judiciary has acknowledged that access to information is vital to ensure that the environment and people living in the environment are adequately protected.

Section 32 (1) of the South African Constitution provides for access to information as follows:

- (1) Everyone has the right of access to –
 - (a) any information held by the state; and

¹²² Asmal “Environment and the Constitution” (1996) *SAJELP* Vol. 3 91 95.

¹²³ See para. 7 2 3 7 above.

¹²⁴ Robinson *Agenda 21* cxii.

¹²⁵ See Chapter 5 para. 5 5 4 5.

¹²⁶ Ibid.

- (b) any information that is held by another person and that is required for the exercise or protection of any rights.”
- (2) National Legislation must be enacted to give effect to this right, and may provide for reasonable measures to alleviate the administrative and financial burden on the state.

It has been noted that the inclusion of a right to access to information is in line with the aim of the Bill of Rights, which guards against the creation of an authoritarian order and emphasises the need for an “open and democratic society”.¹²⁷ The right to access of information therefore guarantees access to information held by the state that may have a direct bearing on an individual. It also ensures access to information that may not be specifically about an individual, but that may have an impact on him or her.¹²⁸ Information that may detrimentally affect the health or well-being of a person or group should therefore be available to that individual or group.

The section is divided into a public and private component and a claim to information is treated differently in these components. Section 32(1)(a) allows for access to information held by the state, which would include an organ of state.¹²⁹ Any person or group should be able to gain access to information held by the state where they need the information to gain insight into state action that may have a detrimental effect on the environment.¹³⁰ Section 32(1)(b) provides for access to privately held

¹²⁷ Meyerson *Rights Limited* (1997) 3.

¹²⁸ De Waal et al *The Bill of Rights Handbook* 460.

¹²⁹ Section 239 of the Constitution defines an organ of state as:

- (a) any department of state or administration in the national, provincial or local sphere of government; or
- (b) any other functionary or institution:
 - (i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or
 - (ii) exercising a public power or performing a public function in terms of any legislation
 - (iii) but does not include a court or a judicial officer.

¹³⁰ In *Van Huyssteen NO v Minister of Environmental Affairs and Tourism* 1995 9 BCLR 1191 (C) the applicants opposed an application for rezoning which would allow the building of a

information, but unlike section 32(1)(a) it is framed as a contingent right. In order to exercise or protect an antecedent right, the applicant will have to prove that the information is required.¹³¹ A person or organisation wishing to gain access to information in the interest of the environment will thus first have to prove the existence of a section 24 right or a right otherwise protected in legislation or in common law.

The Constitution further provides for legislation to give effect to the right contained in section 32(1).¹³² The Promotion of Access to Information Act¹³³ has been adopted with the aim of fostering a culture of transparency and accountability in public and private bodies by giving effect to the right to access to information.¹³⁴ It is also recognised that access to information is essential if people want to fully realise all their rights.¹³⁵

The Act provides for access to records of both public and private bodies.¹³⁶ The inclusion of private bodies significantly strengthens the position of those who are affected by environmental harm. It is often the decisions made by private bodies that cause severe detriment to the environment. The Act also obligates public and private bodies to make certain information publicly available and to indicate the procedures

steel mill near the West Coast National Park and the Langebaan Lagoon. The Environment Conservation Act 73 of 1989 obliges any Minister charged with making a rezoning decision to make that decision in accordance with the environmental policy determined under section 2 of the Act. The applicants applied for an order compelling the Minister of Environmental Affairs and Tourism to make available to them all documents in his possession relevant to the proposed mill. The Court held that the applicants were entitled to such order in terms of their right to access to information held by the state, given that the applicants reasonably required the documents to exercise their rights to object to the rezoning.

¹³¹ Pimstone "Going Quietly about their Business: Access to Corporate Information and the Open Democracy Bill" (1999) *SAJHR* Vol.15 2 3.

¹³² It provides that national legislation be enacted to give effect to the right and that it may provide reasonable measures to alleviate the administrative and financial burden of the state.

¹³³ No. 2 of 2000.

¹³⁴ Preamble.

¹³⁵ *Ibid.*

¹³⁶ Sections 11 and 50.

for gaining access to their records.¹³⁷ This will arguably make it easier for people to actually enforce their right. The Act furthermore provides for circumstances under which such access may be refused.¹³⁸ Provision is, however, made for mandatory disclosure of publicly or privately held information if the disclosure of that information would reveal “an imminent and serious public safety or environmental risk” and if such disclosure is in the public interest.¹³⁹

In addition, the National Environmental Management Act (NEMA)¹⁴⁰ contains a provision on access to information. Section 31 states that every person is entitled to have access to information held by the state and that relates to the environment, the state of the environment and actual and future threats to the environment.¹⁴¹ This provision was enacted pending the promulgation of the Promotion of Access to Information Act and the last mentioned act now caters for application of both of these Acts in relation to access to information on the environment.¹⁴² It seems as if the legislature has paid much regard to the importance of the need to access information in the environmental sphere. Through these two pieces of legislation there seems to be a deliberate effort to fulfil the state’s obligations regarding sections 24 and 32, as well as its wider obligations under section 7(2) of the Bill of Rights.

7 2 8 The Just Administrative Action Clause

Section 33 provides as follows:

- “(1) Everyone has the right to administrative action that is lawful, reasonable and procedurally fair.
- (2) Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons.

¹³⁷ Sections 14(a) and 51(a).

¹³⁸ Part 2, chapter 4 with regard to public bodies and Part 3, chapter 4 with regard to private bodies.

¹³⁹ Section 46(a)(ii) and (b) and section 70(a)(ii) and (b).

¹⁴⁰ No 107 of 1998.

¹⁴¹ Section 31(1)(a).

¹⁴² Section 6.

- (3) National legislation must be enacted to give effect to these rights, and must –
- (a) provide for the review of administrative action by the court or, where appropriate, an independent and impartial tribunal;
 - (b) Impose a duty on the state to give effect to the rights in subsections (1) and (2); and
 - (c) Promote an efficient administration.”

Although environmental law draws from virtually all branches of South African law, administrative law is possibly the most important for its application and development.¹⁴³ As noted in Chapter Six, however, the scope for administrative review in the past has been extremely narrow.¹⁴⁴ Even though the exercise of administrative discretion has been used in ways that have detrimentally affected the environment, it has been virtually impossible to challenge the merits of an environmentally unsustainable administrative decision.

Section 33 will now come into play where officials use their discretionary powers to make decisions that will affect the environment or any person’s right to a healthy environment. In the recent decision of *The Director: Mineral Development, Gauteng Region v Save the Vaal Environment*¹⁴⁵ the question was raised whether interested parties, such as Save the Vaal Environment (Save), wishing to oppose an application by the holder of a mining rights license (Sasol Mining), are entitled to raise environmental objections and be heard by the government official designated to grant or refuse such a license. Save relied primarily on section 24 to oppose the application. The Supreme Court of Appeal held that Save has the right to be heard when the appellant is considering the granting of a mining license. The court noted:

“What has to be ensured when application is made for the issuing of a mining license is that development which meets present needs will take place without compromising the ability of future generations to meet

¹⁴³ Glazewski “The Environment and the New Constitution” 8.

¹⁴⁴ See Chapter 6 para. 6 3 3.

¹⁴⁵ 1999 (2) SA 709 (SCA).

their own needs. 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 processes in our country. Together with the change in the ideological climate must also come a change in our legal and administrative approach to environmental concerns.”¹⁴⁶

Although the court did not explicitly consider section 33 and relied on the common law principle of *audi et alterem partem* instead, the decision implies that the law needs to be interpreted in line with the dictates of the Constitution. This decision indicates a departure from a previous position taken by the court in which environmental considerations were not taken into account in administrative decisions, and indicates a way in which the right may be used to afford optimal environmental protection.

The Promotion of Administrative Justice Act¹⁴⁷ has been enacted in terms of section 33(3) of the Constitution, and purports to create a culture of transparency, openness and accountability in the public administration and to give effect to the right to just administrative action.¹⁴⁸ Section 3 of the Act provides for the procedural fairness of administrative action.¹⁴⁹ It requires that a reasonable opportunity be granted to any person whose rights have been adversely affected by administrative action to make representations.¹⁵⁰ In addition, section 6 of the Act allows for the judicial review of the merits of an administrative act on grounds that include the failure to take relevant considerations into account.¹⁵¹ Any individual or group will therefore be able to take steps to compel the government to consider environmental concerns in its administrative decisions.

¹⁴⁶ At para. 20.

¹⁴⁷ No. 3 of 2000.

¹⁴⁸ The Preamble of the Act.

¹⁴⁹ Section 3(1).

¹⁵⁰ Section 3(2)(b).

¹⁵¹ Section 6(e)(iii).

Section 33 of the Constitution, together with Promotion of Administrative Justice Act, serves to promote environmental justice in that it gives individuals an opportunity to enforce their environmental rights through just administrative action.

7 2 9 Locus Standi

As noted in Chapter Six, the limited legal standing in common law has made it difficult to bring action against those whose actions have contributed to environmental degradation and infringed on the health of groups or individuals.¹⁵² The vast majority of South Africans furthermore do not have the necessary financial means to seek legal remedies when their rights are being infringed or threatened. There are, however, interest groups that are willing and that possess the means to bring an action on behalf of those that are unable to do so. Narrow locus standi rules impede such a possibility.

The Indian court has noted in this regard that limited legal standing denies the poor, vulnerable or socially and economically disadvantaged members of society access to justice.¹⁵³ They have also recognised that since it is often the politically and socially marginalised people in society who are most affected by environmental degradation, these people will have to rely on social action groups and other interested individuals with more power to petition the court. The Indian judiciary has therefore given a generous interpretation to locus standi to ensure environmental justice.

In the absence of constitutional provisions on locus standi, wider standing for US citizens has been granted through numerous statutes.¹⁵⁴ These provisions have made it possible for ordinary people to enforce environmental laws and have strengthened the position of environmental justice lawyers. The more generous approach to locus standi in these two countries has served the cause of environmental justice well.

In South Africa the Constitution has introduced a new locus standi regime in regards to enforcement of the Bill of Rights. Section 38 of the Constitution states:

¹⁵² Para. 6 3 2 2.

¹⁵³ See Chapter Five para. 5 6 1.

¹⁵⁴ See Chapter Four para. 4 4 2.

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

- (a) anyone acting in their own interest
- (b) anyone acting on behalf of another person who cannot act in their own name;
- (c) anyone acting as a member of, or in the interest of, a group or class of persons;
- (d) anyone acting in the public interest; and
- (e) an association acting in the interest of its members.”

Section 38 has broadened the scope of locus standi significantly, not only allowing for class actions, but also for standing on behalf of the wider public interest, in other words an unidentifiable class or group of persons. Commentators have noted that this broad approach to standing is necessary to ensure effective enforcement of the Bill of Rights.¹⁵⁵ Thus, where there has been a threat or infringement of a right in the Bill, section 38 provisions on locus standi come into play.

The liberal standing provisions have been applied in several court decisions.¹⁵⁶ In *Ferreira v Levin NO; Vryenhoek v Powell NO* Chaskalson P stated:

“It is my view that we should rather adopt a broad approach to standing. This would be consistent to the mandate given to this Court to uphold the Constitution and would serve to ensure that constitutional rights enjoy the full measure of the protection to which they are

¹⁵⁵ De Waal et al Bill of Rights Handbook 79.

¹⁵⁶ See for example *Matiso v Commanding Officer, Port Elizabeth Prison* 1994 3 SA 899 (E), *Van Huyssteen v Minister of Environment Affairs and Tourism* 1995 9 BCLR 1191 (C), *Ferreira v Levin NO; Vryenhoek v Powell NO* 1996 1 SA 155 (N), *Minister of Health and Welfare v Woodcarb (Pty.) Ltd.* 1996 3 SA 155 (N), *Beukes v Krugersdorp Transitional Local Council* 1996 3 SA 467 (W), *Freedom of Expression Institute and Others v President of the Ordinary Court Martial NO and Others* 1999 (3) BCLR 261 (C).

entitled. Such an approach would also be consistent in my view with the provisions of section 7(4) of the Constitution.”¹⁵⁷

In *Freedom of Expression Institute v President of the Ordinary Court Martial NO* ¹⁵⁸ the Freedom of Expression Institute and a publisher of a newspaper group respectively, appeared before the ordinary court martial to request that court martial proceedings be open to the public, including the media. The court found that the right to approach the court is extended to anyone acting as a member of or in the interest of, a group or a class of persons, and anyone acting in the public interest. The court thus stated:

“No-one can seriously deny that the first and second applicants are acting in the public interest. In my view the order made by the first respondent on 7 April 1997 denying the first and second applicants locus standi before the ordinary court martial does not stand scrutiny and runs contrary to the spirit of the Constitution.”¹⁵⁹

Any party, including the state, may also bring an action on behalf of others whose rights are infringed or threatened. In *Minister of Health and Welfare v Woodcarb*¹⁶⁰ the Minister applied to the court for an interdict in terms of the Atmospheric Pollution Prevention Act,¹⁶¹ in order to restrain the respondent from emitting noxious or offensive gases. The court held that an interdict was the most suitable remedy for stopping the pollution and decided that, since the applicant was in charge of the administration and control of the Act, he had a sufficient interest to have standing to apply for such relief. The actions of the respondent also had an effect on the neighbouring community. They did not, however, apply for an interdict restraining the infringing conduct. The court held that the action of the respondent infringed the rights of its neighbours to “an environment which is not detrimental to their health and well-being” enshrined in section 29 of the Interim Constitution. The

¹⁵⁷ At para. 165. Section 7(4) of the Interim Constitution essentially mirrored the provisions of section 38.

¹⁵⁸ 1999 (3) BCLR 261 (C).

¹⁵⁹ At para. 12.

¹⁶⁰ 1996 (3) SA 155 (N).

¹⁶¹ 45 of 1965.

minister could in this instance rely on the locus standi provisions of the Constitution to apply to the court for an interdict to restrain the conduct that infringes the rights of the neighbouring community.

Given the court's willingness to allow standing on behalf of others, an environmental group or public interest organisation may be able to bring an action on behalf of a group of persons or in the public interest in an environmental matter. The more restrictive common law position adheres, however, where the case does not concern the infringement of a right in the Bill of Rights. In several instances the court has noted that effective environmental protection necessitates the development of the common law provisions on standing in line with the broader standing provided for in the Constitution.¹⁶² Since environmental rights and interests are protected outside of the Constitution by way of the common law or statute law, the common law position on standing should be changed.¹⁶³

The National Environmental Management Act¹⁶⁴ attempts to broaden the narrow locus standi provisions of the common law. Section 32(1) of the Act states that:

“Any person or group of persons may seek appropriate relief in respect of any breach or threatened breach of any provision of this Act,

¹⁶² See for instance *Wildlife Society of Southern Africa & Others v Minister of Environmental Affairs and Tourism of the Republic of South Africa & Others* 1996 (3) SA 1095 (Tk) and *Van Huyssteen NO and Others v Minister of Environmental Affairs and Tourism and Others* 1995 (9) BCLR 1191 (C).

¹⁶³ In an obiter dictum in *Wildlife Society of Southern Africa & Others v Minister of Environmental Affairs and Tourism of the Republic of South Africa & Others* 1996 (3) SA 1095 (Tk) Pickering J noted the need for the common law to be developed to bring common law rules regarding locus standi in line with the Constitution. He said at 1105 A-B:

“[t]here is much to be said for the view that, in circumstances where the *locus standi* afforded 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, then a body such as the first applicant, with its main object being to promote environment conservation in South Africa, should have *locus standi* at common law to apply for an order compelling the state to comply with its obligations in terms of such statute.”

¹⁶⁴ Act 107 of 1998.

including a principle contained in Chapter 1, or any other statutory provision concerned with the protection of the environment or the use of natural resources-

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

Section 32(1) will apply to those instances where the locus standi afforded to persons by the Constitution is not applicable. Not only does section 32 apply to all legislation concerned with the environment, but it also applies to the principles set out in Chapter 1 of the Act. Two of the principles in Chapter 1 need to be highlighted in this regard. Section 2(4) emphasises the principle of sustainability and connects it to environmental justice. Section 2(4)(c) states that "environmental justice must be pursued so that adverse environment impacts shall not be distributed in such a manner as to unfairly discriminate against any person, particularly vulnerable and disadvantaged persons." It also notes that "equitable access to environmental resources, benefits and services to meet basic human needs and ensure human well-being must be pursued and special measures may be taken to ensure access thereto by categories of persons disadvantaged by unfair discrimination". This is important for advancing an argument based on discrimination in the context of environmental justice.

The Constitution provides for generous standing to approach the court when rights are infringed and NEMA has similarly widened locus standi relating to statutes affecting the environment. There remains, however, a need to bring the common law provisions on locus standi in line with the Constitution. This task will fall upon South African judges to ensure wider access to the court where people are affected by environmental hazards.

7 2 10 The Application Clause

Rights in a Bill of Rights can apply vertically or horizontally, that is, against the state only or against both the state and private persons.¹⁶⁵ Section 8 of the Bill of Rights prescribes who is bound by the Constitution. Section 8 (1) makes the Constitution applicable to the legislature, the executive, the judiciary and all organs of state. In this regard it adheres to the traditional view that a Constitution should protect citizens against unwarranted interference by the state. Section 8(2), however, deviates from this traditional view and provides that a provision of the Bill of Rights also binds natural and juristic persons if, and to the extent that, it is applicable, taking into account the nature of the right and of any duty imposed by the right. The question is to what extent section 8(2) provides for horizontal application and what its effect is on the environmental right in section 24.

The Constitutional Court took a verticalist approach in the judgement of *Du Plessis v De Klerk*¹⁶⁶ and held that section 7 of the Interim Constitution applied only vertically, that is only to instances where state action is challenged. Commentators have different views on whether the matter of horizontal application is settled by section 8 of the Final Constitution.¹⁶⁷ Sprigman and Osborne contend that section 8(2) is essentially open to interpretation by the courts and does not necessarily

¹⁶⁵ Verticalists believe that the Bill of Rights should solely apply to the relationship between the state and the individual or the relationship between individuals in so far as it is guided by legislation. Horizontalists on the other hand believe that both relationships between the state and the individual and relationships between individuals should be subject to the Bill of Rights.

¹⁶⁶ 1996 (3) SA 850 (CC).

¹⁶⁷ For a discussion on the application clause in the Final Constitution see for example Davis and Woolman "The Last Laugh: *Du Plessis v De Klerk*, Classical Liberalism, Creole Liberalism and the Application of Fundamental Rights under the Interim and the Final Constitutions" (1996) *SAJHR* Vol.12 (3) 361, Van der Walt "Justice Kriegler's Disconcerting Judgement in *Du Plessis v De Klerk*: Much Ado About Direct Horizontal Application (Read Nothing)" (1996)4 *TSAR* 732, Cheadle and Davis "The Application of the 1996 Constitution in the Private Sphere" (1997) *SAJHR* Vol.13 (1) 44 and Sprigman and Osborne "Du Plessis is not Dead: South Africa's 1996 Constitution and the Application of the Bill of Rights to Private Disputes" (1999) *SAJHR* Vol.15 (1) 25.

mandate horizontality.¹⁶⁸ Authors such as Davis, Woolman, Cheadle, and others, on the other hand, maintain that section 8(2) “puts beyond dispute that the Bill of Rights can bind natural or juristic persons”¹⁶⁹. Rights in the Bill of Rights, they argue, would not always apply horizontally, but would do so where the rights are capable of and suitable for horizontal application.¹⁷⁰ In determining whether a right applies horizontally the court will have to consider the nature of the right and the nature of the duty imposed by the right.¹⁷¹ It can therefore be argued that it is this consideration, and not whether section 8(2) confers horizontality on the Bill of Rights, which falls within the discretion of the court.

It has been noted that the nature of certain rights in the Constitution, such as the right to dignity and the right to an environment that is not harmful to health or well-being, may be capable of horizontal application.¹⁷² The common law and/or statutory recognition of these rights may furthermore support the notion that they are also suitable for horizontal application.¹⁷³ It can be argued that the common law

¹⁶⁸ Sprigman and Osborne “Du Plessis is not Dead” 36. This, they argue, is supported by section 8(3) that still provides for indirect application and the fact that none of the substantive provisions of the Bill of Rights mandate horizontality. Section 8(3) essentially provides for a situation where the court, faced with a private dispute, will need to develop the common law in line with the dictates of the Bill of Rights. The authors argue that section 8(3) makes sense only in the context of indirect horizontal application.

¹⁶⁹ Cheadle and Davis “The Application of the 1996 Constitution in the Private Sphere” 55. Section 8(3), they argue, supplements section 8(2) in that it mandates the courts to either develop the common law to adhere to the rights in the Bill of Rights or create rules of common law to give effect to those rights. Woolman supports this construction and notes that section 8(3) amounts to potentially a third stage in application analysis. He states that “[i]f the reviewing courts find that a violation of a right has taken place, and if the law (or action) infringing the right is held not to be justifiable under the limitation clause, then s. 8(3)(a) obliges the court to craft a new rule of common law which gives effect to the applicant’s right.” Woolman “Application” in Chaskalson et al (Eds.) *Constitutional Law of South Africa* (Revision Service 3, 1998) 10-i 10-65.

¹⁷⁰ Cheadle and Davis “The Application of the 1996 Constitution in the Private Sphere” 57.

¹⁷¹ Ibid.

¹⁷² Ibid.

¹⁷³ Ibid.

principle of nuisance, as well as environmental laws such as the National Environmental Management Act¹⁷⁴ implicitly recognises the right to a healthy environment. It follows therefore that section 24(a) may be applicable to private disputes. Such an interpretation is important since it is often private actors that cause massive environment degradation. Mines and factories as a rule are owned and operated by corporations. In the context of the environment the power of private persons should therefore be limited by the Bill of Rights to ensure protection to more vulnerable groups. As noted by Madala J in *Du Plessis v De Klerk*:

“The extent of the oppressive measures in South Africa was not confined to governmental/individual relations, but equally to individual/individual relations. In its effort to create a new order, our Constitution must have been intended to address these oppressive and undemocratic practices at all levels. In my view our Constitution starts at the lowest level and attempts to reach the furthest in its endeavours to restructure the dynamics in a previously racist society.”¹⁷⁵

Section 24(b) on the other hand, places a duty on the state to act by way of legislative or other measures. The nature of this provision thus indicates that it is not suitable for horizontal application.¹⁷⁶

7 3 CONCLUSION

Environmental justice requires the social and economic transformation of South African society. It also requires the acknowledgement that the values of equality and dignity are central to that transformation. The South African constitution provides the mechanism for environmental justice, primarily in the form of a concrete environmental right. However, the environmental right must be construed in the

¹⁷⁴ Section 28(1) of NEMA, for example, places a duty of care and remediation of environmental damage on “every person who causes, has caused or may cause significant pollution or degradation of the environment”. Similarly section 1 defines “pollution” as follows: “‘pollution’ means any change in the environment ... whether engaged in by any person or an organ of state, where that change has an adverse effect on human health or well-being..., or will have such an effect in the future.”

¹⁷⁵ Op cit fn 166 supra at para. 75.

¹⁷⁶ De Waal, Erasmus & Currie *The Bill of Rights Handbook* 45.

broader context provided by the Constitution. In this regard the rights to equality, human dignity and life is important. Equally important, however, are the rights that will ultimately provide access to environmental justice, such as the right to information, locus standi and just administrative action.

CHAPTER EIGHT

TOWARDS ENVIRONMENTAL JUSTICE

8 1 SUMMARY

The aim of this dissertation, as set out in Chapter One¹ has been to conceptualise the principle of “environmental justice”:-

- determining its meaning;
- assessing its possible use for the protection of environmental rights, in the light of the South African Bill of Rights, and
- drawing, in a comparative manner, on examples from two other jurisdictions, namely
 - the United States of America (USA), where the notion of “environmental justice” originated, and
 - India, where a right to a healthy environment has been derived from other fundamental rights entrenched in the Constitution.

In Chapters Two and Three I sought to define “environmental justice” and thereafter proceeded to analyse comparatively (in Chapters Four and Five respectively) the ways in which the idea of “environmental justice” has found expression in the United States and Indian jurisprudence as well as in legislative and administrative practices in these two countries. In Chapter Seven I explored possible applications of the principle of environmental justice for the protection of environmental rights in South Africa, assessing the law as it stands and exploring new avenues in the light of the Bill of Rights. What now remains, is to draw some final conclusions. This is done by making some directional recommendations, prefaced with the following recapitulating remarks:

In reviewing the USA experience it became evident that the courts have shown a conspicuous measure of self-restraint in the conceptualisation of environmental

¹ See para. 1 1.

justice.² Due to its non-activist and formalistic approach, the judiciary has failed to address (let alone redress) systemic environmental inequities, and to carve out remedies whereby environmental injustice could have been dealt with in an effective and meaningful way. The social and historical context in which environmental racism occurs has also not been taken into account, and the disparate effects of environmental degradation in the USA have therefore remained virtually unchallenged.

The more activist approach of the Indian judiciary, on the other hand, has led to more effective protection of the environment and of people adversely affected by environmental degradation.³ Three aspects may be highlighted in this regard. First, the judiciary has made it possible for ordinary people to gain access to the court to protect and advance their rights and interests. Second, the judiciary has imposed positive obligations on the state to carry out its social duties as laid down in the Directive Principles. Third, although India does not have a constitutionally entrenched environmental right, the courts have interpreted the right to life expansively so as to include environmental protection. In doing so they have shown a commitment to protect broader societal (including environmental) interests through constitutional means.

South African courts will have the benefit of section 24 to adjudicate alleged infringements of environmental health and well-being. In applying this right, however, it will come face to face with the inevitable conflict between “environment and development”. As a developing country that needs to meet the demands of social transformation and economic growth whilst at the same time enhancing its ability to compete in global markets, South Africa will inevitably embark on developmental programmes. Central to the need for economic development is the need for job creation. Whilst new projects, especially those of an industrial nature, often have a severely detrimental effect on the environment, they also offer new opportunities for many workers. The courts will have to strike a balance between these divergent concerns.

² See Chapter Four para. 4 5.

³ See Chapter Five para. 5 8.

8 2 GUIDELINES

How then should the judiciary (and law and policy makers) in South Africa approach environmental justice? I recommend that the following guidelines be followed:

- Environmental problems in South Africa must be situated within their specific historical and political context. It is one in which there is an inextricable connection between the environment, race and socio-economic status. Consequently environmental injustice must be understood as a form of inequity that impacts on people disproportionately on the basis of race and socio-economic status. It also calls for a recognition of the fact that a degraded environment has an impact on the quality of lives (including the socio-economic conditions) and the dignity of people.
- Since poverty is a cause as well as a consequence of environmental degradation and resource depletion, the underlying reasons for environmental problems should be sought in the human and social conditions attaching to environmental destruction. Poor people in South Africa, in other words, have relatively little control over their environmental and developmental interests and poverty needs to be confronted as a precondition to addressing environmental concerns.
- The concept “environment” can therefore not be narrowly understood, whether it is being dealt with in the Constitution, legislation or common law. It must be recognised that the concept goes beyond ecosystems and that it includes a multiplicity of relationships, in many of which humans are the focal point.
- Environmental justice claims in South Africa may best be framed as constitutional claims. The principle of interdependency of rights, which requires rights in the Bill of Rights to be interpreted in such a way that they reinforce and complement one another, should be central to this approach. In this respect regard should be had not only to the environmental right in section 24 of the Constitution, but also to other rights that support the notion of environmental justice, such as the rights to life, equality, dignity, just administrative action, access to information and access to the courts.
- Judicial activism is a key to the promotion of environmental justice. The Constitution contains powerful provisions aimed at restructuring the South

African society along more egalitarian lines. The judiciary plays an important role in ensuring that the state and other actors fulfil their obligation to respect, protect and promote the rights in the Bill of Rights. Transformation, however, requires a judiciary that is prepared to challenge the traditional boundaries of the doctrine of separation of powers and to lay down directives for other branches of government, in particular the executive. In a country where large sections of the population are uneducated, poor and socially and politically disempowered, the courts will have to interpret the law and specifically the Bill of Rights in a manner that responds to the social needs of these people.

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