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Sustainable Development: The Human Rights Approach to Environmental Protection in South Africa

C. M. van der Bank, Marjoné van der Bank

Abstract**—**International and domestic environmental law has evolved quite rapidly in the last few decades. At the international level the Stockholm and Rio Declarations paved the way for a broad based consensus of the international community on environmental issues and principles. At the Domestic level also many states have incorporated environmental protection in their constitutions and even more states are doing the same at least in their domestic legislations. In this process of evolution environmental law has unleashed a number of novel principles such as; the participatory principle, the polluter pays principle, the precautionary principle, the inter-generational and intra-generational principles, the prevention principle, the sustainable development principle and so on.

Keywords**—**Environment, human rights, international, protection.

I. Introduction

THERE has been injustice in the world ever since Cain killed his brother Abel. Similarly, the driving of men and women from the land and the withdrawal of their means of subsistence have always been standard instruments the repressive exercise of power. The legal status of the human right to a clean and healthy environment as currently conceived and practiced had some truth. The inclusion of an environmental clause section 24 in the South African Bill of Rights represents an important step in the constitutional recognition and protection of human rights [13].

Section 24 states that everyone has the right-

a) To an environment that is not harmful to their health or well-being; and
b) To have the environment protected, for the benefit of present and future generations, through reasonable legislative measures that-
i) Prevent pollution and ecological degradation;
ii) Promote conservation; and
iii) Secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development S24 comprises two important components; firstly, it confers on “everyone” the right to an environment that is not harmful to their health or well-being. Secondly, it places a duty on the state to prevent pollution and other damage to the environment, and to promote conservation and sustainable development. Section 24(b) has vertical application as it is the sate (or its organs like municipalities) that has the capacity to take “legislative and other measures” to protect the environment.

C. M. Van der Bank is with the Vaal University of Technology, South Africa (phone: +27 169509240; fax: +27 169509879; e-mail: riana@vut.ac.za).

Life on earth is remarkably complex and diverse, but also fragile and facing enormous pressures. The many linkages between protection of human rights and protection of the environment have long been recognized. The 1972 United Nations Conference on the Human Environment declared that "man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights-even the right to life itself [2]."

The International Human Rights Watch (HRW) has criticised the failure of governments, international agencies and non-governmental organisations to see environmental issues through the prism of human rights and address them together in legislation. The environment and human rights had to work together to ensure that those who damaged the environment and trampled on human rights held accountable.

II. Should There Be a Human Rights Approach for Environmental Protection?

There are three commonly discussed approaches to examining the interaction between environment protection and human rights. This piece investigates these three approaches to examine if the human rights law regime should subsume the environmental law regime, if the latter should subsume the former or if both the legal regimes should exist separately, with mutual interaction.

First, human rights laws, institutions and processes can be invoked for asserting a right to clean environment. This usually leads to adopting a rights-based approach for environmental protection with an emphasis on the right to clean environment.

A second approach would be to leverage environmental laws, concepts, institutions and processes for better protection of human rights which could not be attained in the absence of a clean and healthy environment. In other words, tort and statutory regulations which make reference to ‘environment protection’ could be used to assert protection of human rights.

The final approach could be to interfuse environmental law and human rights. The movement towards “sustainable development,” which considers the needs of present and future generations, seems to be heading in that direction.

The authors argue that human rights law and environmental law should continue to develop as two independent but closely linked fields whilst ‘borrowing’ apposite concepts. For instance, in countries where a separate right to environment is not formulated in clear terms, the existing human rights provisions regarding right to life and human dignity can be

invoked, on the basis that the right to decent life cannot be protected in the absence of its concomitant right to clean environment. However, a human rights-based approach can lead to an anthropocentric approach to environment protection. Subsuming environmental law into human rights makes the environment only a function of human needs and rights rather than as an issue that deserves protection in and of itself.

The separate existence of environmental and human rights organization's within a multilevel governance structure therefore has its advantages. These institutions can join forces for specific overlapping objectives. For instance, the coming together of OHCHR and UNEP for a joint report on human rights and environmental protection is laudable and it helps both institutions to identify the common ground that they can cover together, strengthening each advocacy platform.

Taking a human rights approach to environmental protection is advantageous in that it reinforces the concept of mutual goals and the serious ramifications each may have on the other. Framing the relationship in terms of an irreconcilable tension between developmental prerogatives and environmental prerogatives stalls progress for environment protection both at international level (by pitching developed countries versus the developing countries in international environmental negotiations), and at national level (by making environment protection subservient to developmental priorities). It is therefore imperative that developmental concerns and environmental concerns are not seen as conflicting, but that all actors realise the need to integrate them in order to make sustainable development a reality. We need to give more flesh to the concept by having more explicit legal provisions, institutions and practice which refer to it directly and in a binding manner, as this can help us in achieving sustainable development in all its dimensions.

III. Human Rights as Interdependent Agents of Human Dignity

Central to the concept of human rights, is the notion of a public order of human dignity an *ordrepublique* in which values are shaped and shared more by persuasion than by coercion, and which seeks to promote the greatest production and widest possible sharing, without discrimination irrelevant of merit, of all values amongst all human beings [5]. This notion of public order, encapsulating the basic policies of an international law of human dignity is embedded in the International Bill of Human Rights.

In the struggle for a clean and healthy environment, a rights-based approach to ecological governance thus signals more than environmental protection per se. it also signals that norms of non-discrimination, justice and dignity that must be central in all aspects of ecological governance, the way in which we achieved as well as the way in which it functions thereafter, including the manner in which it processes and resolves environmental grievances within its jurisdiction. The human right to a clean and healthy environment is part of a complex web of interdependent rights that extends protection beyond one domain to many others. Most, if not all, human rights depend on the satisfaction of other human rights for their fulfilment.

IV. Striking the Sustainability Balance in South Africa

The country faces various challenges related to meeting the needs of people and the social transformation objectives set in the Constitution of the Republic of South Africa, 1996 (the Constitution) coupled with managing the demands of the natural resources base. Kidd states that it is critical in South Africa today with its emphasis on economic growth and development that such growth and development be sustainable. By combining concerns with the environment with concerns relating to social upliftment and economic progress, the concept of sustainability development will be difficult to sideline [11].

A balance must be struck between securing economic growth and stability, providing for the socio-economic needs and social welfare of all people in South Africa, and protecting vulnerable ecosystems and natural resources, whilst also respecting the cultural values and practices of a diverse array of communities. When weighing the sustainability factors (social, economic, cultural and environmental) a fair balance must be struck, in true environmental justice jargon, between the current generation and the generations of people still to be born. This complicates the balancing act since it is not only the present that must be taken into account but also whatever lies in the blurry future.

South Africa is in a position of having an enforceable substantive right in the Constitution. "Sustainable development" has been explicitly included in section 24 environmental right, but sustainability as a notion is referred to more than once [16].

In 2007 the Constitutional Court for the first time actively engaged with the section 24 environmental right, in particular with the notion of sustainable development and the process of weighing the different sustainability factors [8]. In the case of *Fuel Retailers Association of South Africa v Director General Environmental Management, Department of Agriculture, Conservation and Environmental Mpumalanga Province* has extensively dealt with environmental law scholars in South Africa [19]. The case concerns the nature and scope of the obligations of environmental authorities when they make decisions that may affect the environment, in particular, the interaction between socio-economic development and the protection of the environment.

The case involved an application for a filling station in White River, Mpumalanga. Inama Trust applied to the Mpumalanga environmental authorities for authorisation to construct a filling station in White River, Mpumalanga. Fuel Retailers Association of Southern Africa, an organisation which represents the interests of fuel retailers, the applicant in the proceedings in the Constitutional Court, objected to the construction of the filling station on various grounds, including that the construction of the filling station will have an adverse impact on the environment. The applicant insisted that the environmental authorities should consider whether the

proposed filling station would be socially, environmentally and economically sustainable as required by the laws governing the protection of the environment. Despite this objection, the environmental authorities granted authorisation to the Inama Trust to construct the filling station. An internal appeal by Fuel Retailers Association was unsuccessful.

The applicant thereafter approached the Pretoria High Court seeking an order setting aside the granting of the authority to construct the filling station. It alleged that the environmental authorities did not consider whether the proposed development would be socially, environmentally and economically sustainable. The environmental authorities and Inama Trust opposed the application alleging that the socio-economic aspects of the construction of a filling station had been duly considered by the local authority when it considered the rezoning of the property for the purposes of constructing the filling station in question.

The Pretoria High Court dismissed the application. The appeal of Fuel Retailers Association to the Supreme Court of Appeal was equally unsuccessful.

In a judgment concurred in by all the justices except Sachs J, Ngcobo J held that the Constitution recognises the interrelationship between the protection of the environment and socio-economic development. It contemplates the integration of environmental protection and socio-economic development and envisages that the two will be balanced through the ideal of sustainable development. He held that sustainable development provides a framework for reconciling socio-economic development and environmental protection and thus acts as a mediating principle in reconciling environmental and developmental considerations.

Ngcobo J held that the obligation of the environmental authorities to consider socio-economic factors includes the obligation to consider the impact of the proliferation of filling stations and of proposed filling station on existing ones. This obligation is wider than the requirement to assess need and desirability under the Ordinance. It also comprehends the obligation to assess the cumulative impact on the environment of the proposed development.

He reasoned that unsustainable developments are in themselves detrimental to the environment if a development such as a filling station may have a substantial impact on the environment. The proliferation of filling stations poses a potential threat to the environment, which arises from the limited end-use of filling stations upon their closure. However, he stressed that the objective of considering the impact of a proposed development on existing ones is not to stamp out competition; rather it is to ensure the economic, social and environmental sustainability of all developments. The filling station infrastructure that lies in the ground may have an adverse impact on the environment.

He held that the authorities misconstrued the nature of their obligations and as a consequence failed to comply with a compulsory and material condition prescribed by the law for granting authorisation to establish a filling station.

Section 24 of the Constitution does not only concern itself with national issues. It also makes it clear that the government must take reasonable legislative and other measures towards the realization of the right. Legislative measures refer to the making of laws – national laws, provincial ordinances and local bylaws whilst other measures may comprise things like policies, plans, programmes and other regulatory tools must keep the sustainability equation in mind and may not only be construed to protect strictly environmental, social or economic interest [8].

V. Selected Social, Economic and Cultural Rights

The right of access to sufficient water is accorded to everyone in s 27(1)(b) of the Constitution, which states that everyone has the right to have access to sufficient water [10]. Section 27(2) requires the State to take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of the right [16].

In a number of international and regional instruments, the right to sufficient water is not explicitly recognised. Most of the instruments provide for the right to adequate standard of living for the health and well-being of the individual and family [7]. These instruments include the Universal Declaration of Human Rights (UDHR), (Universal Declaration of Human Rights Article 25, 1948) [1], the International Covenant on Economical Social and Cultural Rights (ICESCR article 11) [17] and at the regional level the African Charter on Human and Peoples Rights [3].

The right to access to sufficient water in s 27(2) should be understood to mean that the State is not obliged to provide water freely, but is under an obligation to create mechanisms that enable people to have access to sufficient water. The right of access to sufficient water has been extensively dealt with by the Constitutional Court *inter alia* in the matter of *Mazibuko v The City of Johannesburg and Others* [20]. This case has shown not only the environmental right *per se* but also the right to access to water requires a careful balancing of social, economic and environmental interests and has confirmed that provided the executive and legislative branches of government can prove that reasonable measures have been taken to realize the right, this would satisfy the state's constitutional duty.

The right to adequate housing (section 26(1) places positive responsibilities upon the state in stating that "The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right." The primary responsibility for fulfilling this mandate lies with the Department of Human Settlements. Section 26 also grants the right to due process with regard to housing, stating that "No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions" [16].

The Constitution also provides for three procedural rights to support the substantive rights relevant for the sustainability equation [8]. There are also two explicit rights of access namely, access to information and the right to administrative action. The Bill of Rights guarantees our rights and says we can defend our rights in court. This will go a long way towards creating a human rights culture. But building a human rights

culture depends mostly on the attitudes of individuals, and the respect and tolerance that they show towards other people. Section 32 provides for the right to access to information, also known as the right to know. This provision is unique among human rights instruments, but are comparable with freedom of information legislation in other countries. The right to know was enshrined in the South African Bill of Rights in reaction to the restrictive information policies by the Apartheid regime. Section 32 states that "Everyone has the right of access to any information held by the state; and any information that is held by another person and that is required for the exercise or protection of any rights. "Section 32 not only provides for access to information held by the state, but also from a third party if it is required to exercise or protect any right. This makes this provision unique, even among freedom of information legislation, which commonly only apply to public bodies. Section 32 applies to public bodies, as well as private bodies, including companies and the environmental right. The right to information is supplemented by NEMA section 31 and PAIA. It can be said that South Africans have significant constitutional and legislative protection when it comes to accessing information necessary to protect their environmental rights and ensuring accountability for rights –based obligations. In environmental decision-making actions section 33 of the right to administrative action comes into play.

VI. Interlinkage of Sustainable Development and Environmental Issues

The environmental issue undoubtedly adds a new dimension to the problem of human rights. In the first place, it shows once again that all human rights are closely interlinked, and secondly, that the problem of human rights is inseparable from practically all other processes in human society, and especially from economic development and the progress of science and technology. The main conclusion is the model of sustainable development which has its roots primarily in environmental issues [18].

The principle of sustainable development was first coined in the *Report of the World Commission on Environment and Development: Our Common future* (WCED), widely known as the *Brundtland Report*. "Sustainable development" is defined in the *Brundtland Report* as:"Development that meets the needs of the present without compromising the ability of future generations to meet their own needs" [14].

Another definition that can be given to sustainable development is to perform activities that safely can be performed indefinitely [9]. This supposes that the activities will be performed in the environment, and that it will be possible to continue to perform these activities in the environment indefinitely. Sustainable development should in other words be understood in two contexts, the first having to do with people`s needs and the second dealing with the technology and social organisation which will ensure the environment`s ability to meet the needs of present and future generations [4]. The findings of the *Brundtland Report* include the recommendation that the environment should be re-examined in the context of developmental issues.

In the broader context the *Brundtland Report* suggests that the impact of development on the natural environment should be established and that a limit should be put on further development in order to ensure that the environment is able to sustain the survival of future generations. The Millennium Ecosystem Assessment claimed that human activity is putting a strain on the environment and the natural ecosystem and that such sustainability can therefore no longer be taken for granted. Human economic, social and environmental systems are inextricably linked, and their development should be controlled and monitored simultaneously. These systems are referred to as the three pillars of sustainable development.

Policy in all fields of human rights must be environmentally sound. The enjoyment of all human rights is closely linked to the environmental issue. Not only rights to life and health in the first place, but also social, cultural, as well as political and civil rights, can be fully enjoyed only in a sound environment. The worst the environment becomes, the more impaired are human rights, and vice versa. That is the reason why there is the need for sustainable development and that means, in the first place, ecologically sound development of economies, science and technology, and all other fields. This is a *sine qua non* for both protection of the environment and further promotion of human rights. Besides that, the environmental issue shows in a very clear way that all human rights should be regulated and enjoyed in a balanced way, or to put it better, in a sustainable way. That means that civil and political rights, on the one hand, and economic, social, and cultural rights on the other are needed equally and should be protected and promoted by all means. Finally, the rapid development of environmental law, together with the closely interlinked, and dialectically inseparable, law of sustainable development, are contributing to the development of international law in general and especially human rights law.

VII. Interlinkage of Sustainable Development and Environmental Issues

The Constitution suggests that none of the rights in the Bill of Rights is superior to others, which implies the need for the continuous balancing *inter alia* of economic, environmental, social and cultural interest.

Fundamental rights and freedoms are not absolute [6]. Their boundaries are set by the rights of others and by the legitimate needs of society. In the South African Constitution, a general limitation clause- section 36 sets out specific criteria for the restriction of the fundamental rights in the Bill of Rights. "Limitation" is a synonym for "infringement" or, perhaps, "justifiable infringement", a law that limits a right infringes the right. However, the infringement will not be unconstitutional if it takes place for a reason that is accepted as a justification for infringing the right in an open and democratic society based on human dignity, equality and freedom. In other words, not all infringements of fundamental rights are unconstitutional. The existence of a general limitation clause does not mean that rights can be limited for any reason. The reason to limit a right need to be exceptionally strong. The limitation must serve a purpose that

most people would regard as particularly important [12]. But, however important the purpose of the limitation, restrictions on rights will not be justifiable unless there is good reason for thinking that the restriction would achieve the purpose it is designed to achieve, and that there is no other way in which the purpose can be achieved without restricting rights.

Section 38 the interpretation clause states when interpreting the Bill of Right, the courts must promote the values that underlie an open and democratic society based on human dignity, equality and freedom, and must consider international law. The objects of the Constitution (including the object of sustainability) must furthermore be taken into account when developing the common law or customary law or when interpreting legislation [16]. This rule of interpretation arguably applies to laws regulating environmental, economic, social and cultural affairs in South Africa. To cater for diversity in the country it is further stated that the Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill.

VIII. Interrelation between Environmental Degradation and Human Rights

Human rights and environmental laws have traditionally been envisaged as two distinct, independent spheres of rights. Towards the last quarter of the 20th century, however, the perception arose that the cause of protection of the environment could be promoted by setting it in the framework of human rights, which had by then been firmly established as a matter of international law and practice. There are many complex issues that arise when these two disciplines interact, it is to be expected that there are different views on how to approach the environment and human rights [15]. There are three approaches prevailing with regard to the relationship between human rights and environmental protection:

The first approach is one where environmental protection is described as a possible means of fulfilling human rights standards. Here, the end is fulfilling human rights, and the route is through environmental law.

The second approach states that the legal protection of human rights is an effective means to achieving the ends of conservation and environmental protection. This highlights the presently existing human rights as a route to environmental protection. The focus is on the existing human right.

The third approach is to deny the existence of any formal connection between the two at all according to this approach there is no requirement for an environmental human right.

There can be a conflict between the established human rights and the protection of the environment. Whether international human rights law can contribute to environmental protection is an issue that remains to be conclusively resolved, but scholars have discussed the relationship between human rights and environmental protection in length. By adopting a human rights based approach, the environmental model would improve its effectiveness by enhancing the ability to manage risks and improve environmental and developmental outcomes. A right to environmental can easily be incorporated in the core of human rights protection whose ultimate purpose is the blooming of personality of all human beings. Both environment and human rights law have some common points and both disciplines have deep social roots and both have become internationalized.

IX. Conclusion

The connection between environmental protection and human rights has been discussed in the international field since the 1970s. The links between the two fields have served as a basis for establishment of the so-called rights-based approach to environmental protection. All the new approaches (such as the environmental consequences of newly interpreted traditional human rights, procedural aspects of environmental protection and a new substantive human right to a healthy environment) are aimed at increasing the effectiveness of environmental protection and improving the quality of the human environment. Indeed, human rights-based approaches seem to be an efficient means of fulfilling this goal, however there is still room for positive development - the right to a healthy environment still cannot be seen as having a stable position in an internationally guaranteed human rights catalogue.

In South Africa, the focal point of legal regulation of environmental protection still remains distinctly in the public regulatory approach. The mere possibility of applying rights-based approaches has been brought about by the incorporation of environmental rights in the Constitution in 1994. However, their enforcement is weak due to legislative and judicial limitations. The first stems from the fact that the Constitution leaves the right to a favourable environment to be implemented by further legislation. The second is caused by the existing judicial interpretation of the right to the environment and a narrow interpretation of standing to claim this right.

We have come a long way since the time when many doubted whether the right of access to adequate water was justifiable, pointing to its glaring exclusions from the International Bill of rights. The right to access to sufficient water is essential for dignified existence, let alone the fact that it is a source of life, so to speak.

All human beings depend on the environment in which we live. A safe, clean, healthy and sustainable environment is integral to the full enjoyment of a wide range of human rights, including the rights to life, health, food, water and sanitation. Without a healthy environment, we are unable to fulfil our aspirations or even live at a level commensurate with minimum standards of human dignity. At the same time, protecting human rights helps to protect the environment. When people are able to learn about, and participate in, the decisions that affect them, they can help to ensure that those decisions respect their need for a sustainable environment.

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