

Does the Namibian legal framework guarantee the right to Environmental Justice?

Environmental Justice

A dissertation submitted in partial fulfilment of the requirement for the degree of Bachelor of Laws

At the Faculty of Law of the UNIVERSITY OF NAMIBIA

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Supervisors' Certificate

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Declaration

I the undersigned, hereby declare that the work contained in this dissertation for the purpose of obtaining my degree of Bachelor of Laws, is my own original work and that I have not used any other source than those listed in the bibliography and quoted in the references.

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Dedication

Firstly, to God Almighty who created this earth for us ALL to enjoy!

To my little angel, Buyiswa #Khita Kandundu. (You will achieve more than I did.)

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ABSTRACT

This dissertation investigates the legal framework of Namibia to determine whether it ensures environmental justice. It traces the development of the environmental justice movement (EJM), showing how it evolved. It provides an introduction and background to the subject of environmental justice. It will further explain the importance of environmental justice and why it should be researched. This sets the basis for examining whether Namibia has in place a legal framework that guarantees the right to environmental justice.

Furthermore, this paper seeks to examine the extent to which Namibia has complied with international and regional instruments in order to guarantee environmental justice. In this context this paper also embarks on a comparative study of South Africa's approach to environmental justice.

It was found that the Namibian Constitution is lacking to the extent that it does not explicitly specify neither substantive nor procedural environmental justice rights for Namibians. This deficiency is in contrast to constitutions of other African countries. The fact that the environmental right is contained in Art 95 of the Namibian Constitution leaves a bitter taste in this author's mouth as Art 95 is overshadowed by questions of enforceability and justiciability.

It was re-affirmed that the provisions of Bill of Rights as contained in the Constitution lends itself to a broad interpretation thus making it easy to use a human rights approach to ensure the right to environmental justice.

New environmental legislation has provided the framework for environmental redress by poor communities and other national statutes such as the Environmental Management Act goes a long way in ensuring environmental justice especially in the prevention of pollution and holding the polluter accountable. The inclusion of the Environmental Impact Assessment processes can be seen as a major area of success, as a way of ensuring that proposed development processes such as employment creation through the granting of mining licences, were in line with principles of sustainable development and conservation. However it was also found that many EIAs are rituals that never make a difference to the actual outcome, but do tie up activists' time. Information can be kept secret, often in collusion with the state (regulators), thus excluding

communities from knowing how polluted they are, and denying communities the evidence to take legal steps for protection.

Regional and international progress in the field of environmental justice is quiet comforting. Although the Aarhus Convention is a European legislation the provisions contained therein are to be nationalised by all nations.

South Africa is a step ahead with its inclusion of an environmental right in the Constitution. It elevates the importance of the environment and of environmental protection and conservation.¹ The environmental right is then placed on par with other constitutionally-protected rights such as equality, dignity and the right to life.² The inclusion further underscores the significance which South Africans place on a sound and healthy environment.³ The South African legislature went a step further and implemented statutes to give effect to the constitutional requirements.

¹Feris, supra, p49.

²Ibid.

³Ibid.

Acronyms

AMCEN	African Ministerial Conference on the Environment AMCEN
CBD	Convention on Biological Diversity
CEDHA	Centre for Human Rights and Environment
EIA	Environmental Impact Assessment
EJM	Environmental Justice Movement
OECD	Organisation for Economic Co-operation and Development
OHCHR	Office of the High Commissioner for Human Rights
SEA	Sustainable Environmental Assessment (SEA)
UN	United Nations
UNDP	UN Development Programme
UNFCCC	UN Framework Convention on Climate Change
USEPA	United States Environmental Protection Agency

1. CHAPTER 1

1.1. Introduction

This study is an investigation into the Namibian legal framework as to whether it ensures environmental justice. In an attempt to unveil the concept of environmental justice in Namibia, this paper will discuss *inter alia* constitutional, legislative provisions as well regional and international instruments that provide for the environmental justice. Relevant to this study would be an understanding of how sustainable development has been incorporated within Namibia's principles on environmental justice. . Additionally, this paper will highlight the link between environmental justice and human rights both within Namibia and at international level. This paper will discuss what the government has done in this area and also what still needs to be done in light of the expectations of its citizens and the international community. The starting point will be to define what is environmental justice?

1.2. Definition of EJ

Environmental justice can be defined as the right to a safe, healthy, productive, and sustainable environment for all, where "environment" is considered in its totality to include the ecological (biological), physical (natural and built), social, political, aesthetic, and economic environments.⁴ It then follows that environmental justice also refers to the conditions in which such a right can be freely exercised, whereby individual and group identities, needs, and dignities are preserved and fulfilled. This must be done in a way that provides for self-actualization, personal and community empowerment.⁵ This above definition basically summarises the principles of environmental justice.⁶ This term acknowledges environmental "injustice" as the past and present state of affairs and expresses the socio-political objectives needed to address them.⁷

⁴U.S. Environmental Protection Agency. Environmental Justice([http:// www. epa. gov/ environmentaljustice/](http://www.epa.gov/environmentaljustice/)). U.S. EPA. . Accessed on 20 May 2011. See also the Preamble to the Principles of Environmental Justice in Annexure 1.

⁵ Ibid.

⁶See Annexure 1

⁷ Ibid.

Generally, Environmental justice is defined as seeking to redress inequitable environmental burdens, oftentimes borne by minority and low-income communities.⁸ In the words of Bunyan Bryant, "Environmental justice is served when people can realize their highest potential."⁹

A more political definition is the one put forward by Cutter who states that:

environmental justice is a more politically charged term, one that connotes some remedial action to correct an injustice imposed on a specific group of people, mostly people of colour in the USA.

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The definition by the U.S. Environmental Protection Agency if understood from an African context and more so Namibian context, is clearly aimed at correcting the injustices of the past under the colonial regimes where not all people enjoyed the same rights to the environment. McDonald¹¹ seem to agree with this observation when he opines that the term essentially encompasses the widest possible definition of what is considered "environmental" and is unapologetically anthropocentric in its orientation when it places persons, rather than flora and fauna, at the centre of a complex web of social, economic, political, and environmental relationships.¹² A good example of this is locating a clothing factory, next to a poor black community simply because they are poor and black, is an environmental injustice that violates the basic human rights, democratic accountability and demands remediation and prevention.¹³

The following explanation of environmental justice from the quarterly newsletter of the South African Environmental Justice Networking Forum encapsulates the basic philosophical tenets and epitomises the focus on human and democratic rights that is so central to environmental justice movement and literature worldwide¹⁴:

⁸See Principle 2 of the Principles of Environmental Justice annexed hereto. Annexure 1.

⁹Quoted in Munnik, V. (2007). Solidarity for Environmental Justice in Southern Africa. *groundWork*, p2. See also Principle 5 of the Principles of Environmental Justice.

¹⁰Cutter, S. 1995. Race, class and environmental justice. *Progress in Human Geography*. Vol, 19; p111-122. Available at www.phg.sagepub.com. Accessed 23 April 2011

¹¹McDonald, D.A. 2002. *Environmental Justice in South Africa*. Cape Town. University of Cape Town Press. P3

¹²ibid

¹³The Ramatex clothing factor location in Windhoek, Namibia is an clear example of this. The city has enough industrial areas to cater for a factory of that nature but it was located between residential areas of the black and poor residents of the city.

¹⁴Quoted in McDonald, 2002, supra.

Environmental justice is about social transformation directed towards meeting basic human needs and enhancing our quality of life-economic quality, health care, housing, human rights, environmental and social justice issues; the environmental justice approach seeks to challenge the abuse of power which result in the poor people having to suffer the effects of environmental damage caused by the greed of others. This includes workers and communities exposed to dangerous chemical pollution, and rural communities without firewood, grazing and water.

Ruppel¹⁵ simplifies it as follows:

Recognition of the link between the abuse of the human rights of various vulnerable communities and related damage to their environment is expressed under the term environmental justice. In both the industrialised and developing parts of the world, a growing body of evidence demonstrates that poor and other disenfranchised groups have been the greatest victims of environmental degradation.¹⁶

1.2.1 Environmental Equity

Closely related to or intertwined with environmental justice is Environmental equity, which is a broad term that is used to describe the unbalanced effects of environmental degradation on people and places.¹⁷

According to Cutter, environmental equity originates from three major sources of dissimilarity - social, generational, procedural.¹⁸ Social equity refers to the role of social and economic factors (class, race, gender, ethnicity, political power) in environmental degradation and resource consumption.¹⁹ Cutter and others also make mention of generational equity, which is a framework of legal norms to bring justice to future generations from current and past practices.²⁰ In other words, public policy decisions are governed by the concept of fairness to future generations, so that our children and grandchildren will have the same or even better access to resources and the same or even better quality of life as we do. This is particularly important to the legal question raised in this paper as the current policies of the government to ensure

¹⁵Ruppel, O.C. 2008. "Third-generation human right and the protection of the environment in Namibia."In Horn, N.J. & Bosl, A. (Eds.).*Human Rights and the Rule of Law in Namibia*. Windhoek: Macmillan Namibia.

¹⁶(ibid).

¹⁷Cutter supra. See also Bullard, R. *Environmental Justice / Environmental Racism*. www. Ejnet.org/ej/ . Accessed 09 January 2011.

¹⁸ibid, p112.

¹⁹ Ibid.

²⁰ Ibid.

environmental justice will determine the future enjoyment of environmental justice. Generational equity is similar to the Black Economic Empowerment (BEE) policies in Namibia. Government through these policies want to level the playing field by deliberately ensuring that the previously disadvantaged people do get preference. Whether these BEE policies truly benefit all previously disadvantage people or only an “elite” few is a matter of debate.

Generational equity ensures that society does not mortgage the environmental future for a present short-term economic gain. The current Uranium boom in Namibia is a thorn in the flesh of some for the simple reason that it seem as the Government just issue mining licences blinded by the short term economic gains. Yes it is an undisputed fact that these mines do create much needed employment but if it is weighed against the “pressure” put on the environment it becomes questionable. The number of uranium mines concentrated in the Erongo Region will switch on an alarm even in a layman who is neither scientist nor geologist.

For many, the phrase ‘environmental equity’ implies an equal sharing of risk burdens, not an overall reduction in the burdens themselves.²¹ This understanding is in line with Principle 3 of the Principles of environmental justice.²² Shelton positions the definition of environmental equity better by stating that equity has played a major part in determining the distribution of rights and responsibilities in conditions of scarcity and inequality.²³ This is the general value of equity which is largely accepted. However, debate exists on the appropriate principles to determine allocation, e.g. whether decisions should be based on need, capacity, prior entitlement, just deserts, the greatest good for the greatest number or strict equality of treatment.²⁴

The above explained terms relate directly to environmental justice and one cannot discuss environmental justice without first establishing their meaning. The omnipresence of environmental deliberations in every turf of human endeavour is illustrated by the legal rules generated to administer the field. Professor Robinson found that:

(e)nvironmental law is at once part of, and an active force in, bringing about a metamorphosis throughout human society. Environmental Law has emerged as the discipline that most clearly

²¹ Cutter, *ibid* p 112

²²Annexure 1

²³Shelton D, *ibid* p58

²⁴*ibid*, p59

defines normatively and establishes a fundamental part of the coming elements of a new sustainable world community. Environmental Law is neither purely municipal or national law, nor is it solely or even essentially international law. It is part of the future paradigm of knowingly interdependent social and natural system(s).²⁵

From the above definition it is clear that environmental law in itself envisage a new sustainable order and that at its core it therefore is a very wide legal discipline. Even though some legal scholars classify environmental law as soft law there can be no dispute that it plays a major role in the sustainable development of societies across the globe. Today if one reads newspapers or watch news on television you will find that somewhere environmental concerns and or environmental law is mentioned and this is the omni-presence that Professor Robinson is referring to.

At first mention of the phrase ‘environmental justice’ what comes to mind is litigation dealing with offences relating to the environment. This understanding is correct however for this study we consider the social justice meaning of environmental justice. During the past decade, environmental justice thought has emerged as a major part of the environmental discourse. Fundamentally environmental justice is about incorporating environmental issues into the broader intellectual and institutional framework of human rights and democratic accountability.²⁶

In theory, the dogma of environmental justice means that we can no longer disregard who benefits and loses in the environmental game or in whose backyard the unwanted facility is located.

1.3. Historical Background

The threads of history that led to the environmental justice movement go back much further, to colonization of Native people and African Americans, to the Civil War, to Hiroshima and issues surrounding nuclear testing since the 1930s, and to the development of pesticides post-WWII.²⁷ The term environmental racism was coined in 1982 by Benjamin Chavis²⁸, who states:

²⁵Professor Robinson from the Pace University Center for Environmental Legal Studies, New York.

²⁶ibid p3.

²⁷Lynch, P.G. http://www.toxicspot.com/env_justice/env_principles.html. Accessed 26 October 2011.

²⁸Then head of the United Church of Christ’s Commission on Racial Justice

Environmental racism is racial discrimination in environmental policy-making and enforcement of regulations and laws, the deliberate targeting of communities of color for toxic waste facilities, the official sanctioning of the presence of life threatening poisons and pollutants in communities of color, and the history of excluding people of color from leadership of the environmental movement.²⁹

Within the activist community, environmental justice is now the preferred term and the one that I will use. Environmental racism is part of a historical system of discriminatory exploitation, but is too restrictive a term for the current movement. Environmental justice, on the other hand, moves beyond racism to include others (regardless of race or ethnicity) who are deprived of their environmental rights, such as women, children and the poor.

Environmental justice is political action and social mobilization that marshals public and private commitment to change.³⁰ In merging environmental, social equality and civil-rights movements into one potent political force, environmental justice advocates have considerable influence on public policy at all levels. The environmental justice movement began in 1982 in Warren County, North Carolina, when the state selected a site (Afton) to host a hazardous waste landfill containing 30 000 cubic yards of PCB-contaminated soil.

Residents, mostly African-American, rural and poor, were joined in their protests by national civil-rights groups, environmental groups, clergy and members of the Black Congressional Caucus.³¹ Although unsuccessful in halting the landfill construction, the Warren County demonstrations marked the first time that African Americans mobilized a national broad-based coalition in response to an impending environmental threat. The Warren County demonstrations were the first of many community of colour struggles over toxic substances.³²

Two studies, one by the government, and the other by the United Church of Christ's Commission for Racial Justice (1987), galvanized the movement and provided some much-needed empirical

²⁹Cutter, S. 1995. Race, class and environmental justice. *Progress in Human Geography*. Vol, 19; p111-122. Available at www.phg.sagepub.com. Accessed 23 April 2011

³⁰Shelton, 2009, supra, p59

³¹(ibid.) and see also Cutter supra

³²(ibid.).

support for the claims of environmental racism. Bullard's *Dumping in Dixie*³³ added further empirical support for the disproportionate burden of toxic waste on minority communities.

October 1991, the First National People of Color Environmental Leadership Summit took place, organized and attended by more than 650 grassroots and national leaders representing more than 300 environmental groups. Many of the delegates, participants and observers shared their experiences and early struggles and offered networking tips on surviving 'environmental sacrifice zones'.³⁴

In the 1980s, environmental justice emerged as a concept in the United States, powered by a intensifying disdain within African-American, Hispanic and native communities that were subject to hazardous and polluting industries located predominantly in their neighbourhoods.³⁵ This directly resulted in the launch of the environmental justice movement, which adopted a civil rights and social justice methodology to environmental justice and grew organically from dozens, even hundreds, of local struggles, events and a variety of other social movements.³⁶

Until the early 1990s minorities have been absent from the rank and file of mainstream environmental organizations such as the Sierra Club, the Audubon Society, Friends of the Earth, and Greenpeace.³⁷ At the same time, these organizations have not taken on environmental justice issues. They all began to recruit minorities both among their rank and file membership and to serve in staff and decision making positions in the 1990.³⁸ A few, including the Sierra Club and Greenpeace have participated in the environmental justice struggle by filing briefs or providing informational and organizational resources.³⁹

By 1991, the First National People of Colour Environmental Leadership Summit in Washington agreed on the principles of environmental justice.⁴⁰ According to, Bullard, this meeting

³³Bullard, R.D. 1990: *Dumping in Dixie: race, class, and environmental quality*. Boulder, CO: Westview Press.

³⁴Ibid.

³⁵Munnik, *supra*, p2.

³⁶ Ibid, p2.

³⁷ Cutter, *ibid* p116.

³⁸Ibid.

³⁹Ibid.

⁴⁰Ibid, p 117.

“broadened the environmental justice movement beyond its anti-toxics focus to include issues of public health, worker safety, land use, transportation, housing, resource allocation and community empowerment”

This is a distinguishing trend that is part of the legacy of Environmental Justice: a tendency to include a broad range of issues into environmental justice, because the starting point of environmental justice is people and their rights in their environments, and not the environment in an abstract sense.⁴¹ And this is where the environmental justice movement diverges from all other environmental right groups which put the environment before the human beings in the environment.

By 1992, the USEPA formally established its Office of Environmental Equity and the Workgroup on Environmental Equity had finished its report.⁴² Critics of the report contend that EPA did not go far enough in examining its current activities, including its own role in re-enforcing environmental inequalities through its own decision-making procedures.

Environmental justice appears to be fairly unknown in Namibia. The environmental interests groups operating in Namibia are primarily concerned with protecting the environment from abuse by human beings. Their focus is not the people living in the environment but on how safeguard the environment. There is no concern over how marginalised people suffer as a result of the manner in which the environment is used. Namibians by nature are known as people who do not litigate and therefore there are no major court cases concerning environmental justice. This does however not mean that there is no environmental injustice. The case of Ramatex⁴³ is one demonstrating environmental injustice in Namibia.

1.4. Rationale for selection of topic

The reason for the selection of this topic is firstly to fill the gap on knowledge on environmental justice. This study into environmental justice is important as it will contribute to the sensitization of the Namibian nation to Environmental law, but more specifically to Environmental Justice. The primary aim of the study is to establish how government guarantees environmental justice.

⁴¹Ibid.

⁴²Ibid.

⁴³Discussed in detail elsewhere in this paper.

1.5. Problem Statement

The history of environmental policy in Namibia is a cruel and perverse one. Under colonial and apartheid governments, thousands of black Namibians were forcibly removed from their ancestral lands to make way for game parks, and billions of rands were spent on preserving wildlife and protecting wild flowers while people in “townships” and “homelands” lived without **adequate food, shelter, and clean water**. Referring back to the definition of environmental justice which is the right to a safe, healthy, productive, and sustainable environment for all, where "environment" is considered in its totality to include the ecological (biological), physical (natural and built), social, political, aesthetic, and economic environments, it is clear that there was no environmental justice under the previous dispensation.

This past injustice must be rectified and the question is to what extent the Namibian government through its various arms ensures that firstly there is environmental justice and secondly that it is safeguarded by legislation. A further question is whether the government complies with the enforcement of environmental justice taking into consideration of the array of international environmental law instruments that it has ratified.

Ruppel⁴⁴ argues that although the Namibian Constitution has adopted a positive human rights framework and culture, and has established a new regime relating to the natural resources in the country, for, after 20 years of Independence Namibia still faces several challenges that hamper the development of environmental justice and the explicit recognition of environmental (human) rights. Ruppel⁴⁵ further argues that the legal milieu in support of environmental rights and justice is still far from perfect.

1.6. Legal Research Question

The main legal question which this dissertation seeks to answer is:

How does the Namibian legal framework ensure and safeguard environmental justice?

⁴⁴Ruppel, O.C. 2010. “Environmental rights and justice under the Namibian Constitution. In Bosl, A. Horn, N & Du Pisani, A. (Eds.). *Constitutional Democracy in Namibia. A Critical Analysis After Two Decades*. Windhoek: Macmillan Namibia.

⁴⁵ Ibid.

1.6.1. Sub-questions

- What is the Namibian understanding of environmental justice?
- How does the Namibian legal framework ensure and safeguard environmental justice or differently but how does the government ensure environmental justice i.e. Constitutional provisions, other national legislation, international and regional provisions?
- Who or which organization(s) is responsible for the attainment of environmental justice?

1.7. Research Objectives

The objectives of this study are to

1. To explain environmental justice within the Namibian context.
2. To investigate whether the national legal framework does ensure the attainment of environmental justice.
3. To analyse the application of international and regional instruments to achieve environmental justice in Namibia.
4. To evaluate how far Namibia is with the realisation of environmental justice compared to South Africa.
5. To advocate for environmental justice
6. To provide for recommendations towards immediate and long-term efforts to ensure environmental justice.

1.8. Methodology

The methodology employed is the qualitative method as the aims of this paper are to explain, describe and evaluate.⁴⁶The qualitative method investigates the *why* and *how* of decision making,

⁴⁶Bachman, R &Schutt, R. 2008.*Fundamentals of Research in Criminology and Criminal Justice*. SAGE Publication.London p17

not just *what, where, when*⁴⁷ and this is more suitable for the objectives of this study which are to establish how government provides for and safeguards the right to environmental justice.

In this dissertation the focus is on the right to environmental justice through legislation and therefore the qualitative methods was more relevant because in the conventional view, qualitative methods produce information only on the particular cases studied, and any more general conclusions are only propositions (informed assertions).

Qualitative researchers typically rely on the following methods for gathering information: *Participant Observation, Non-participant Observation, Field Notes, Reflexive Journals, Structured Interview, Semi-structured Interview, Unstructured Interview, and Analysis of documents and materials*. The research was mostly desk research because of the explanatory nature of the of the dissertation. The desk research entailed gathering and analysis of information on the environmental legislation in Namibia, South Africa and further legal instruments within the African Region and internationally.

In particular historical Research, allows one to discuss past and present events in the context of the present condition, and allows one to reflect and provide possible answers to current issues and problems was used.⁴⁸ Historical research helps us in answering questions such as: Where have we come from, where are we, who are we now and where are we going?⁴⁹

1.9. Literature review

According to McDonald⁵⁰, beyond the fundamental principles of environmental justice mentioned above at page 9, there are much, that wreckages the environmental justice movement. One cause is that the movement lacks a coherent theoretical framework. There are wide differences of opinion, for example, on the relative importance of race, class, and gender, and there are major splits on the potential for reform in a market economy. Even the efficacy of judicial procedure (i.e., whether the courts are an effective means for addressing and preventing

⁴⁷Bent Flyvbjerg, 2006, "Five Misunderstandings About Case Study Research." *Qualitative Inquiry*, vol. 12, no. 2, April, pp. 219-245.; Bent Flyvbjerg, 2011, "Case Study," in Norman K. Denzin and Yvonna S. Lincoln, eds., *The Sage Handbook of Qualitative Research*, 4th Edition (Thousand Oaks, CA: Sage), pp. 301-316

⁴⁸(ibid.)

⁴⁹(ibid.)

⁵⁰McDonald, D.A. 2002. *Environmental Justice in South Africa*. Cape Town. University of Cape Town Press.

environmental injustices) is a matter of debate. Eliminating or minimising these differences in the environmental justice movement is crucial for the advancement of the movement and most importantly in compelling government to ensure that environmental justice is protected as a right.

McDonald further opines that this diversity of opinion is not surprising. As the surveyed literature on environmental theory makes clear, there are simply too many underlying methodological and ideological variances in environmental thought to allow for any neat conceptualization of environmental justice. Ecofeminism, ecosocialism, deep ecology, ecological economics, and social ecology all have a claim of sorts to being concerned about environmental justice insofar as they pay attention to how environmental resources and their by-products are distributed (within and across generations) and the inequitable power relations that lead to environmental injustices.

According to Munnik⁵¹ there is a need to build stronger solidarity in support of environmental justice in Southern Africa. The immediate reason is that communities and activists are faced with a commodity boom - a new scramble for Africa. The current rush, similar to the previous, is compelled by the interests of outside powers. These interests are being accommodated by African governments, who themselves are taking part in the scramble, while the legacies of previous rounds of accumulation and their effects on people's environments have not yet been cleaned up and are unlikely ever to be cleaned up. This is clear in the case of Namibia with the uranium boom. The government seem to give mining licence to big corporations from developed countries in the hope that by so doing they are speeding up employment creation or alleviating poverty for Namibians. Government must be vigilant to the environmental degradation caused by some of these international companies who only have profit-making interest. Therefore the legislature must ensure that legislation protects the citizens and that human needs prevail over that of these international companies.

⁵¹Munnik, *supra*, fn1.

According to Cutter⁵², a healthy environment is a basic right of all the Earth's inhabitants, a right reaffirmed by the Rio declaration UN, 1992. Yet we know that environmental risks are unevenly distributed within and between societies, and we know that these risks affect populations differently. Inequities in risk exposure, risk reduction and risk compensation are crucial elements in contemporary management issues, so much so that the concepts of fairness and equity are now regular components in decision-making for all remedial actions. Namibia is a signatory⁵³ to the Rio Declaration and must therefore ensure that its nationals do enjoy a healthy environment by implementing the obligations under the declaration.

Shelton⁵⁴ opines that environmental law and policies are predominantly goal oriented. Standards, principles and procedures for the protection of the environment are often instrumental to achieve the conservation of fragile ecosystems and endangered species, the preservation of fresh water and other natural resources, the restoration of contaminated soils as well as the stratospheric ozone layer, and the protection of human health (this is the most important for this paper). This goal oriented feature is evident in national as well as international law. It is further also apparent when legal approaches to managing environmental problems are compared with economic or market-based instruments, such as emission trading, environmental taxes and voluntary agreements and codes and conduct. Therefore national statutes and international treaties, standards, instruments and procedures are assessed with these underlying objectives in mind, and mainly analysed in terms of effectiveness and achievability of the set objectives.

Environmental law also involves priorities, conflicts and clashes of interests and concerns for justice and fairness. In fact, any drafting, negotiation, adoption, application and enforcement of environmental laws indeed comprehending environmental law in general induces justice considerations: i.e. concerns for the distributive and corrective effects of laws and decisions pertaining to health, the environment and natural resources, as well as concerns for the opportunities of those potentially affected to participate in such law-making and decision-making

⁵²Cutter.S. 1995.Race, class and environmental justice. Progress in Human Geography. P112. Available at <http://www.phg.sagepub.com>.

⁵³United Nations. www.un.org/esa/agenda21. Accessed 12 July 2011.

⁵⁴Shelton D. 2009.Describing the elephant: international justice and environmental law. In “ EbbessonJ &Okowa P. *Environmental Law and Justice in Context*” Cambridge University Press.

in the first place. Although well-established concepts in environmental law, whether based in custom or statutes, appear neutral on their face, a closer study, or simply placing them in a context, may reveal disproportionate burdening or restricting effects for certain groups or categories when these concepts are applied.

1.10. Limitations of the study

The biggest challenges faced by this author was the limited literature focusing on firstly the environmental justice in Namibia and then secondly on the legal framework safeguarding environmental justice. There is basically only one article on environmental justice in Namibia.

1.11. Research design

Due to the explanatory nature of this dissertation, no hypothesis was formulated. The dissertation follows a qualitative research method as highlighted above and the research questions are answered in this regard.

1.12. Arrangement of the Dissertation

The Dissertation is divided in 5 chapters as follows:

Chapter 1 provides an introduction and background to the subject of environmental justice. The main content of this chapter includes the legal question, historical background, statement of the problem, literature review, research objectives, research methodology and the structure of study.

Chapter 2 discusses the relationship between environmental justice and human rights as well its relation to poverty.

Chapter 3 discusses the Namibian legal framework and how it ensures the protection of the right to environmental justice. Further, it examines at how the international and regional instruments are implemented to ensure environmental justice.

Chapter 4 is a comparative study of South Africa and Namibia.

Chapter 5 is the conclusion and the findings and the recommendations.

Chapter 2

2.1. Environmental justice: A human rights perspective.

2.1.1 A Human Rights Definition of Environmental Justice

For the purpose of the chapter the following definition Environmental justice will be adopted:

“Environmental justice is about social transformation directed towards meeting basic human needs and enhancing our quality of life-economic quality, health care, housing, human rights, environmental and social justice issues; the environmental justice approach seeks to challenge the abuse of power which result in the poor people having to suffer the effects of environmental damage caused by the greed of others. This includes workers and communities exposed to dangerous chemical pollution, and rural communities without firewood, grazing and water.”⁵⁵

2.1.2. Link Between Human Rights and Environmental Protection

Although both human rights protection and environmental protection are relatively well-developed areas of public policy, recognition of the linkage between the two has been slow to develop.

Reflecting on the true-life relationship between environmental degradation and the impairment of human rights, it is important to consider how these two fields interrelate within the law. According to Dausab⁵⁶ the interconnectedness of human rights is irrefutable and that it permeates all spheres of human existence is sacrosanct. Thus, the subjects of human rights are not members of this or that society, but of the community of humankind.⁵⁷ The establishment of an international legal order to regulate state relations and to afford human rights protection to the individual locates itself within the framework of this reality.⁵⁸

Human rights entitlements are based on morality, justice and fairness which, collectively, the nations of the world have agreed all people ought to have. They include the rights to life, liberty, health and wellbeing. Human rights are rights inherent to all human beings, whatever our

⁵⁵McDonald

⁵⁶Dausab, Y. 2008. “International law vis-à-vis municipal law: An appraisal of Article 144 of the Namibian Constitution from a human rights perspective.” In Horn, N.J. & Bosl, A. (Eds.). *Human Rights and the Rule of Law in Namibia*. Windhoek: Macmillan Namibia. pp, 253.

⁵⁷(ibid.).

⁵⁸(ibid.).

nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status.⁵⁹All human beings are equally entitled to our human rights without discrimination.⁶⁰. These rights are all interrelated, interdependent and indivisible.⁶¹

Universal human rights are often expressed and guaranteed by law, in the forms of treaties, customary international law, general principles and other sources of international law. International human rights law lays down obligations of Governments to act in certain ways or to refrain from certain acts, in order to promote and protect human rights and fundamental freedoms of individuals or groups.⁶²This is the stance on paper but in reality international human rights only gain momentum or grounds once so recognised and enforced by the world governments.

Environmental policies ensuring environmental justice cost money that a government may not have, therefore there is no demand that these rights be guaranteed immediately but progressively, depending on the resources of the government⁶³.This leaves a scape-goat for governments to evade their responsibility under the disguise of lack of resources. It would have been better if governments were expected to spend money on ensuring the fulfilment of these obligations ahead of other non-rights-based objectives. Ensuring that the inhabitants of the country enjoys a healthy environment should be more important than ministers and governors getting new vehicles and therefore the courts must enforce these affirmative obligations and there must be demand for immediate enforcement.

The International Bill of Rights therefore defines in law the limits of authority that can be imposed on individuals, as well as the basic necessities required by them, so that all individual people, in every place, and at all times, can retain their human dignity.⁶⁴ These rights are directly aimed at protecting the vulnerable and marginalized from being exploited or otherwise

⁵⁹United Nations.Office of the High Commissioner on Human Rights.HumanRights.Available at www.unhcr.org. Accessed on 25 October 2011

⁶⁰Ibid.

⁶¹Ibid.

⁶²Ibid.

⁶³It is amazing that states are given the option to progressively guarantee the second generation rights such as an adequate standard of living based on the contention that they do not have enough money. However you read in newspapers that a statehouse cost around two billion Namibian dollars.

⁶⁴ *ibid*

made to suffer under the self-interested politics of powerful. The World Conference on Human Rights in 1968 declared the rights in the Bill of Rights to be *indivisible* and the UN General Assembly in 1984 and 1986 declared them to be *interrelated*.⁶⁵ According to Beder this means the various rights are related to each other, complementary to each other and reinforce each other and cannot be separated off from each other.⁶⁶ The right to health is most obviously indivisible and interrelated to the right to life.

The relationship between human rights and the environment was first studied by the Special Rapporteur on Human Rights and the Environment for the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, Madame Zhohra Ksentini from 1991-1994.⁶⁷ She reported on the human rights violations that resulted from environmental degradation, including climate change, deforestation, pollution and loss of biological diversity.⁶⁸ Not only are human rights dependent on environmental protection but environmental degradation often entails the trampling of human rights. It is imperative that we have a clear understanding of environmental protection in relation to environmental justice. Environmental protection means any action designed to remedy or prevent damage to our physical surroundings or natural resources, or to encourage the efficient use of these resources.⁶⁹

This definition suggests that environmental protection involves the putting into practice principles that will ensure against environmental degradation or its furtherance. This definition also contemplates the protection of nature for nature's own benefit, and for the benefit of humankind.⁷⁰

Currently environmental protection has predominantly been hinged upon the inclusion of an environmental dimension in the field of human rights law. It follows that the protection of the

⁶⁵ Ibid.

⁶⁶ Beder, S. 2006. *Environmental Principles and Policies. An interdisciplinary introduction*. University of New South Wales Press Ltd.

⁶⁷ UNHCHR 1994

⁶⁸ Ibid.

⁶⁹ Community guidelines on State aid for environmental protection. (2001) 37 *Official Journal of the European Communities*. Available at: <http://eurolex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2001:037:0003:0015:EN:PDF>. Accessed 10/04/2011.

⁷⁰ Andresson, A. & Kolk, B. A. 2003. *The Role of Basic Rights in Environmental Protection*. Available at: http://www.juridicainternational.eu/public/pdf/ji_2003_1_140.pdf. Accessed on 10/04/2011.

environment at a global or local scale is enshrined in the concept of environmental right.⁷¹ While there is no unanimity as to whether the environmental right exists as an independent right or as a right emanating from a progressive interpretation of already existing rights,⁷² it is commonly accepted that this right is regarded as the right to a safe, healthy and ecologically balanced environment.⁷³ Evidently, this right originates from civil and political rights as well as social and economic rights. The rights commonly identified with this right include – the right to life, to property, privacy, health, self – determination, safe and healthy working conditions.⁷⁴

At the domestic level, the obligation upon governments to protect the environment is to refrain from interfering directly or indirectly with the enjoyment of the right, to prevent third parties such as corporations from interfering in any way in the enjoyment of the right, and to adopt necessary measures to achieve the full realisation of the right.⁷⁵ The necessary measures entail putting in place relevant and effective legislative mechanisms. In addition, the role of the court should not be ignored and neither can it be overemphasised. The international experience of courts that have been asked to decide on cases with regard to a human right to environment shows that the judiciary is crucial when it comes to interpreting existing laws in a way that takes into account recent global developments incorporating environmental concerns.⁷⁶

Within the context of this study, the right that becomes crucial in the protection of the environment is the right to a safe, healthy, productive, and sustainable environment this is evident by what Klaus Toepfer⁷⁷ in CEDHA 2002b meant when he stated that human rights cannot be secured in a degraded or polluted environment. The fundamental right to life is threatened by soil degradation and deforestation and by exposure to toxic chemicals, hazardous wastes and contaminated drinking water. Environmental conditions clearly help determine the extent to which people enjoy their basic rights to life, health, adequate food and housing, and traditional livelihood and culture. It is time to recognize that those who pollute or destroy the

⁷¹Cullet, P. *Definition of and Environmental Rights in a Human Rights Context* .Available at: <http://www.ielrc.org/content/a9502.pdf>. Accessed on 10August 2011.

⁷²Cullet, supra, pp, 1.

⁷³Ruppel, O.C. 2008. "Third-generation human right and the protection of the environment in Namibia."In Horn, N.J. & Bosl, A. (Eds.).*Human Rights and the Rule of Law in Namibia*. Windhoek: Macmillan Namibia. P.101.

⁷⁴Andresson & Kolk, 2003, supra pp, 2.

⁷⁵Ruppel, 2008, supra.

⁷⁶Ruppel, ibid.

⁷⁷ Executive Director of the UN Environmental Programme.

natural environment are not just committing a crime against nature, but are violating human rights as well. It is thus safe to conclude that the right to life is very much dependent on the protection of the environment.

This is a profound statement in that Toepfer calls for recognition by those polluting or destroying the natural environment that they are violating human rights in that are violating a person's right to life because the right to life includes the right to an acceptable standard of life which cannot be enjoyed in a polluted environment. This connection is a direct call for environmental justice and that the effect of pollution and environmental degradation on human beings are as important if not more important than to the environment itself.

Within the right to a healthy environment is embodied a healthy human habitat, including clean water, air, and soil that are free from toxins or hazards that threaten human health. The right to a healthy environment entails the obligation of governments to⁷⁸ –

- refrain from interfering directly or indirectly with the enjoyment of the right to a healthy environment
- prevent third parties such as corporations from interfering in any way with the enjoyment of the right to a healthy environment, and
- adopt the necessary measures to achieve the full realisation of the right to a healthy environment.

Recognition of the link between the abuse of the human rights of various vulnerable communities and related damage to their environment is expressed under the term environmental justice.⁷⁹ The people who suffer the most of environmental degradation are the poor and other disenfranchised groups and this is so in developed and developing countries. Redressing this injustice is the focal point of environmental justice. It is imperative that all role players acknowledge their different yet integral roles in ensuring environmental justice which includes ensuring environmental equity and equality. The legislature must take the lead by enacting

⁷⁸Ruppel, OC. 2008a. "Third-generation human rights and the protection of the environment in Namibia". In Horn, N & Bosl (eds). *Human rights and the rule of law in Namibia*. Windhoek: Macmillan Education Namibia, p103

⁷⁹(ibid.).

legislation which ensures environmental justice both substantively and procedurally. The rest of the organs of state will be forced to follow suit once there is intervention on the supra-level of society.

Securing the right to environmental justice as a human right so vital to people's survival cannot be achieved without improvement in the political, legal, and judicial rights that rural Namibians have long been denied.

A commitment to sustainable development in general and to improving the welfare of the rural poor in particular is important. Companies that win commercial mining concessions must be required to develop and comply with a management plan that ensures environmental stewardship and fair treatment of local residents. Government must make it their business to ensure compliance with such management plans.

According to Ruppel the concept of *environmental justice* embraces two objectives.⁸⁰ The first is to ensure that rights and responsibilities regarding the utilisation of environmental resources are distributed with greater fairness among communities, both globally and domestically.⁸¹ This entails ensuring that poor and marginalized communities do not suffer a disproportionate burden of the costs associated with the development of resources, while not enjoying equivalent benefits from their utilisation.⁸² The second is to reduce the overall amount of environmental damage domestically and globally.⁸³

As was earlier illustrated the environment and the right to environmental justice is protected to some extent by existing human rights, some of which explicitly refer to environmental protection while others imply environmental justice. Other human rights can be reinterpreted to give them an environmental dimension so that they include a concern for environmental justice. For example the right to equality can be interpreted as a "right to equal access to, and protection of, human beings from environmental risks".

⁸⁰Ibid.

⁸¹Ibid.

⁸²Ibid.

⁸³Ibid.

Jan Hancock⁸⁴, has argued that there need to be two new universal human rights:

- To an environment free from toxic pollution and
- To ownership rights of natural resources.

Her rationale for this is that in capitalist societies, environmental protection is relegated to secondary considerations, subordinate to economic considerations, and that unless there are human rights to a healthy environment, this will continue, at the expense of the most vulnerable people in society. These two rights are important to the environmental justice movement in that they firstly will ensure ownership rights of natural resource, mainly to the disenfranchised and vulnerable communities, which will result in these communities having the right and ability to control and limit the extend and effects of environmental degradation. However, once again this control will be limited to the economic power of the specific community. For example an impoverished San community in the Kalahari desert will find it hard to resist a mining giant wanting to dump waste in their jurisdiction against payment in cash or in kind (by building infrastructure). Secondly the right to an environment free from toxic pollution will ensure environmental justice in that it will strengthen the national laws,⁸⁵ which enables citizens to hold government accountable for a clean and pollution free environment.

New human rights have in fact been developed that explicitly recognise the importance of the environment to humans. The Stockholm Declaration 1972 created a right to the environment. Agreed to at a UN Conference on the Human Environment, it stated that:

Both aspects of the 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.

Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of quality that permits a life of wellbeing and dignity, he bears a solemn responsibility to protect and improve the environment for present and future generations.

⁸⁴Quoted in Beder,2006, supra, p102

⁸⁵ The Environmental Management Act of 2007; The Minerals (Prospecting and Mining) Act of 1992

In 1984 OECD agreed that the right to a 'decent' environment was a fundamental human right. A decade later Madame Ksentini claimed that the right to conservation and prevention of ecological harm was both an individual and a collective human right.

Chapter 3

3.1. ENVIRONMENTAL JUSTICE IN NAMIBIA

3.1.1. Introduction

In order to fully understand the concept of environmental justice in Namibia it is important to first understand environmental injustice. In Namibia the spatial distribution of population groups into safe and unsafe locations, the unequal access to natural resources and participation in decision-making all occurs on the basis of such socio-economic factors as income, class and even gender, amounting to discrimination against the weak, powerless and vulnerable in society is regarded as environmental injustice.

Since independence environmental justice has largely been about two perspectives: firstly to redressing the environmental injustices of the past, secondly, linking poverty and environmental justice.

It is the basic rights of all humans to live, work, learn and play in a clean, healthy, sustainable and just environment.⁸⁶ The way to achieve this is to ensure that environmental benefits such as clean water, fresh air and other resources are evenly distributed among all population groups while environmental burdens such as resource depletion, water, air and land pollution are minimized and evenly distributed over all population groups irrespective of such variables as class, income or location. The reality in most communities around the world is that vulnerable population groups such as the poor, women, ethnic minorities, people disadvantaged in terms of education, income and occupation - tend to live amid the worst environmental conditions while the more affluent members of society reside in clean and healthy locations.

Therefore, within the Namibian context environmental justice can be defined as entailing both a more equitable distribution of environmental resources and greater public participation in

⁸⁶UN Draft Declaration of Human Rights and the Environment. Available at: www1.umn.edu/humanrts/instree/1994-dec.htm. Accessed 24 July 2011.

evaluating and apportioning these resources.⁸⁷ This means environmental justice is basically concerned with equity in environmental matters including participation in the allocation of resources and burdens in Namibia's communities. Before one discusses the constitutional, legislative and policy provisions, it is imperative to first discuss the relationship between environmental justice and sustainable development.

3.2. Relationship between Environmental Justice and Sustainable Development in Namibia

The three principles relevant in sustainable development discourse are intergenerational equity, intragenerational equity and integration.⁸⁸ Intergenerational equity, as an element of sustainable development, requires the present generation to leave the environment in no worse a condition than they found it.⁸⁹ Intragenerational equity, in the context of sustainable development, requires equity within a generation.⁹⁰ Thus, intragenerational equity, as an element of sustainable development, is concerned with the equitable distribution of environmental costs and benefits from developmental activities.⁹¹ In this sense intragenerational equity attempts to achieve justice between nations. In particular, intragenerational equity attempts to achieve justice between rich and poor nations. In this regard, the depletion of natural resources and irreversible environmental pollution by current generation would constitute acts of environmental injustice against future generations.⁹²

Furthermore, there is growing concern about what may be referred to as 'international environmental injustice' with regards to such issues as the growing international trade in solid waste from affluent nations to poor nations.⁹³ The growing volumes of solid waste which are

⁸⁷Cutter, 1995, supra see also the quarterly newsletter of the South African Environmental Justice Networking Forum quoted in McDonald, supra, p4.

⁸⁸Cutter, 1995, supra and also Louka, E. 2006. *International Environmental Law: Fairness, Effectiveness and World Order*. New York. Cambridge University Press, p24; Khalfan, A & Segger, M.C. 2006. *Sustainable Development Law: Principles, Practices & Prospects*. New York. Oxford University Press, p131.

⁸⁹Ibid.

⁹⁰Ibid.

⁹¹See Principle 7 of the 1992 Rio Declaration on the Environment and Development.

⁹²Louka, E. 2006, supra.

⁹³The Basel Convention. The United Nations Environment Programme (UNEP) - "The Convention is the response of the international community to the problems caused by the annual world-wide productionof wastes, which are hazardous to people or the environment..." United Nations Environment Programme, Geneva. Available

being shipped from rich countries to poor ones often contain substantial amounts of hazardous substances which become environmental hazards in the recipient countries. Such incidences have occurred in China, and the Ivory Coast.⁹⁴

In Namibia, the classical case has so far has been the alleged controversial deal between the government of Namibia and Russia that wanted to dump its nuclear waste in the Namibia. It has been reported that:

“Russia and Namibia plan to sign an agreement on cooperation in the development of uranium deposits in Namibia on May 20, Russian Minister of Ecology and Natural Resources Yuri Trutnev said on Tuesday...”⁹⁵

In a related development it was reported that:

“For the first time, Namibia has an informed opinion on how the uranium rush in Erongo Region would impact on the underground water in the semi-desert coastal region, something that has been a concern, since uranium mining activities use vast quantities of water. There is fear that, if not monitored, the proliferation of uranium mining and production activities would deplete the underground water in the Swakop and Khan rivers. The expert opinion comes from a study, commissioned by the Ministry of Mines and Energy, and funded by the German government...”⁹⁶

In the same vein it was observed that:

“Production plants for uranium industry chemicals planned at Namibian coast will have serious environmental impacts and extinct certain species: According to an environmental expert, Gecko's project of production plants for reagents for the uranium mining industry will have serious environmental impacts, if constructed at the proposed coastal site. The environmental expert wants to remain anonymous out of fear of threats. One problem is the acid fogs generated by the plants, fogs which are much worse than acid rain. Moreover, if the plants are built at Mile 6, the sensitive lichens in the area will die out. Many other plant species, beetles, and reptiles will perish, and an arachnid species only found there will be extinct. Also of serious concern are the numerous production wastes that are to be dumped in the sea: Gecko admits

at:<http://www.zerowasteamerica.org/WasteTrade.htm>. Accessed 08 January 2012. See also Principle 6 of the Principles of Environmental Justice. Annexure 1

⁹⁴(ibid.)

⁹⁵(RIA Novosti May 18, 2010)

⁹⁶Staff Reporter. New Era Aug. 15, 2011

that nothing will survive within a radius of 2 km. This is particular serious between Mile 7 and Mile 11, where certain species of shark and turtle occur".⁹⁷

These are only but a few examples of the need to have sustainable development in Namibia. Unsustainable development is the result of lack of concern about the health and economic situations of vulnerable groups in society.⁹⁸ It has been identified that the causes of unsustainable development can be the commoditization of natural resources [such as land, water and air], unresponsive, unaccountable government policies and regulations and the lack of resources, power and influence in affected communities".⁹⁹ Activists and advocates of environmental justice, therefore, focus on addressing these issues in order to prevent the occurrence of environmental injustice and unsustainable development. The question in Namibia is: to what extent does the Constitution promote Environmental justice?

3.3. Environmental Justice and the Namibian Constitution

The 1990 Namibian Constitution¹⁰⁰ is the supreme law of the land in Namibia and it presents the civil, political, environmental, economic, social and cultural goals for Namibia, sets out fundamental human rights and duties for all Namibians and the duties of the different branches of government. The local government system is established pursuant to Article 102 of this Constitution with the duties of a local government authority set out. The role of a local government authority is to promote socio-economic development and protect the environment. International and regional treaties and non-binding instruments also play a role in the formulation of national legislation in Namibia, to a greater degree when binding legal instruments have been implemented into the domestic laws of Namibia. Under Article 144 of the Namibian Constitution, treaties Namibia has signed and ratified must be implemented into Namibian law to have effect in Namibia.

⁹⁷Author not stated. (Allgemeine Zeitung July 28, 2011) Available at: <http://www.wise-uranium.org/upna.html#REAGENTS>. Accessed 12 December 2011.

⁹⁸Khalfan, A ;Segger, M.C. ; Sumudu, A. 2006. International Human Rights and Poverty Law in Sustainable Development. *Sustainable Development Law: Principles, Practices & Prospects*. New York. Oxford University Press, p314

⁹⁹Gutierrez L. *The Root Cause of Unsustainable Development*. Available at: http://www.iucn.org/about/union/commissions/ceesp/ceesp_publications/ceesp_newsletter/editorials/guested6/. Accessed 12 August 2011

¹⁰⁰Republic of Namibia. 1990. The Constitution of the Republic of Namibia. Windhoek. Ministry of Information and Broadcasting.

The Namibian Constitution does not explicitly guarantee a right to the environment for all Namibians, but Chapter III of this constitution spells out the fundamental rights as discussed in chapter two these include the advancement, health, and wellbeing and prosperity of Namibians. Economic objectives include the promotion of planned and steady economic growth and for the key resources of Namibia to be exploited and shared to the greatest extent possible for the good of all Namibians. An environmental objective to protect and improve key environmental resources in Namibia is set out in Article 95.¹⁰¹

3.3.1. Justiciability of Article 95¹⁰²

A weakness in the provisions of Article 95 of the Namibian Constitution numerous writers and constitutional scholars point to is that Article 95 of the constitution is not considered to be legally enforceable. This leaves a scape-goat for governments to evade their responsibility under the disguise of lack of resources. It would have been better if governments were expected to spend money on ensuring the fulfilment of these obligations ahead of other non-rights-based objectives. Ensuring that the inhabitants of the country enjoy a healthy environment should be more important than ministers and governors getting new vehicles and therefore the courts must enforce these affirmative obligations.¹⁰³

This style of enunciating legal entitlements as Principles of State Policy instead of specifying fundamental rights has no place in modern day constitutions and is in stark contrast to the constitutions of other African countries like the Republic of South Africa Constitution¹⁰⁴, and the recently adopted constitution of the Republic of Kenya that replaced the 1963 version and went into effect on August 27, 2010. Both of these Constitutions unequivocally guarantee substantive

¹⁰¹Ibid.

¹⁰²Ibid.

¹⁰³Namibian Broadcasting Corporation News. 09 October 2011

¹⁰⁴ConstitutionNo. 108 of 1996, as amended

and procedural environmental rights and duties in Bills of Rights sections of the respective constitutions.¹⁰⁵

Also, the 1995 Constitution of the Republic of Uganda guarantees a right to a “clean and healthy environment” for all Ugandans (Section 39).¹⁰⁶ Fundamental human rights for all Namibians are contained in Chapter III of the 1990 Constitution. Despite the above-noted defect, a fundamental human right in the Namibian Constitution that may be used to recognize an environmental human right, albeit through an indirect rights theory developed in international law to link the enjoyment of basic human rights to an environment of a good quality, is the right to life as a severely degraded environment can affect the right to life. The “Love Canal” environmental disaster that occurred in New York State in the 1970s, and the Bhopal disaster in India in 1984 show that environmental pollution can result in the loss of human life and significant human health issues.¹⁰⁷

Support for this position that the right to the environment is also found in Nigerian case law, specifically the oft-cited case of *Fawehinmi v. Abacha*,¹⁰⁸ that this author considers as a victory for environmental rights advocates in Nigeria, as the Court of Appeal in Nigeria determined that the human rights specified in the African Charter on Human Rights as enacted into the local law of Nigeria by means of the African Charter on Human and Peoples Rights (Ratification and Enforcement) Act, especially a right to the environment in Section 24, could be used by a Nigerian to enforce the individual’s right to the environment instead of relying on the environmental provisions in Chapter II of the 1999 Nigerian constitution.¹⁰⁹ In other words, of the African Charter Ratification Act¹¹⁰ could be used to guarantee a substantive environmental right in Nigeria. This author suggests that the court could also have relied on Articles 15 (right to equitable and satisfactory working conditions) and 16 (right to best attainable mental and physical health) of the African Charter on Human Rights as implemented into Nigerian law as

¹⁰⁵Razzaque, J. 2002. *Human Rights and the Environment: the national experience in South Asia and Africa*. Available at: Office of the United Nations High Commissioner for Human Rights. www2.ohchr.org/english/issues/environment/envIRON/bp4.htm. Accessed 11 December 2011

¹⁰⁶Ibid.

¹⁰⁷Ibid.

¹⁰⁸(1996) 9 NWLR part 475, p 710

¹⁰⁹Ibid.

¹¹⁰S24

additional authority for the recognition of a substantive environmental right in Nigeria based on a derived-from human rights approach. In the case of Articles 15 and 16 of the African Charter on Human Rights and the Nigerian equivalent, using a derived from human rights approach, it is reasonable to argue that the rights to equitable and satisfactory working conditions and best attainable mental and physical health respectively cannot be enjoyed in a degraded environment.¹¹¹

Namibia does not have a precise working definition of environmental justice. It is suggested if the government is serious about the concept of environmental justice, the following definition adopted by the United States Environmental Protection Agency (USEPA) must be also be adopted by Namibia in order to lay a framework for the enforcement and implementation of environmental justice:

“the fair treatment and meaningful involvement of all people regardless of race, color, national origin or income with respect to the development, implementation and enforcement of environmental laws, regulations and policies. Fair treatment means that no group of people including racial, ethnic or socio-economic groups, should bear a disproportionate share of the negative environmental consequences resulting from industrial, municipal and commercial operations or the execution of national, state, local and tribal programs and policies”

3.3.3. Article 6 The right to life¹¹²

Article 6 regulates inter alia that –

[t]he right to life shall be respected and protected.

The quality of life is interwoven with the quality of the environment they live in. Environmental degradation threatens people’s lives and livelihoods. The right to life is the most basic human right: a person can exercise no other right unless this most primary of rights is adequately protected.

¹¹¹Razzaque, 2002, supra.

¹¹² Republic of Namibia. 1990, supra

The fundamental right to life has very clear environmental implication as it is a standard relating to the basics of environmental law.

3.3.4. Article 8: Respect for Human Dignity¹¹³

(1) The dignity of all persons shall be inviolable.

(2) a. In any judicial proceedings or in other proceedings before any organ of the State, and during the enforcement of a penalty, respect for human dignity shall be guaranteed.

The right to dignity is closely related to other fundamental rights set out in the Constitution, such as the right to equality and to non-discrimination (Article 10). In relation to environmental justice one cannot separate a person's dignity from the environment which they live in. The dignity of a person is dependent on a person's health, well-being and respect-worthiness and these in turn are subject to environmental human rights, as e.g. access to clean and sufficient water, sanitation services, and waste disposal.¹¹⁴

The Stockholm Declaration from 1972 further provides that:

Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations.¹¹⁵

One can therefore argue the pollution of the underground water especially in the Erongo region by the uranium mines infringes on the dignity of those living and farming in that region. Therefore one can further deduce that even though the right to dignity is guaranteed in the Constitution its violation is still continuing. The "environmental" right to dignity has not yet been tested in our courts. Even with an incident such as the Ramatex textile factory where there were allegations of underground water pollution there is to date no case brought to the Namibian courts requiring it to interpret the right to environmental justice. Textile dyes and other chemicals used in textile processing are known to contain heavy metals and other dangerous substances which can be highly toxic to the environment and, thus, to human beings. Accusations against the factory included their disposal of excess waste water carelessly on its property. Residents in the neighbourhood of the works complained not only of the stench emanating from the disposed

¹¹³ Republic of Namibia. 1990, supra.

¹¹⁴ Eds. Ruppel, O & Ruppel, K. 2011 Environmental Law and Policy in Namibia. Ruppel, O. *Human Rights and the environment*. p226.

¹¹⁵ Principle 1, Declaration of the United Nations Conference on the Human Environment 1972.

waste water, but also recorded irritation to their skin and respiratory tracts.⁸¹ Streams emanating from the factory carried contaminated water, in turn polluting the water at the Goreangab Dam, one of Windhoek's major water reservoirs.

Finally the African Charter on human and peoples' rights states that:

All peoples shall have the right to a general satisfactory environment favourable to their development.¹¹⁶

3.3.5 Article 10: Equality and Freedom from Discrimination¹¹⁷

(1) All persons shall be equal before the law.

(2) No persons may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status.

Environmental debater Wolfgang Sachs points out a key question for research and policy in the field of environmental justice when he asks who has the advantages and the disadvantages in the use of nature?¹¹⁸

Advantages are related to access to land and basic services and disadvantages to exposure to pollution and other health related issues. Article 10 of the Namibian Constitution certainly requires that there be no discrimination and that advantages and disadvantages be equally distributed.

The South African Environmental Justice Networking Forum describes equality as a challenge of the status quo:

In linking environmental and social justice issues the environmental justice approach seeks to challenge the abuse of power which results in poor people having to suffer the effects of environmental damage caused by the greed of others.¹¹⁹

The disproportionately negative environmental effects are felt in poor communities and communities of colour relative to the richer often white communities highlighting that equal

¹¹⁶The African Charter on human and peoples' rights states, Article 24.

¹¹⁷ Republic of Namibia. 1990, supra.

¹¹⁸Sachs, Wolfgang, *Environment and human rights*, Wuppertal, 2003 p 5

¹¹⁹EJFN Newsletter 1997, quoted in McDonald 2002: p 5

distribution of environmental hazards is just part of what environmental justice entails. To be more effective there need to be equivalent attention given to the underlying causes of systematic race and class discrimination.¹²⁰

3.3.6. Article 16: Property¹²¹

(1) All persons shall have the right in any part on Namibia to acquire, own and dispose of all forms of immovable and movable property individually or in association with others and to bequeath their property to their heirs or legatees: provided that Parliament may be legislation prohibit or regulate as it deems expedient the right to acquire property by persons who are not Namibian citizens.

(2) The State or a competent body or organ authorised by law may expropriate property in the public interest subject to the payment of just compensation, in accordance with requirement sand procedures to be determined by Act of Parliament.

The fundamental right to property has a very clear environmental implication as it is a standard relating to the basics of environmental law. The right to property is based on Roman neighbour law that makes it illegal to harm another or others property.¹²² Similarly, English law of nuisance which recognizes both private and public nuisance.¹²³ This implies that the State or any other entity must not harm another or his property by for example polluting the underground water on a farm through mining activities. In terms of environmental justice this means that the economically powerfully mining companies benefit at the expense of the farms.

3.3.7 Article 19: Culture& Article 66: Customary law¹²⁴

Every person shall be entitled to enjoy, practice, profess, maintain and promote any culture, language, tradition or religion subject to the terms of this Constitution and further subject to the condition that the rights protected by this article do not impinge upon the rights of others or the national interest.

¹²⁰Stacy, Helen, *Environmental Justice and Transformative Law in South Africa and some Cross-jurisdictional Notesabout Australia, The United States and Canada*, Acta Juridica, 1999, page: p 36.

¹²¹ Republic of Namibia. 1990, supra.

¹²²Badenhorst, P.J.; Pienaar, J.M.; Mostert H.; Van Rooyen, M. 2003. *Silberberg and Schoeman's The Law of Property*. 4th ed. Durban. LexisNexis Butterworths

¹²³ Ibid.

¹²⁴ Republic of Namibia. 1990, supra.

Environmental rights and cultural rights have a complex interrelationship that is reflected in many concrete policy debates. Sometimes these rights are compatible, and there is only minimal controversy. In other cases, however—notably those involving issues of endangered species—there is often conflict, which plays out in legislative and judicial contexts.

Article 27 of the International Covenant on Civil and Political Rights (ICCPR), guarantees cultural rights, which are crucial for the maintenance of social identities. These rights are threatened and are invoked primarily when governments take steps that threaten to undermine the way of life of whole groups.¹²⁵ According to the Human Rights Committee ¹²⁶the right to culture involves more than non-interference. The Committee has explicitly stated that cultural rights are “positive” and not “negative,” meaning that governments must take *affirmative* steps to ensure their protection.¹²⁷

Often, the cultural argument reinforces the demand for environmental protection. Indigenous people have challenged the desecration of sacred sites, arguing that harm to the environment will also undermine the way of life of a people. In the *Yanomami* case (1985), the Inter-American Commission on Human Rights held that failure of the Brazilian government to prevent development that destroyed the Yanomami way of life constituted “ethnicide.” In cases such as this, environmental rights and cultural rights coincide, revealing a confluence of rights claims.¹²⁸

Similarly the Himba community in Namibia’s Kunene Region rejected the development of a hydro-electric power station at the Epupa waterfall situated in the Kunene River.¹²⁹ Their contention is that it is a sacred site where ancestors were buried and where they worship.¹³⁰ The site therefore has strong cultural and heritage value to the Himba. The land along the lower Kunene is used for gravesites, pasture land and migration route to pasture land. Additionally there are permanent houses along the river as well as seasonal gardens.

¹²⁵Renteln, A.D. 2004. Environmental Rights vs. Cultural Rights *Human Rights Dialogue*: "Environmental Rights." Available at http://www.carnegiecouncil.org/resources/publications/dialogue/2_11/section_2/4453.html. Accessed 26 November 2011

¹²⁶The United Nations treaty body that enforces the ICCPR

¹²⁷Renteln, A.D. 2004, *supra*.

¹²⁸*Ibid.*

¹²⁹ Southern African Institute for Environmental Assessment. 2009. *Epupa HydroPower Station, Kunene River Angola-Namibia-Good can come from bad*. Available at www.saiea.com/case_studies09/12_EpupaHydropower.pdf. Accessed 24 December 2011

¹³⁰ *Ibid.*

Ancestral gravesites are of great importance to the Himba people, as they define their relationship to the land, their cultural identity and social relationships.¹³¹ They are also a focal point in religious ceremonies. Graves are more sacred along the river than in the hinterland.¹³²

The recognizing of customary law by virtue of Art 66 has the effect that the chiefs are in control of most of the decision-making in the area. There are currently 15 Himba chiefs, each responsible for a specific area with a well defined group of people.¹³³

Environmental justice and the Constitution demand that the cultural and religious rights of these people are respected and protected. It is thus imperative that the developmental plans of government are carried out in a sustainable manner that would protect these sacred areas for the current.

3.3.8. Article 21: Fundamental Freedoms¹³⁴

The Constitution of Namibia through this article empowers its nationals to hold government responsible for their actions that lead to environmental injustice.

Commonly recognized general participatory rights include the right to freedom of thought, the right to freedom of expression and opinion, the right to freely participate in the cultural life of a community, and the right to freedom of peaceful assembly and association are guaranteed pursuant to Article 21 of the Constitution.

In 1990, Ken Saro-Wiwa, an internationally acclaimed poet, author, and activist from the Niger Delta, began mobilizing his people, the indigenous Ogonis, for nonviolent protest against the Shell Oil Corporation.¹³⁵ For more than 20 years oil spills and gas flares from the multinational's oil explorations had destroyed the environment and the health of the indigenous Ogonis, causing thousands of lost lives.¹³⁶ Five years after the start of his campaign, Saro-Wiwa and eight other

¹³¹ Southern African Institute for Environmental Assessment, 2009, supra.

¹³² Ibid.

¹³³ Southern African Institute for Environmental Assessment, 2009, supra.

¹³⁴ Republic of Namibia. 1990, supra

¹³⁵ Olagbaju and Mills, S. 2004. *Defending Environmental Defenders Human Rights Dialogue: "Environmental Rights"* Available at www.carnegiecouncil.org/resources/publications/dialogue/2_11/section_4/4463.html. Accessed 21 November 2011

¹³⁶ Ibid.

indigenous Ogoni activists were brutally hanged for their peaceful protest on the orders of General Sani Abacha, then military dictator of Nigeria.¹³⁷

This surely will not happen in the Namibian democracy which in its supreme law the constitution guarantees the right and freedom to assemble without arms and to form or join any organization. In relation to environmental justice this means that community members can without fear speak out against environmental injustice of any form. In terms of this constitutional provision it further means that they can join any environmental or human rights organization to voice their joint grievances.

Activists and community members cannot rally public opinion in their countries if there is no freedom of speech or of assembly.¹³⁸ Public opinion matters less if people cannot vote. Their protests will be muffled if they are jailed or put under house arrest.¹³⁹ They cannot continue to resist if they are assassinated or executed. And it is hard to be effective if you are living under threats for your life.¹⁴⁰

The Constitution of Namibia through this article empowers its nationals to hold government responsible for their actions that leads to environmental injustice.

3.3.9. Article 22: Limitation upon Fundamental Rights and Freedoms¹⁴¹

Whenever or wherever in terms of this Constitution the limitation of any fundamental rights or freedoms contemplated by this chapter is authorised, any law providing for such limitation shall:

a. be of general application, shall not negate the essential content, and shall not be aimed at a particular individual;

b. specify the ascertainable extent of such limitation and identify the article or articles on which authority to enact such limitation is claimed to rest.

¹³⁷ Ibid.

¹³⁸ Ibid.

¹³⁹ Ibid.

¹⁴⁰ Ibid.

¹⁴¹ Republic of Namibia. 1990, supra

3.3.10. Article 23: Apartheid and Affirmative Action

This Article prohibits the practice of apartheid in any every possible form. It further authorizes Parliament to enact legislation aimed at advancing the previously disadvantaged and at redressing the past wrongs.

When Namibia's independence became eminent, the term "environment" began to take on a more general meaning for black Namibians.¹⁴² Until then, the word "environment" had been linked to wildlife and conservation only.¹⁴³ The focus of the liberation movement was on achieving political goals and not on environmental issues but once negotiations were underway, the environment took on a much broader meaning. It came to mean "brown" issues as well as "green" issues.¹⁴⁴ Brown issues refer to socio-environmental, and include health, water, living and working conditions. Physical diseases such as TB and malnutrition were recognised as environmental diseases, as were some mental diseases, such as stress and trauma from living in degraded surroundings.

Apartheid impacted not only on the biophysical dimension, but also on the political, social and economic dimensions. Townships were neglected; often with no running water; no sanitation, or roads. Some were located near unhygienic landfill sites or industries. Industry operated without environmental regulation; the mines polluted the land, water and air; there was poor disposal of toxic wastes.¹⁴⁵

The health of the majority was affected by the lack of a healthy environment.¹⁴⁶ The lack of sanitation, the lack of available potable water, the lack of access to medical services; and the lack of nutritious food all combined to have a major effect on the health of the majority.¹⁴⁷ Preventable environmental diseases such as malnutrition, malaria and diarrhoea still take their toll in Namibia.¹⁴⁸

¹⁴² NIED

<http://www.nied.edu.na/divisions/projects/SEEN/SEEN%20Publications/Environmental%20Information%20Sheets/Poverty%20and%20Inequality/2.%20Apartheid.pdf>

¹⁴³ Ibid.

¹⁴⁴ Ibid.

¹⁴⁵ Ibid.

¹⁴⁶ Ibid.

¹⁴⁷ Ibid.

¹⁴⁸ Ibid.

These are some of the socio-environmental issues that are still with us in Namibia today. It is the opinion of this author that Article 23 of the Namibian Constitution is broad enough to be applied to address the environmental injustice of the past and to finally achieve environmental justice.

However after 21 years of independence the provision of basic services such as water, sewerage and sanitation is still not adequate. The lack of basic services like sewerage and sanitation for millions of Namibians is arguably the most pressing environmental justice problem in the country today. The government has made impressive strides in providing these services, however the pace is rather slow and this is cause for alarm at the short- and long-term environmental justice implications.

Article 98: Principles of Economic Order¹⁴⁹

(1) The economic order of Namibia shall be based on the principles of a mixed economy with the objective of securing economic growth, prosperity and a life of human dignity for all Namibians.

Economic globalization is increasingly shifting power from governments to a handful of global corporations and financial institutions. Large multinationals such as Shell's total annual revenue, for example, is far greater than that of many African countries combined. What this means from the standpoint of grassroots campaigning is that to be effective in social justice activism it is also necessary to develop strategies around corporate social responsibility and accountability.

It is important to recognise the nexus of human rights and the environment. Citizens must quickly realise that environmental protection is a precondition for the enjoyment of human rights, and that the human rights framework can be a useful tool for environmental defenders advocating their cause.

Multinational corporations and international financial institutions must acknowledge the need to consult with local communities regarding project plans, to consider the potential impact on the local environment, and to mitigate any adverse effects. Multinational corporations now devote much more attention to these issues on their web sites and in paid advertising.

¹⁴⁹ Republic of Namibia. 1990, supra.

3.3.11. Article 100: Sovereign Ownership of Natural Resources¹⁵⁰

Land, water and natural resources below and above the surface of the land and in the continental shelf and within the territorial waters and the exclusive economic zone of Namibia shall belong to the State if they are not otherwise lawfully owned.

If the State owns land, water and natural resources then it follows that the State has the final say in how land is used and therefore the State is ultimately responsible for environmental justice. The legislature has enacted an array of laws aimed at ensuring the sustainable use of land, water and natural resources which translates to preventing environmental injustice.

3.3.12. Article 144: International Law¹⁵¹

Unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia.

The regional and international agreements pertaining to Namibia are discussed under the heading Environmental Justice: An International perspective. Namibia is not party to all of them but some such as the Aarhus Convention is included for its excellent and progressive provisions which Namibia can nationalise.

3.4. Statutory law

3.4.1. Environmental Management Act, 2007

Namibia has put in place an array of legislation ensuring the protection of the environment. It has numerous legislative instruments that provide for the equitable use of natural resources for the benefit of all. The implementation of the legislative framework is a mammoth task.

The Environmental Management Act, 2007¹⁵² aims to –

- promote the sustainable management of the environment and the use of natural resources by establishing principles for decision-making on matters affecting the environment
- establish the Sustainable Development Advisory Council

¹⁵⁰ Republic of Namibia. 1990, supra.

¹⁵¹ Ibid

¹⁵² No. 7 of 2007

- provide for the appointment of an Environmental Commissioner and Environmental Officers, and
- provide for the process of assessment and control of activities which may have significant effects on the environment.¹⁵³

How far this new piece of environmental legislation will cross-fertilise in respect of protecting and implementing human rights will only be seen with time. This Act vest powers in the Minister of Environment and Tourism to after following the consultative process referred to in section 44 by notice in the Gazette or by regulation, declare a site to be a waste disposal site.¹⁵⁴

Furthermore, where a waste disposal site already exists in terms of any law, the Minister may approve that site as a waste disposal site for the purpose of this section.¹⁵⁵

The Act goes further to prohibit any person from the discarding or causing to be discarded waste or dispose of it in any other manner, except -

(a) at a disposal site declared or approved by the Minister in terms of this section;

or

(b) in a manner or by means of a facility or method and subject to such conditions

as the Minister may prescribe.¹⁵⁶

Section 5 of the Act criminalise the contravention of subsection (4) and imposes a fine of a fine not exceeding N\$500 000 or to imprisonment for a period not exceeding 25 years or to both such fine and such imprisonment upon conviction.

This has far reaching effects on the protection of the right to environmental justice. The Minister has the ultimate power to decide firstly what constitutes “waste” and where and how it must be disposed of. Therefore the Minister can ensure that environmental justice prevails within the borders of Namibia. The Minister can also ensure that human life is more valuable than the

¹⁵³Environmental Management Act 7 of 2007.

¹⁵⁴ Ibid, Section 5(2).

¹⁵⁵ Ibid, S 5(3).

¹⁵⁶ Ibid S4(4).

environment. The question however remains whether the Minister is really in control. For example if uranium deposits are found in the Erongo Region close to a community of poor communal farmers can the Minister really control the emission of gasses or the effects of radiation or the residue of the mining process. The answer is of course no but the Minister can influence the decision of the Minister of Mines and Energy to issue uranium licence in terms of the number issued; the Minister can also ensure that the mines mitigate the effects of their mining process on the human beings and that waste is properly disposed of.

The Act also provide for the carrying out of EIAs. The EIA is a method developed in international law, which have spread globally. The method is structured as a way of estimating the impact of a development or construction before it is started its and to ensure public participation in the decision to allow the action. Being part of the planning rather than a reaction when the damage is already done, the EIA can be an opportunity to a dialogue between affected parties.

As Ruppel¹⁵⁷ pointed out implementation remains a problem. For example the Sustainable Development Advisory Council is yet to be established.

3.4.2. The Water Act¹⁵⁸

Although the new Water Resources Management Act¹⁵⁹ was approved by parliament in 2004 it is yet to be signed by the Minister and is currently being amended to take into account practical aspects of implementation thus the Water Act of 1956 still remains in force.

This Act empowers the Minister to, amongst others, investigate water resources, plan water supply infrastructure, develop water schemes, control water pollution, protect, allocate and conserve water resources, inspect water works, levy water tariffs and advise on all matters related to the water environment in general. In the pursuit of environmental justice this can be regarded as progressive. The Act goes further then giving mere control to the Minister but it also imposes a duty on the Minister to prevent environmental injustice. The Minister must the Act to ensure environmental justice by guaranteeing environmental equality.

¹⁵⁷Ruppel 2008, supra.

¹⁵⁸1956.

¹⁵⁹No. 24 of 2004.

For the environmental justice movement this furthermore means that the sustainable use of water is ensured by this piece of legislation translating to environmental justice. The moment the government goes as far penning down regulations as to the use and control of a particular resource it shows the political will to ensure (environmental) justice in the use of that particular resource for all its citizenry.

The Act basically makes the Department of Water Affairs responsible for the use, allocation, control, and conservation of Namibia's surface and groundwater resources. It makes provision for the protection of river catchments, drilling of boreholes and making of wells, it controls effluent discharge into rivers and weather modifications such as cloud seeding and outlines regulations that govern the optimal use of water resources. It clearly defines the interests of the state in protecting water resources.

The Act guarantees the rights to access, use, and manage water which rights are inextricably linked to the rights of health and economic welfare. The Namibian population is heavily dependent on its natural resource base for survival thus water is more than essential. Most rural Namibians have agricultural land and the household labor to grow crops they need and, in good years, some to sell. The vast majority also rely on farming with livestock. These are all dependent on water and the access thereto. In this vein the provisions of this Act are broad enough to ensure environmental justice.

3.4.3. The Prevention and Combating of Pollution at Sea by Oil Act¹⁶⁰

The Act like its name suggest prohibits the discharge of oil from ships, tankers or off-shore installations and gives the state certain powers to prevent such pollution and to deal with the removal of oil spills. Preventing pollution in any form is at the root of the environmental justice movement. Furthermore where pollution is done in a discriminatory manner such as when ships and tankers from rich countries discharge oil on the seas of poorer countries. This piece of legislation empowers the state to ensure environmental justice by preventing pollution.

¹⁶⁰No. 6 of 1981

3.4.4. The Minerals Prospecting and Mining Act¹⁶¹

This Act makes mandatory to have a license to prospect and mine, as such may have a negative impact on the environment. In the pursuance of protecting the environment or the natural resources of Namibia or the prevention of pollution or damage, the Minister may declare that certain explorative and mining processes may not be carried out or only with special permission.¹⁶² Even though the Act does not make specific reference to protecting human beings this author is of the strong opinion that the provisions of the Act are broad enough to be extended to ensure environmental justice. To be specific provisions such as the prevention of pollution or damage can equally apply ensuring environmental justice for every Namibian citizen.

3.4.5. The Petroleum (Exploration and Production) Act¹⁶³

This Act was enacted to provide for there connaissance, exploration, production and disposal of, and the exercise of control over petroleum. Production licences must be obtained to carry on reconnaissance operations. Section 71 is of particular importance to the environmental justice movement in Namibia as it regulates that, rights-holders are held responsible for the pollution of the environment, or other damages or losses caused. Does this mean a community for example in Luderitz fully dependent on fish hold a production license holder responsible for the depletion in fish? Can such a community claim a right to access? The rights to access, use, and manage natural resources are inextricably linked to the rights of health and economic welfare. Does the right of the licence holder interfere with the rights to access, use and manage the marine resources? This author is of the opinion that the Act makes it possible for the two rights holders to co-exist.

3.4.6. Community-Based Tourism Policy (1995)

Tourism in Namibia is one of the major contributors to the gross domestic product of the country and this warrant thorough planning in order to ensure that all Namibians benefit. The Ministry of Environment and Tourism has crafted the Community-Based Tourism Policy. The policy is supposed to explore how communities can benefit from the tourism industry to promote social

¹⁶¹No. 33 of 992

¹⁶²S122

¹⁶³No. 2 of 1991

and economic development and conservation in communal areas. The main principles of this act are:

1. Consultation of the people with tourism planning and legislation reflecting their input;
2. Demand for the informal tourism sector to organize, recognize and even represent community interests;
3. Requirement of large businesses to allow participation of local people if operating on their communal lands.

If we reconcile this policy with the definition of environmental justice it is safe to conclude that it is broad enough to provide a safe environment and ensure sustainable development thus ensuring environmental justice. This is achieved through consultations with the communities and thus ensuring that the communities' interest is reflected in legislation. The Policy also ensures self-actualization, personal and community empowerment which is a requirement for environmental justice.

3.5. Customary law

The Traditional Authorities Act, 2000¹⁶⁴ provides certain powers, duties and functions to Traditional Authorities and their members. The Act regulates the establishment of a Traditional Authority for every traditional community which could consist of the designated and recognised Chief or head of that community, the senior traditional councillors, and traditional councillors appointed or elected in accordance with the Act. Inter alia, the Act empowers the Traditional Authority to –

... ensure that the members of his or her traditional community use the natural resources at their disposal on a sustainable basis and in a manner that conserves the environment and maintains the ecosystems for the benefit of all persons in Namibia.

This implies that the onus is on the communities to maintain and ensure that they safeguard their way of living. This entails their customary laws as well, including the protection of the

¹⁶⁴No. 25 of 2000

environment within traditional areas. The majority of indigenous Namibians still live in accordance with their respective customary laws. After independence, Namibia gave the same degree of recognition to customary law as it accorded to common law. This is contained in article 66 of the Constitution, which states that both customary law and common law are to be recognised as far as they are not repugnant to the provisions of the Constitution. This leads to the conclusion that customary law should also reflect the recognition of human rights when it comes to the protection of the environment.

The aforementioned make it clear what an important role traditional leadership and local governance play in the context of environmental governance.

3.6. Regional Legislation: Africa

Legally binding and non-binding environmental instruments in the region of Africa routinely prescribe duties for Contracting Parties to promote and protect procedural environmental rights for the general public.

3.6.1. African Convention on the Conservation of Nature and Natural Resources 1968

In seeking collective and individual responsibility in the sustainable use and maintenance of natural resources in Africa for current and future generations¹⁶⁵ and to safeguard the natural systems of earth, and other life forms, the 1968 African Convention on the Conservation of Nature and Natural Resources, promotes environmental sustainability on the continent of Africa.¹⁶⁶ Environmental sustainability inevitably lead to environmental justice.

3.6.2. African Nature Convention I

A deficiency in African Nature Convention is its sparseness with respect to procedural rights tools. The African Nature Convention I calls for domestic legislation to provide for a permit scheme to ensure the sound use, development, and preservation of faunal resources¹⁶⁷, and the

¹⁶⁵African Convention on the Conservation of Nature and Natural Resources.Preamble, Article II

¹⁶⁶African Convention on the Conservation of Nature and Natural Resources, Sept. 15, 1968, O.A.U Doc. CAB/LEG/24.1, [hereinafter African Nature Convention I], Preamble, arts. II, VIII. Available at http://www.africaunion.org/root/au/Documents/Treaties/Text/Convention_Nature%20&%20Natural_Resources.pdf Accessed: September 19, 2011.

¹⁶⁷Article VII (2)

adoption of requisite mechanisms for the development and coordination of water development schemes.¹⁶⁸ This will provide entry points for the public to get involved in environmental issues.

3.6.3. Revised African Nature Convention

Although the Revised African Nature Convention has the same goals to protect the environment and sustainably use natural resources¹⁶⁹ like the African Nature Convention I, it went further by building upon the 1968 document with the introduction of procedural environmental rights and obligations in Article XVI. The Revised African Nature Convention explicitly recognizes the value of traditional and local knowledge in Articles VI.3 (a), VIII.1 (a) and XVII and State Parties are called upon to consider local and traditional knowledge and ensure the participation of local communities in the development of plans and processes to manage natural resources.

As a departure from the international environmental instruments, in addition to promoting environmental sustainability, identical to Article 24 of the African Human Rights Charter, the Revised African Nature Convention specifies a right to the environment that considers development needs of the people.¹⁷⁰ Another particularly noteworthy provision in the Revised African Nature Convention is that it advocates for community based environmental governance and management.

3.6.4. The Bamako Convention

The Bamako Convention¹⁷¹ may be considered to be the African regions equivalent to the Basel Convention. Like the international environmental instruments, the Bamako Convention uses procedural mechanisms to achieve its substantive goals, albeit on an inter-State level. Such mechanisms include notification requirements for State Parties (Article 6), cooperation among the State Parties in the collection and exchange of information on the transfer of hazardous

¹⁶⁸ Article V (1))

¹⁶⁹ Article II.

¹⁷⁰ Article III.1.

¹⁷¹ Bamako Convention on the Ban on the Import into Africa and Control of Transboundary Movement and Management of Hazardous Wastes within Africa, 30 I.L.M. 773 (1991) (entered into force on April 22, 1998). Available at <http://www.africaunion.org/root/au/Documents/Treaties/Text/hazardouswastes.pdf> Accessed: 25 September, 2011).

waste¹⁷² and the requirement that State Parties immediately notify impacted States when accidents occur during the transfer of hazardous wastes between States¹⁷³

A unique feature of the Bamako Convention is that it encourages the participation of individuals in the decision making process in allowing non-State Parties who have experience on hazardous waste matters to participate in the meetings of the “Conference of Parties” as observers¹⁷⁴. Article 9(2) calls on all State Parties to introduce criminal laws that penalize people for carrying or assisting in the illegal traffic of hazardous waste.

The Bamako Convention does not specify rights of access to justice for individuals but like the same numbered provision in the Basel Convention it has judicial and administrative procedures to resolve disputes between parties that have assumed obligations under the Bamako Convention for matters covered in the Bamako Convention.¹⁷⁵ Presumably, organizations that are accorded observer status pursuant to Article 15(5) cannot partake of the mechanisms in Article 20 as it is reserved only for State Parties.

3.6.5. African Charter

At the regional level, a key regional human rights instrument, the African Charter, is often mentioned for explicitly guaranteeing a right to the environment. In referring to the development of the African peoples in Article 24 of the African Charter, this author breaks from some scholars who see a clear substantive environmental right in Article 24 in suggesting that a better argument is that the environmental right in Article 24 is linked to a right to “economic, social and cultural development”, which is guaranteed in Article 22 of the African Charter. In the case of regional instruments such as the African Charter on Human Rights and the Maputo Protocol, and ILO 169 at the international level, when a standalone substantive environmental right is guaranteed, arguably it is recognized as a group right.

¹⁷² Article 10

¹⁷³ Article 13.

¹⁷⁴ (Article 15(5))

¹⁷⁵ (Article 20)

3.7. Environmental Justice – an International Perspective

3.7.1. Environmental and Human Rights International Agreements

Namibia is a Party to the following international agreements: UN Convention on Biological Biodiversity, the Convention on Climate Change, Desertification Convention, Convention on Trade in Endangered Species of Wild Fauna and Flora, Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, Law of the Sea Convention, Vienna Convention for the Protection of the Ozone Layer, and Wetlands.

The legacy and persistent practice of environmental exploitation has unbridled forces of destruction, any impact on which will have, of necessity, to be driven by fundamental changes in global resource use, development patterns and lifestyle options.¹⁷⁶ It is critical a mutual environmental goal is reached by the sovereign states of the world and these states participate effectively in its achievement. The world should jointly find an amicable solution to the environmental injustice which is on an increase. The poor within the world and within states continue to suffer more from environmental injustice.

The world community is however confronted, as it is with the increasing disparities between and within nations and a worsening of poverty and thus face significant hurdles in crafting a common platform for environmental action.

3.7.2. Conventions on Environmental Justice

3.7.2.1. Aarhus Convention.¹⁷⁷

The adoption of the United Nations Economic Commission for Europe's (UN/ECE) Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, also known as the Aarhus Convention were major steps forward in the

¹⁷⁶Rajamani, L. *Differential Treatment In International Environmental Law*. Available at [www.http://fds.oup.com/www.oup.co.uk/pdf/0-19-928070-3.pdf](http://fds.oup.com/www.oup.co.uk/pdf/0-19-928070-3.pdf). Accessed on 25 April 2011

¹⁷⁷United Nations Economic Commission for Europe, *Convention on Access to Information, Participation in Decision-making and Access to Justice in Environmental Matters*, opened for signature 25 June 1998 in Aarhus, Denmark; entered into force 30 October 2001. Available at <<http://www.unece.org/env/pp/documents/cep43.e.pdf>> Accessed on 24 September 2011.

development of international law in this field. The Aarhus Convention, although it presently applies primarily to the region of Europe, has global significance for the promotion of environmental governance.¹⁷⁸ The Convention, which has the current status of 40 signatories and 35 parties who have ratified or acceded to it, puts emphasis on the need for civil participation in environmental issues, as well as the importance of access to environmental information held by the government and its public authorities.¹⁷⁹ This convention is basically an elaboration of Principle 10 of the Rio Declaration¹⁸⁰, which underlines the need for citizen participation in environmental issues and for access to information on the environment held by public authorities.¹⁸¹

Therefore one can only conclude that it is the most ambitious venture in the area of environmental democracy so far undertaken under the direction of the United Nations. Granting access to information and allowing participation of citizens in environmental issues and “environmental” decisions of public authorities goes far in safeguarding environmental justices as it ensure that public authorities do not take decisions without consulting the communities.

Secretary-General, Ban Ki-moon on the launch of the Convention stated that the Convention’s critical focus on involving the public is helping to keep governments accountable.¹⁸²

This is critical for environmental justice as the governments are ultimately responsible for the policy framework that will firstly do away with past environmental injustices and secondly ensure that the right to environmental justice is guaranteed.

The Aarhus Convention is an instrument that is being considered for its merits not only by European countries, but also by many countries around the world. One of the strong points of the convention is that it builds synergies through cooperation with other international organizations, including the Convention on Biological Diversity (CBD), the Office of the High Commissioner

¹⁷⁸<http://susdev.csir.co.za>; Ibid.

¹⁷⁹Tamuno, A. (2011) *The Legal Roadmap for Environmental Sustainability in Africa: Participatory Rights & International Environmental Justice* (S.J.D. dissertation, Pace University School of Law) see also Jeffery, M.I. 2005. Environmental Governance: A comparative analysis of public participation and access to justice. *Journal of South Pacific Law*. Volume 9. Issue 2. Available at <http://law.usp.ac.fj/>. Accessed 4 October 2011

¹⁸⁰The Rio Declaration, a soft law mechanism, reaffirms the Stockholm Declaration and provides 27 principles guiding environment and development, the core concept being sustainable development, and integrating development and environmental protection.

¹⁸¹<http://susdev.csir.co.za>

¹⁸²UN News Service available at www.unnewservice.org. Accessed 25 September 2011

for Human Rights (OHCHR), the UN Framework Convention on Climate Change (UNFCCC) and the UN Development Programme (UNDP).¹⁸³

According to Jeffery collaboration with international organizations such as the Organization for Security and Co-operation in Europe (OSCE) and the European Bank for Reconstruction and Development is also yielding results.¹⁸⁴ Aarhus goes a step further than previous international conventions, in providing explicit linkages between environmental rights and human rights. Commencing with the preamble, it states in the 7th and 8th preambular paragraphs:

‘Recognising also that every person has the right to live in an environment adequate to his or health and well-being, and the duty, both individually, and in association with others, to protect and improve the environment for the benefit of present and future generations.’¹⁸⁵

This provision directly links with the definition of environmental justice and it affirms the principles of environmental justice that provides that every human being has a right to a healthy environment and to environmental equity.

‘Considering that, to be able to assert this right and observe this duty, citizens must have access to information, be entitled to participate in decision-making and have access to justice in environmental matters, and acknowledging in this regard that citizens may need assistance in order to exercise their rights.’¹⁸⁶

This provision goes further to ensure that the right postulated above is accessible to the citizen and the citizen can then use this instrument to hold government accountable if it fails to grant the necessary access.

¹⁸³ Ibid.; Tamuno, supra, fn 3

¹⁸⁴ Ibid.

¹⁸⁵ Aarhus Convention, see Preamble, paragraphs 7 and 8. The linkage between environmental rights and human rights is further articulated in the stated objective of the Convention (Article 1) as follows: *‘In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well being, each party shall guarantee the rights of access to information, public participation in decision-making, and access to justice in environmental matters in accordance with the provisions of this Convention.’*

¹⁸⁶ Ibid.

Access to environmental information leads to a well-informed public, who is in a better position to question the actions of the government. These factors can then lead to a more accountable environmental decision-making and greater potential for environmental justice. In Namibia this is achieved for the inclusion of EIA in most mining and property development projects. The carrying out of EIAs are provided for in the Environmental Management Act.¹⁸⁷

Article 4¹⁸⁸ outlines when it is appropriate for access to information to be denied, these circumstances being

- a) when the public authority does not have the information requested;¹⁸⁹
- b) when it is unreasonable to provide the information;¹⁹⁰ and
- c) when confidentiality is in the public interest,¹⁹¹ for example, with intelligence or national security information.
- d) Moreover, information can be refused if disclosure will adversely affect factors such as the course of justice¹⁹² and intellectual property rights.¹⁹³

At the first Meeting of the Parties to the Convention,¹⁹⁴ the Parties noted the revolution in electronic information technology as being very important to the promotion of environmental governance. The Meeting's declaration called on parties to the Convention to make government environmental information progressively available electronically, yet for these services to be kept under frequent review.¹⁹⁵ The Meeting of the Parties stressed that the Convention is mainly concerned with building partnerships between an empowered civil society and the government, and that the public had responsibility for sustainable development too.¹⁹⁶

¹⁸⁷No. 7 of 2007

¹⁸⁸Aarhus Convention

¹⁸⁹ibid, Article 4 (3) (a).

¹⁹⁰ibid, Article 4 (3) (b).

¹⁹¹ibid, Article 4 (3) (c).

¹⁹²ibid, Article 4 (4) (c).

¹⁹³ibid, Article 4 (3) (e).

¹⁹⁴Jefferey, supra.

¹⁹⁵Ibid.

¹⁹⁶Ibid.

It was stated:

The engagement of the public is vital for creating an environmentally sustainable future. Governments alone cannot solve the major ecological problems of our time. Only through building partnerships within a well-informed and empowered civil society, within the framework of good governance and respect for human rights, can this challenge be met.¹⁹⁷

3.7.2.2. The Biological Diversity Convention¹⁹⁸

The Biological Diversity Convention promotes environmental sustainability in that State Parties pursue to conserve and use biological diversity in a sustainable manner for the good of current and future generations but also comprehending the significance of maintaining biological diversity because of its inherent worth and life sustaining attributes.¹⁹⁹ As stated earlier the sustainable use of the environment is linked with ensuring the right to environmental justice. One cannot for example enjoy the right to life in a derogated environment. Therefore state Parties are enjoined to encourage and aid public instruction and consciousness on measures to protect biological diversity.²⁰⁰ The convention calls on states to develop national plans and processes to carry out the goals of this convention.²⁰¹ Article 14 of the Biological Diversity Convention, strive to promote what may be considered to be Environmental Impact Assessment (EIA) and Sustainable Environmental Assessment (SEA) procedures on issues related to biological diversity, at the national level.

However the watered down obligation for State Parties in Article 14, which allows State Parties to undertake impact assessment procedures “*as far as possible [sic], and appropriate*” is regarded as reducing the effectiveness of the stated procedural mandates. In the absence of clear directives for State Parties to ensure EIA procedures pursuant to Article 14, for many struggling democracies in Africa such as Namibia where the rule of law, government transparency and accountability are yet to be fully entrenched in society, it is unlikely at best that governments will deem it appropriate to facilitate effective public participation in a SEA or EIA process. This

¹⁹⁷www.paclii.org/journals/fjspl/vol09no2/2.shtml. Accessed 23 September 2011

¹⁹⁸ Convention on Biological Diversity, opened for signature June 5, 1992, 1760 UNTS 79; 31 ILM 818 (1992), available at http://treaties.un.org/doc/Treaties/1992/06/19920605%2008-44%20PM/Ch_XXVII_08p.pdf. Accessed 25 September 2011.

¹⁹⁹Tamuno, *supra*, fn 3

²⁰⁰Convention on Biological Diversity, *supra* Article 13.

²⁰¹*Ibid*, Article 6.

is in contrast to the strong mandate in Article 13. Depending on the circumstances, and the contracting party in question, the dispute resolution mechanism may take the form of a negotiated settlement, mediation, arbitration, conciliation or if all else fails submission of the dispute to the international court of justice.

3.7.2.3 Stockholm Convention on Persistent Organic Pollutants

The Stockholm Convention on Persistent Organic Pollutants seeks to safeguard the environment and public health by preventing or curtailing the use, production and transfer Of Stockholm Convention on Persistent Organic Pollutants.²⁰² Environmental justice is not specifically mentioned in the Stockholm Convention on Persistent Organic Pollutants Convention but this study suggests that this convention has international environmental justice goals. Consistent with the goals in Principles 4 and 6(footnote these principles) of the Environmental Justice Principles that call for worldwide protection from nuclear tests and activities, and to bring an end to the production of harmful substances, Article 6(1) of the Stockholm Convention on Persistent Organic Pollutants Convention calls for the proper handling of dangerous substances to protect the health of all people everywhere in the world and the global environment.

By taking into account the capacity and ability of State Parties from developing countries to undertake the necessary research, supervision and development in the implementation of the Stockholm Convention on Persistent Organic Pollutants Convention²⁰³, the Stockholm Convention on Persistent Organic Pollutants Convention like the Climate Change Convention and its Kyoto Protocol, seeks to prevent the placing of a disproportionate environmental burden on developing countries in implementing the Stockholm Convention on Persistent Organic Pollutants Convention. This is a clear target to achieve environmental justice.

The Stockholm Convention on Persistent Organic Pollutants Convention mandates that State Parties provide technical assistance and facilitate the transfer of technology to economically disadvantaged countries of the world and other depressed economies so these countries can

²⁰²Stockholm Convention on Persistent Organic Pollutants, May 22, 2001, 40 I.L.M. 532 (2001). Available at http://treaties.un.org/doc/Treaties/2001/05/20010522%2012-55%20PM/Ch_XXVII_15p.pdf (last visited 12 September, 2011).

²⁰³Article 11(2)(c)

fulfill their obligations under the Stockholm Convention on Persistent Organic Pollutants Convention.²⁰⁴ Through the provision of financial resources, technical aid and the transfer of technology from developed countries to developing countries, and considering the UN Bureau of Statistics definitions of developing, developed and least developed countries, it is fair to conclude that the Stockholm Convention on Persistent Organic Pollutants Convention attempts to prevent unfair environmental burdens on African Countries that are State Parties to the Stockholm Convention on Persistent Organic Pollutants Convention.

3.7.2.3. Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade

The basic environmental justice themes are promoted in the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade at the international level.²⁰⁵ In seeking to protect the health of all of humankind and the environment from hazardous chemicals in international trade²⁰⁶ the Rotterdam Convention enunciates a key goal in the Environmental Justice and Bali Principles which is to ensure the [ecological] health of the natural world for present and future generations.

The Rotterdam Convention requires that State Parties take into account the needs of countries with depressed economies and provide technical assistance and training to such disadvantaged countries to facilitate their implementation of the Rotterdam Convention.²⁰⁷ The Rotterdam Convention relies heavily on procedural tools to achieve the substantive goals of the treaty.²⁰⁸ Considering that the entire region of Africa is considered a developing region, this study considers that the Rotterdam Convention seeks to prevent a disproportionate environmental burden on developing countries in Africa that are State Parties to the Rotterdam Convention and

²⁰⁴Article 12

²⁰⁵ Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, 38 ILM 1(1999), opened for signature September 11, 1998, [hereinafter Rotterdam Convention], available at http://treaties.un.org/doc/Treaties/1998/09/19980910%2007-22%20PM/Ch_XXVII_14p.pdf (last visited 20 August 2011).

²⁰⁶Ibid. Article 1.

²⁰⁷Ibid. Article 16.

²⁰⁸ Ibid. Articles 10-16.

ensure that such countries have adequate technical assistance and training to implement the Rotterdam Convention.

3.8. Conclusion

Although legally-binding human rights instruments at the international level generally do not explicitly guarantee a substantive environmental human right, a substantive environmental right may be derived from these instruments using an indirect rights approach that relies on basic human rights to secure such a right. On the other hand, numerous non-binding international instruments on human rights and the environment explicitly recognize a substantive environmental right.²⁰⁹

²⁰⁹Tamuno, *supra*

4. Chapter 4

4.1. South Africa - a comparative study of South Africa

4.1.1. Introduction

In South Africa conservation ideology and environmentalism is closely linked to the undemocratic and violent history of colonization and apartheid. Forcefully removing people from their ancestral land, without any consultation or compensation, to make way for a game park is wrong by most moral standards.²¹⁰ Spending millions of rands on municipal services for one group of people and not providing the most basic necessities to others is simply undemocratic.²¹¹ Environmental inequities of this sort are so manifestly unjust that it makes sense to speak of an environmental justice movement to address them.²¹² It is easy to see why the environmental justice movement in South Africa has been able to attract a significant following.

In 1992, the concept of environmental justice (EJ) was imported to South Africa by the US activist Dana Alston who introduced it as a very broad issue extending existing social justice or human rights work: “Environment justice affords us a platform to address some of the critical issues of our time.” She also opened another theme with which environmental justice activists have to deal when confronted with “development” schemes:

“Private industry has exploited the pervasive unemployment among people of colour. They have promoted the idea that poor people must choose between jobs and a clean environment... Over the last thirty years, our communities have been desperate for development and have accepted polluting industries. We were told we would receive jobs, that an expanded tax base could be used to address community needs and development, and that our health would be protected. In reality, the few jobs that we did get were the lower-paying and more hazardous jobs.”²¹³

²¹⁰ Kahn in McDonald, D, (ed) Environmental justice in South Africa, Cape Town, 2002: p 23

²¹¹ *ibid*

²¹² *ibid*

²¹³ Alston quoted in Munnik, *supra* fn 1

4.2. Meaning of Environmental Justice in South Africa

Hallowes & Butler uses the term in relation to development:

[E]nvironmental injustice is evident in that the rich receive the major benefit of development while the poor bear the brunt of environmental degradation caused by development²¹⁴

Glazewski marks three perspectives that have become connected to the term as it used in South Africa:

- equitable distribution of the burdens of polluting activities
- access to basic resources such as land and water
- community participation in decision-making²¹⁵

He adds that in South Africa, a country where income disparities are among the most extreme in the world, poverty and environmental justice are inherently linked.²¹⁶

In South Africa all projects and all measures taken within the environmental field is evaluated from its benefits or lack benefits in regards of poverty alleviation. This for example means that no conservation work is done purely on based on arguments of biodiversity, but always have a motivation linked to eco-tourism or another income or benefit for the surrounding community.

Referring to Harvey, Cook links the environmental justice movement with the broader term “environmentalism of the poor”.²¹⁷ Further she identifies reframing of needs as rights as a main mobilisation strategy. Other forms of social mobilisation used include; strikes, litigation, advocacy, negotiation, boycotts, organised demonstrations, public petitions and the use of media.²¹⁸

²¹⁴Hallowes, David & Butler, Mark, 2004. *The Balance of Rights*, the groundWork Report 2004, Pietermaritzburg, : p 8

²¹⁵Glazewski, J, 2000, *Environmental law in South Africa*, Durban, p 7

²¹⁶ibid, p8

²¹⁷Cock, Jacklyn, 2004. *Public sociology and the environmental justice movement*, Seminar paper, University of Witwaterstrand, , p8

Environmental justice as method of analysis calls for radical questions on how power relations define and re-produce development. As a social motto it turns the environmental debate towards issues as poverty reduction and empowerment of discriminated groups.

4.3. The South African Constitution²¹⁹

Similar to the Namibian Constitution the South African Constitution from 1996 includes a Bill of rights which ensures the equal rights and freedom for all and again it is the opinion of this author just as in the instance of the Namibian Constitution that the provisions contained in the Bill of rights of the South African Constitution are broad enough to be applied to attain environmental justice.

According to Professor Glazewski, environmental rights include both fundamental rights and socio-economic rights. “A person’s well-being is harmed if his or her interests are harmed”.²²⁰ This, writes Glazewski “provides environmentalists with a powerful weapon”.²²¹

The South African Constitution however went a step further by including the right:

- to an environment that is not harmful to their health or well-being; and
- to have the environment protected, for the benefit of present and future generations through reasonable legislative and other measures that:
 - prevent pollution and ecological degradation;
 - promote conservation; and
 - secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.²²²

Munnik opine that the environmental right was formulated in such a way that the health of communities was the reason that the environment had to be protected, not the other way round as in earlier environmental (or, more properly, conservation) movements.²²³ Also in its framing the

²¹⁹Ibid.

²²⁰Glazewski, supra, p24

²²¹ibid

²²²South African Constitution S 24

²²³Munnik, supra fn 1, p4 see also Feris, L. 2007. Constitutional Environmental Right: An under-utilised Resource. *SAJHR*.2008, Vol 24

right imposes a duty on government to provide for these standards by way of legislative or other means.²²⁴

The section contains two general aims. i.e.:

- Paragraph (a) guarantees a healthy environment to everyone in general
- Paragraph (b) mandates the state to take certain measures in order to realise the guarantee proclaimed in the first part of this section.²²⁵

In Munnik's opinion the actualisation of the environmental right in the South African constitution has been far more difficult than writing it.²²⁶ He reasons that the ongoing favouring of economic growth and impatience with environmentalism "stood in the way of growth".

Even though most of the statutes relating to the developmental activities which depends on the environment such as mining, similar to Namibian statutes requires environmental impact assessments(EIA) to be carried out Munnik reasons that EIA regulations have been "streamlined" to make it easier for business.

The oft quoted constitutional right of all South Africans to "an environment that is not harmful to their health or well-being" is only one of many constitutional and legislative reforms introduced by the African National Congress (ANC) that offer a formidable array of judicial tools to challenge environmental injustices. Most of these legal tools, argues Glazewski,²²⁷ have yet to be tested in a court of law, but their potential is impressive and they could lead to the formalization of an otherwise abstract set of environmental "rights."

4.5. Statutory Law

The legislature has paid serious attention to the duty created in the Constitution and has enacted a good number of statutes which aim is to protect the environment and regulate harmful effects on the environment. The most central is the National Environmental Management Act (NEMA) of 1998. The National Water Act and National Forest Act from the same year are also important and

²²⁴Feris, L. 2007. Constitutional Environmental Right: An under-utilised Resource. *SAJHR*.2008, Vol 24

²²⁵Currie, I & De Waal J. 2006. *The Bill of Rights Handbook*. 5th ed.

²²⁶Ibid.

²²⁷In McDonald, D.A. 2002. *Environmental Justice in South Africa*. Cape Town. University of Cape Town Press, p 171

the rather new Clean Air Act has raised high expectations. Nonetheless the implementation of these laws is not in the fast lane.

4.1. The National Environmental Management Act 107 of 1998

The most central of the new laws is the National Environmental Management Act (NEMA) which established a new form of environmental regulation and environmental governance in South Africa.²²⁸ NEMA aims to:

- define overarching and generic principles in which sectoral-specific legislation is embedded;
- enhance co-operative environmental governance amongst fragmented line ministries.
- Provide for a broad flexible framework to address environmental issues and to respond to changes in socio-economic and ecological parameters.

NEMA also has a public participation approach and include a detailed scheme to secure administrative justice, which according to Kidd will have positive consequences:

[I]n the future it can be expected to that citizens (individually or as part of nongovernmental environmental activist organisations) will be increasingly taking up the cringles on behalf of the environment. The legal environment for them to do so, with liberal standing rules provided by the NEMA and the Constitution, makes this a likely scenario. [...] Whatever instruments are used by members of the public, it is likely that their efforts will constitute a significant part of environmental law enforcement effort in years to come. This, it is submitted, is something to be encouraged.²²⁹

The Act further provides that:

The environment is held in public trust for the people, the beneficial use of environmental resources must serve the public interest and the environment must be protected as the people's common heritage.²³⁰

²²⁸ This is a similar piece of legislation to the Namibian Environmental Management Act, 2007 (No. 7 of 2007)

²²⁹ Kidd Michael, 2002. Alternatives to criminal sanction in the enforcement of environmental law, *The South African Journal of Environmental Laws and Policy*, vol. 9 no 1.

²³⁰ Glazewski, 2000, referring to National Environmental Management Act of 1998 section 2

The legislation also incorporates international environmental principles such as the duty of care principle and the ‘polluter pays’ principle and further creates a liability for environmental damage.²³¹ It is only fair that those who causes pollution also carry some of the burden and not only the victims of pollution. The Principles of Environmental Justice also demands that all past and current polluters pay for their wrongs.²³²

In addition to NEMA and other statutes such as the National Water Act 36 of 1998, Water Services Act 108 of 1997, Marine Living Resources Act 18 of 1998, National Forest Act 84 of 1998, National Environmental Management: Biodiversity Bill 2003, National Environmental Management: Protected Areas Act 2003, Air Quality Act 2004(coming into force 01/09/2005), an array of statutes has been enacted to give effect to the procedural rights in the Constitution, which are indispensable to the implementation and enforcement of environmental rights.

For example the Promotion of Access to Information Act 2 Of 2000 has been enacted to give effect to s32 which guarantees the right to access to information. This provision also complies with Principle 7 of the Principles of Environmental Justice which demands the right to participate in decision-making at all levels. One can only effectively participate if you are well informed. Statutes such as the Promotion of Access to Information Act gives the citizen the right to demand information even from government.

4.6. Conclusion

South Africa and Namibia share an history of apartheid and therefore the environmental justice movement has found(in the case of South Africa) acceptance especially in the black and poor communities and it will be the same here in Namibia.

The provisions aimed at the protection of the environment, sustainable development and environmental equity contained in the Constitution of South Africa and other statutes are clearly aimed at redressing the past environmental injustices. On this front Namibia is lacking behind because it does not have an explicit environmental provision in the Constitution and subsequent statutes to give effect to the call of the Constitution.

²³¹NEMA S 2(4) and S 28

²³²Annexure 1

Although environmental issues including environmental justice are in the political agenda, it is not a priority neither by government nor the civil sector. This is also true in the instance of Namibia. Even though South Africa has an explicit constitutional provision providing for a safe environment actualisation of this right is problematic. This is confirmed by McDonalds writing that beyond a few core principals there is much that fragments the environmental justice movement due to a lack of coherent theoretical framework.

Both Namibia and South Africa use the provisions of the Bill of Rights contained in their Constitutions through an indirect rights theory developed in international law to link the enjoyment of basic human rights to an environment of a good quality, to ensure environmental justice and that all human beings enjoy the environment equally but that they also share equally the risks. The provisions of the Bill of Rights are broad enough to lend itself to and environmental justice interpretation.

5. CHAPTER 5

5.1. Conclusions

The primary objective of this study was to establish whether the Namibian legal framework ensures environmental justice and if it does to what extent. From the research done several findings were made, which will be highlighted hereunder and based on those findings recommendations are made.

5.2. Findings

The Namibian Constitution is lacking to the extent that it does not explicitly specify neither substantive nor procedural environmental rights for Namibians. This deficiency is in contrast to constitutions of other African countries. The fact that the environmental right is contained in Art 95 of the Namibian Constitution leaves a bitter state in this author's mouth as Art 95 is overshadowed by questions of enforceability and justiceability.

It was re-affirmed that the provisions of Bill of Rights as contained in the Constitution lends itself to a broad interpretation thus making it easy to use a human rights approach to ensure the right to environmental justice.

New environmental legislation has provided the framework for environmental redress by poor communities and other national statutes such as the Environmental Management Act goes a long way in ensuring environmental justice especially in the prevention of pollution and holding the polluter accountable. The inclusion of the Environmental Impact Assessment processes can be seen as a major area of success, as a way of ensuring that proposed development projects such as mining or property development were in line with principles of sustainable development and conservation. However many EIAs are rituals that never make a difference to the actual outcome, but do tie up activists' time. Information can be kept secret, often in collusion with the state (regulators), thus excluding communities from knowing how polluted they are, and denying communities the evidence to take legal steps for protection.

Regional and international progress in the field of environmental justice is quiet comforting. Although the Aarhus Convention is a European legislation the provisions contained therein are to be nationalised by all nations.

The introduction of procedural environmental rights and obligations in Article XVI of the Revised African Nature Convention is noteworthy. The Convention explicitly recognizes the value of traditional and local knowledge in Articles VI.3 (a), VIII.1 (a) and XVII and State Parties are called upon to consider local and traditional knowledge and ensure the participation of local communities in the development of plans and processes to manage natural resources.

South Africa is a step ahead with its inclusion of an environmental right in the Constitution. Namibia can therefore learn to elevate the importance of the environment and of environmental protection and conservation.²³³ Furthermore, Namibia can take steps just like the South Africans to place the environmental right on par with other constitutionally-protected rights such as equality, dignity and the right to life.²³⁴ It can be seen from the South African practice that the inclusion further underscores the significance which South Africans place on a sound and healthy environment which Namibia can draw inspiration from.²³⁵ The South African legislature went a step further and implemented statutes to give effect to the constitutional requirements.

5.3. Recommendations

The State by virtue of its ownership²³⁶ of all natural resources is ultimately responsible for the protection of the right to environmental justice. This ownership further obliges the state to ensure equal enjoyment of its resources by its citizens and therefore the state is called upon to full its obligation in this regard.

In this regard it is firstly recommended that Namibia adopts a legal instrument that provides for the protection of the right of every person of present and future generations to live in an

²³³Feris, supra, p49

²³⁴ibid

²³⁵ibid

²³⁶Article 100 of the Namibian Constitution provides inter alia that the land, the water, and the natural resources below and above the land, in the continental shelf and within the territorial waters as well as within the exclusive economic zone of Namibia belong to the state in terms of the Constitution, if not otherwise lawfully owned.

environment adequate to his or her health and wellbeing, by guaranteeing the rights of access to information, public participation in decision-making, and access to justice in environmental matters.

Namibia must enshrine the provisions of the Aarhus Convention. The benefits that can be derived from enshrining the rights contained Aarhus in Namibian environmental legislation are general freedom of information laws which are usually the most appropriate solution in safeguarding the environment.

However, in its absence, an explicit but non-exhaustive definition of environmental information, at least covering the elements in contained in the Aarhus Convention, should be applied. The right to information should apply to any individual without having to prove or even state an interest and without distinction on the basis of citizenship, nationality, domicile or any other ground.

Constitutional provisions should be strengthened in Namibia, but it is not enough to rely on constitutional provisions or incidental access to information provisions in other laws.

The above recommendations confirm that much needs to be done in Namibia to make the most of the potential of the public to contribute to sustainable environmental development. The government should discuss the implementation intensively with environmental citizens' organisations and go beyond the requirements wherever this is seen as necessary and possible.

Lastly, environmental implications need to be raised to the forefront of judicial decision making, even though the pleadings or issues on hand may not explicitly address environmental cases. This must be recognized as fundamental to the notion of justice, the notion of the Rule of Law, and the notion of governance. The Chief Justice of the Philippines, Hon. Justice Hilario G. Davide Jr., referring to a fundamental right to a balanced and healthful ecology, remarked in the celebrated Full Bench decision of the Supreme Court of the Philippines in the *Oposa v. Factoran case*:

“As matter of fact, these basic rights need not even be written in the Constitution for they are assumed to exist from the inception of humankind. If they are now explicitly mentioned in the fundamental charter, it is because of the well-founded fear of its framers

that unless the rights to a balanced and healthful ecology and to health are mandated as State policies by the Constitution itself, thereby highlighting their continuing importance and imposing upon the State a solemn obligation to preserve the first and protect and advance the second, the day would not be too far when all else would be lost not only for the present generation, but also for those to come- generations which stand to inherit nothing but parched earth incapable of sustaining life.”²³⁷

Therefore, it is clearly evident that notions of Governance and the Rule of Law are intrinsically intertwined and that the Judiciary—as the final arbiter in human affairs—has both the responsibility and the duty to dispense justice with due regard to both the Rule of Law and the rules of good governance.

²³⁷ http://www.unep.org/law/Programme_work/Judges_programme/index.asp; last accessed 12 May 2011

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Annexure 1

Principles of Environmental Justice

P R E A M B L E

We, the people of color, gathered together at this multinational People of Color Environmental Leadership Summit, 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 to 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 insure environmental justice; to promote economic alternatives which 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 colonization and oppression, resulting in the poisoning of our communities and land and the genocide of our peoples, do affirm and adopt these Principles of Environmental Justice:

1. 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.
2. Environmental justice demands that public policy be based on mutual respect and justice for all peoples, free from any form of discrimination or bias.
3. Environmental justice 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 things.
4. Environmental justice calls for universal protection from nuclear testing, extraction, production and disposal of toxic/hazardous wastes and poisons and nuclear testing that threaten the fundamental right to clean air, land, water, and food.
5. Environmental justice affirms the fundamental right to political, economic, cultural and environmental self-determination of all peoples.

6. Environmental justice 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.
7. Environmental justice demands the right to participate as equal partners at every level of decision-making, including needs assessment, planning, implementation, enforcement and evaluation.
8. Environmental justice 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.
9. Environmental justice protects the right of victims of environmental injustice to receive full compensation and reparations for damages as well as quality health care.
10. Environmental justice considers governmental acts of environmental injustice a violation of international law, the Universal Declaration On Human Rights, and the United Nations Convention on Genocide.
11. Environmental justice 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.
12. Environmental justice 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 all our communities, and provided fair access for all to the full range of resources.
13. Environmental justice 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.
14. Environmental justice opposes the destructive operations of multi-national corporations.

15. Environmental justice opposes military occupation, repression and exploitation of lands, peoples and cultures, and other life forms.
16. Environmental justice 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.
17. Environmental justice 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 insure the health of the natural world for present and future generations.