

# Environmental rights and justice under the Namibian Constitution

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## Introduction

Colonialism, apartheid and the unequal distribution of resources have curbed human rights and challenged progress in Namibia for a long time. Today, that is, 20 years after Independence<sup>1</sup> and the promulgation of the Constitution of the Republic of Namibia,<sup>2</sup> the country still faces challenges that impede, inter alia, the development of environmental justice and the explicit recognition of environmental (human) rights.

The adoption of a human rights framework and culture in terms of the Namibian Constitution of 1990 has without doubt been a positive attribute of the country since it gained independence. The Constitution serves as the fundamental and supreme law, and the Namibian Government is subordinate to it.<sup>3</sup> The Constitution also established a new regime relating to natural resources in the country.<sup>4</sup> Regardless of the aforementioned, the legal milieu in support of environmental rights and justice is still far from perfect.

In its first part, this article examines the categorisation and concept of *environmental rights and justice* in general, and then views the Namibian constitutional dispensation in that light. The article intends to establish whether and to what extent environmental (human) rights are explicitly or implicitly recognised in Namibia, demonstrating at the same time how human rights and the environment are interrelated and indivisible.

## Environmental rights: What category do they belong to?

The categorisation of human rights into generations has not been without criticism;<sup>5</sup> and it must be admitted that the attempt to relegate human rights into categories, be it into generations or other classifications, always bears the risk of not being capable of determining exactly which rights belong to which category. This is inherent in the very nature of human rights in general, as human rights are universal, inalienable, indivisible, interrelated and interdependent.<sup>6</sup>

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1 Namibia became independent on 21 March 1990.

2 No. 1 of 1990.

3 Naldi (1995:15–19).

4 Carpenter (1991:56–57).

5 Scheinin (2009:25).

6 These important characteristics of human rights were formulated and reaffirmed by the World Conference on Human Rights held in Vienna in 1993, and are laid down in Section I(5) of the Vienna Declaration and Programme of Action. See [http://www.unhchr.ch/huridocda/huridoca.nsf/\(symbol\)/A.CONF.157.23.En?OpenDocument](http://www.unhchr.ch/huridocda/huridoca.nsf/(symbol)/A.CONF.157.23.En?OpenDocument); last accessed 25 November 2009.

The categorisation of human rights into three generations goes back to the Czech-French lawyer Karel Vasak, the first Secretary-General of the International Institute for Human Rights in Strasbourg. As early as 1977, he divided human rights into three generations. The so-called *first-generation* (human) rights<sup>7</sup> refer to traditional civil and political liberties prominent in Western liberal democracies, such as freedom of speech, religion, and the press; and freedom from torture, which presuppose a duty of non-interference on the part of government towards individuals. These rights are the ‘classical’ human rights contained in notable instruments such as Chapter 3 of the Namibian Constitution. For many years, the dominant position was that only these rights were genuine human rights.<sup>8</sup>

*Second-generation* rights, namely economic, social and cultural rights, have generally been considered as rights which require affirmative government action for their realisation. Second-generation rights are often styled as group rights or collective rights, in that they pertain to the well-being of whole societies. They contrast with first-generation rights that have been perceived as individual entitlements, particularly the prerogatives of individuals, as they refer to rights which are held and exercised by all the people collectively or by specific subsets of people. Examples of second-generation rights include the right to education, work, social security, food, self-determination, and an adequate standard of living. These rights are codified in the International Covenant on Economic, Social and Cultural Rights (ICESCR),<sup>9</sup> and also in Articles 23–29 of the Universal Declaration of Human Rights.<sup>10</sup> Writers reluctant to recognise second-generation rights as human rights have often based their arguments on the assumption that courts are unable to enforce affirmative duties on states and, therefore, that such rights are mere aspirational statements. Similarly, critics have opined that, regardless of the political system or level of economic development, all states are able to comply with civil and political rights, but not all states have the ability to provide the financial and technical resources for the realisation of affirmative obligations such as education and an adequate standard of living.<sup>11</sup>

*Third-generation*<sup>12</sup> or ‘solidarity’ rights are the most recently recognised category of human rights.<sup>13</sup> This grouping has been distinguished from the other two categories of human rights in that its realisation is predicated not only upon both the affirmative and negative duties of the state, but also upon the behaviour of each individual. Rights in this category include self-determination as well as a host of normative expressions whose status as human rights is still controversial. Third-generation rights include the right to development, the right to peace, and environmental rights.<sup>14</sup>

7 Vasak (1977).

8 Steiner et al. (2008).

9 1966 United Nations International Covenant on Economic, Social and Cultural Rights; see [www.unhchr.ch/html/menu3/b/a\\_cescr.htm](http://www.unhchr.ch/html/menu3/b/a_cescr.htm); last accessed 29 December 2009.

10 1948 United Nations Universal Declaration of Human Rights; see <http://www.unhchr.ch/udhr/lang/eng.htm>; last accessed 29 December 2009.

11 On the classification of human rights, see Parker (2002).

12 See Ruppel (2008a:101ff).

13 Recent reference has been made to so-called fourth-generation human rights or ‘communication rights’, which are concerned with human rights in the information society.

14 Vasak (1977).

However, strictly speaking, environmental rights actually do not really fit into any one particular category or generation of human rights. These third-generation rights can be viewed from different angles, somehow touching all of the above-mentioned generations of rights. Thus, through existing civil and political rights,<sup>15</sup> it should be possible to give individuals and groups access to environmental information, judicial remedies, and political participation. In this context, environmental rights should be seen as empowerment rights that grant participation in environmental decision-making, compelling governments to meet minimum standards of protecting life and property from environmental harm. This anthropocentric approach<sup>16</sup> focuses on harmful impacts on individuals rather than on the environment, thus leading to a ‘greening’ of human rights law. Another possibility of dealing with environmental rights would be in treating a healthy environment as an economic, social or cultural right, comparable to those codified in the ICESCR. This approach values the environment as a good in its own that is vulnerable and at the same time linked to development. Like (other) economic, social and cultural rights, environmental rights are still largely of an aspirational nature and in many cases enforceable only through the relatively weak international supervisory mechanisms.

The fact that environmental rights are usually not expressly recognised by the 1966 Conventions,<sup>17</sup> meaning that their status and content are often still seen to be contentious.<sup>18</sup> As a collective or solidarity right, environmental quality provides communities rather than individuals with the right to determine how their environment and natural resources should be managed and protected.<sup>19</sup>

Environmental rights – for the purpose of this article and, more importantly, for their improved recognition and application in Namibia – should not be seen in isolation from the other human rights. They are Janus-faced, embracing simultaneously morality and the law. They are constructions rather than moral truths to be discovered and, as such, have an inherently juridical character, which entails an orientation towards a positive conceptualisation.<sup>20</sup>

## **The concept of *environmental justice***

Modern human rights law is commonly considered to have its roots in the 1945 Charter of the United Nations (UN), whereas environmental concerns started to move to the centre

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15 1966 United Nations International Covenant on Civil and Political Rights; see <http://untreaty.un.org/cod/avl/ha/iccpr/iccpr.html>; last accessed 29 December 2009.

16 Also a human-centred approach, as opposed to an ecocentric approach that is focused on the environment, or a theocultural approach that is focused on religion, philosophy and culture. See Theron (1997:23–44).

17 Both the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) were adopted by the United Nations General Assembly on 16 December 1966.

18 Scheinin (2009:25).

19 See also Boyle (2007:471).

20 Mushkat (2009:119ff).

of international activities with the UN Conference on the Human Environment held in Stockholm in 1972. More than 30 African countries<sup>21</sup> participated at this conference and, thus, committed themselves – at least to some extent – to recognising and promoting environmental concerns on the international level.<sup>22</sup> At the Conference, the then Indian Prime Minister Indira Gandhi stated the following:<sup>23</sup>

We do not want to impoverish the environment any further, but we cannot forget the grim of poverty of large numbers of people. When they themselves feel deprived how can we urge the preservation of animals? How can we speak to those who live ... in slums about keeping our oceans, rivers and the air clean when their own lives are contaminated at the source? Environment cannot be improved in conditions of poverty.

Today, in both the industrialised and developing parts of the world, a growing body of evidence still demonstrates that poor and other disenfranchised groups have been the greatest victims of environmental degradation.<sup>24</sup> The poor and marginalised still lack access to justice, especially environmental justice. The North/South divide still needs to be bridged in this respect.<sup>25</sup> The social impacts of degradation increase the vulnerability of specific groups and populations. This vulnerability has become a key element in human rights discussions.<sup>26</sup> Rights and responsibilities regarding the utilisation of environmental resources need to be distributed with greater fairness among communities, both globally and domestically. Therefore, human rights movements increasingly apply a rights-based

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21 Some 113 states were invited, in accordance with UN General Assembly Resolution 2850 (XXVI). The following African states took part in the Conference: Algeria, Botswana, Burundi, Cameroon, Central African Republic, Chad, Congo, Egypt, Ethiopia, Gabon, Ghana, Guinea, Ivory Coast, Kenya, Lesotho, Liberia, Libyan Arab Republic, Madagascar, Malawi, Mauritania, Mauritius, Morocco, Niger, Nigeria, Senegal, South Africa, Sudan, Swaziland, Togo, Tunisia, Uganda, United Republic of Tanzania, Zaire, and Zambia.

22 It should be noted that the Stockholm Declaration is legally only a non-mandatory document.

23 Quoted in Anand (1980:10).

24 Globally, contaminated water remains the greatest single cause of human disease and death. About 1.2 billion people still lack access to clean drinking water, 80% of whom are the rural poor. Some 2.4 billion people lack adequate sanitation. In many developing countries, poor health conditions prevail as a result of contaminated water, poor sanitation, severe air pollution, malaria and other infectious diseases, and the spread of HIV. Two thirds of the world population will live in water-stressed areas by 2025, and there are already an estimated 25 million environmental refugees resulting from changing rain patterns, floods, storms and rising tides, and this figure is likely to rise significantly (UNDP 2006). Flooding, housing collapse, alterations of freshwater and irrigation water supplies, infectious diseases, prolonged drought and subsequent forced migration, deforestation and flooding; poverty and hunger due to reduced livelihood assets; insufficient primary education caused by deteriorated infrastructure and displacement; child mortality as a result of extreme weather events; and maternal health problems stemming from the effects of weather and drought are only some of the possible impacts of climate change, which specifically threaten people living in rural settings, most of whom are poor (UNDP 2007).

25 Beyerlein (2006:259–296).

26 Thus, the Human Rights and Documentation Centre conducted a study in 2009–2010 on human vulnerability and climate change.

strategy to confront global environmental devastation and to protect ecological habitats and the planet for future generations.<sup>27</sup>

The concept of *environmental justice* embraces two objectives. 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. This entails ensuring that poor and marginalised communities do not suffer a disproportionate burden of the costs associated with the development of resources, while not enjoying equivalent benefits from their utilisation. The second is to reduce the overall amount of environmental damage, again globally and domestically.<sup>28</sup> Recognition of the link between the abuse of the human rights of various vulnerable communities and related damage to their environment is expressed in the concept *environmental justice*. The scale and urgency of environmental justice are beyond past challenges: solving them will mean destabilising and reorienting global economic growth.<sup>29</sup>

Only recently, the Council of Europe stated that “living in a healthy environment should be made a legally enforceable human right”.<sup>30</sup> On 30 September 2009, the Parliamentary Assembly of the Council of Europe (PACE) called for the “right to live in a healthy and viable environment” to be enshrined in the European Convention on Human Rights – which would make it legally enforceable in courts across Europe. It was further said that “society as a whole ... must pass on a healthy and viable environment to future generations, in accordance with the principle of solidarity between generations”.<sup>31</sup> Yet, the Legal Affairs Committee expressed a dissenting opinion, raising concerns about defining any new right in a way that could be enforced.<sup>32</sup>

Although the European Convention on Human Rights does not include any provisions on the environment, the European Court of Human Rights (ECHR) has upheld the right to a healthy environment in an indirect manner. In its *Powell & Rayner v The United Kingdom* judgment of 21 February 1990, it acknowledged the potential link between certain forms of environmental pollution and the human rights enshrined in the

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27 Kiss & Shelton (2004:12ff).

28 (ibid.).

29 Thus, the issue of climate change prompts significant questions about justice and distribution. There is an acute need for intelligent collective action focusing on the human suffering that climate change will cause in future. As a matter of law, the human rights of individuals need to be viewed in terms of state obligations: it is the state that is responsible for human rights fulfilment. This assignation of responsibility may seem inadequate in the context of climate change, where social and economic rights in poor countries are threatened primarily by actions undertaken elsewhere. The special responsibility of wealthy countries to mitigate climate change remains – and is widely accepted. See also Kiss & Shelton (2004:12ff).

30 <http://assembly.coe.int/ASP/Press/StopPressView.asp?ID=2206>, last accessed 3 January 2010.

31 (ibid.).

32 (ibid.).

Convention, in particular with regard to the right to respect for people's homes (Article 8). It has confirmed this position in several subsequent rulings.<sup>33</sup>

Environmental justice includes two complementary dimensions: *procedural* and *substantive*. The *procedural* dimension is divided into three rights: the right to information, the right to participate in decision-making, and the right of access to justice in environmental matters. Environmental rights still face a multitude of challenges of a procedural nature. To what extent these challenges are relevant depends on the following aspects, inter alia:

- The question of whether and under what conditions an individual, organisation or state has the right to commence action regarding a right to environment needs to be addressed. The issue of locus standi is of great relevance in respect of judicial enforcement of the right to environment and needs specific attention. The Indian experience with the establishment of public interest litigation has shown that environmental concerns can be advanced more efficiently by enabling any citizen to appeal directly to the Supreme Court.<sup>34</sup>
- Another focal point deals with the question of who would be the proper addressee of claims dealing with a right to environment, and whether a right to environment is to be enforced vertically between individuals and/or horizontally between individuals and states. Moreover, the question whether environmental rights can be enforced at the national or international level is of particular interest in the globalising world, also with regard to human rights law and the concept of *regional integration*, which is playing an increasingly important role in sub-Saharan Africa.<sup>35</sup>

The substantive dimension will be monitored from a Namibian perspective in the following paragraphs.

## **Environmental rights and justice under the Namibian Constitution**

Many national constitutions cover environmental protection and establish it as a constitutional objective, an individual right, or both. These include Brazil, Ecuador, Peru, the Philippines, South Africa, and South Korea. Among Council of Europe member countries, the constitutions of Belgium, Hungary, Norway, Poland, Portugal, Slovakia, Slovenia, Spain and Turkey acknowledge a fundamental individual right to environmental protection, while those of Austria, Finland, France, Germany, Greece, the Netherlands,

33 Here one could mention the judgments in *López Ostra v Spain* of 9 December 1994, which dealt with the relationship between the right to a healthy environment and the right to respect for private life; *Guerra & Others v Italy* of 19 February 1998, which put forward the theory of the “positive obligations” of states; *Hatton & Others v The United Kingdom* of 8 July 2003, in which the Grand Chamber employed the term environmental human rights; and *Öneryıldız v Turkey* of 30 November 2004, for an approach to environmental degradation from the angle of Article 2 of the Convention enshrining the right to life.

34 Rosencranz & Jackson (2003:228).

35 Ruppel (2009c:275–318).

Sweden and Switzerland enshrine environmental protection as a constitutional objective. In southern Africa, it can be observed that, during the past few decades, states have placed a strong emphasis on including environmental provisions in their respective legal frameworks. While some constitutions explicitly recognise the existence of such right within their respective Bills of Rights,<sup>36</sup> others include environmental concerns in the principles of state policy<sup>37</sup> rather than formulating a human right to environment as a fundamental human right.

In some legal systems it can be observed that a human right to environment is established on the basis of other fundamental human rights. More often than not, international provisions binding on states serve to establish a human right to environment. Besides a rather historic aspect – namely that a human right to environment has only been recognised during recent decades and, therefore, is subsequent to the drafting process of many constitutions – the reasons for such different approaches include being rooted in considerations relating to limitations or derogation of other rights, as well as with regard to state obligations and the enforcement mechanisms available specifically for fundamental human rights. The discussion of whether to equip the citizen with a subjective and enforceable human right to environment is ongoing and highly relevant, particularly with regard to the potential impacts of climate change.<sup>38</sup>

When the Namibian Constitution came into force, it was lauded as a model for Africa based on its drafting process and content. The Constitution as adopted by the Constituent Assembly came into force on the date of Independence, namely 21 March 1990.<sup>39</sup> The Constitution can be considered to be among the most liberal and democratic in the world. It enjoys hierarchical primacy amongst the sources of law by virtue of its Article 1(6). It is thematically organised into 21 chapters that contain 148 Articles relating to the chapter title. Together, they organise the state and outline the rights and freedoms of the Namibian people.<sup>40</sup>

The Namibian Constitution is special in several ways. Firstly, it was developed largely under the eyes and with the assistance of the international community. This is closely related to the fact that Namibia's decolonisation process was strongly supported by the implementation of UN Resolution 435. Secondly, the Namibian Constitution was certainly an experiment in southern Africa in putting an end to racial discrimination and apartheid.<sup>41</sup> Namibia has not totally relinquished its South African legal legacy, however. Article 140 provides for legal continuity, stating that all existing laws prior to Independence are to remain in force until repealed by Parliament. This does not only mean that Roman–Dutch law continues to be the ordinary law of the land, but also that

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36 One example of a human right to environment codified on the national level is Article 24 of the 1996 Constitution of the Republic of South Africa.

37 Such as Article 95 of the Namibian Constitution on the promotion of the welfare of the people in the Chapter entitled “Principles of State Policy”.

38 Frenz (2009:232–260); Global Humanitarian Forum (2009).

39 Article 130.

40 Bukurura (2002:57).

41 Watz (2004:21).

Namibia has a considerable amount of pre-Independence legislation that still needs renewal.

The constitutional rights relevant to environmental rights and justice will be analysed in several steps. Since the Namibian Constitution does not provide explicitly for an entrenched and enforceable environmental right, it has to be determined whether (and to what extent) these rights are covered by the fundamental rights and freedoms or whether the respective rights form part of the Constitution at other stages, e.g. as principles of state policy. In this context, the rights to life, human dignity and equality in the Constitution *inter alia* fortify the claims that people may have to an environment of a certain quality, even if that supreme law does not, *per se*, impose positive obligations on the part of the state. International aspects of environmental rights applicable in Namibia, e.g. via Article 144 of the Constitution, will also be outlined below.

### ***The Preamble***

The preamble of a constitution is an important tool for the interpretation of such document, because it reflects the general spirit of the drafter.<sup>42</sup> The Namibian Constitution makes no clear reference to the environment in its Preamble. However, it explicitly recognises that “the inherent dignity” and “the equal and inalienable rights of all members of the human family is indispensable for freedom, justice and peace”. The reference to *inalienable rights* leads immediately to Chapter 3 and Article 5 therein, the states that –

[t]he fundamental rights and freedoms enshrined in this Chapter shall be respected and upheld by the Executive, Legislature and Judiciary and all organs of the Government and its agencies and, where applicable to them, by all natural and legal persons in Namibia, and shall be enforceable by the Courts in the manner hereinafter prescribed.

The 1996 South African Constitution, in which it is also adopted as the supreme law of the Republic, aims to –

... establish a society based on democratic values, social justice and fundamental human rights[.]

Here, the reference to *fundamental human rights* also opens the way for Chapter 2, the South African Bill of Rights, and therein to Section 24.<sup>43</sup> Compared with the Namibian Constitution, the 1996 South African Constitution makes it very clear from the outset in

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42 (ibid.). He further quotes Hartmut Ruppel, Namibia’s first Attorney-General after Independence, and the Chairman of the Standing Committee on the issue that the content of the Preamble was critically debated at the time. Some members raised the question whether the Preamble had been influenced predominantly by Western values.

43 Section 24 reads as follows: “Everyone has right (a) to an environment that is not harmful to their health or well-being; and (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that (i) prevent pollution and ecological degradation; (ii) promote conservation; and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.”



its Preamble that not only the Bill of Rights but also the environmental rights in Section 24 thereof apply to all laws in the country, and binds all the organs of the state.

However, Section 24 jurisprudence in South Africa has not always been applauded when it comes to understanding the nature of such right and how it operates vis-à-vis other rights.<sup>44</sup> In *HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism & Others*,<sup>45</sup> for example, the court held that Section 24(b) was akin to a directive principle and was “aspirational in form”. The aforementioned view of the court is, however, incorrect.<sup>46</sup> Firstly, the rights in the Bill of Rights are justiciable rights, which can be distinguished from directive principles in two ways:

- While fundamental rights may either prohibit the state from doing something or may place a positive obligation on the state, directive principles are simply affirmative instructions to the state.
- While fundamental principles are legally binding, directive principles are not.

Secondly, Section 24(b) is clearly not aspirational in nature. The mandate stemming from Section 24(b) “falls within the realm of real expectations”.<sup>47</sup>

### ***Fundamental rights and freedoms***

Chapter 3 of the Namibian Constitution outlines 16 fundamental rights and freedoms, reflecting the carpet values and spirit of the independent Namibian nation. The Constitution excels in being one guaranteeing human rights by comprehensive coverage and provisions set out in clear language. Human rights are justifiable as their protection can be secured through the courts.<sup>48</sup> This gives citizens the right to take executive agencies to court, and the judiciary reigns as the authority to adjudicate such matters.

The set of enforceable fundamental human rights and freedoms should be respected and upheld by the executive, legislative and judiciary, all organs of government, its agencies, and, where applicable, by all natural and legal persons in Namibia.<sup>49</sup> Apart from the right to culture (Article 19) and the right to education (Article 20), Chapter 3 does not contain any typical socio-economic rights – such as rights to housing, water or access to health services.<sup>50</sup> Instead, such socio-economic considerations are addressed elsewhere in the Constitution, especially in the principles of state policy.<sup>51</sup>

The following section deals with those Articles in the Namibian Constitution that in one way or another are related with promoting the protection of environmental rights and justice.

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44 Ferris (2009:132).

45 2006 (5) SA 512 (T).

46 Ferris (2009:132).

47 (ibid.).

48 Bukurura (2002:21).

49 Article 5.

50 See Erasmus (1991:13).

51 Watz (2004:75).

## **Article 6: The right to life**

Article 6 regulates inter alia that –

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

It is clear that human life depends strongly on the state of the environment, including water, air, natural resources, plant and animal life. 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. The right to life is one that should be interpreted narrowly. It arguably requires the state to adopt positive measures. Presenting compelling facts, however, is critical for an individual. Obviously, the most compelling cases involve environmental harm that is likely to cause death in the short term.<sup>52</sup>

## **Article 8: Respect for human dignity**

Article 8 states as follows:

- (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.
- (b) No persons shall be subject to torture or to cruel, inhuman or degrading treatment or punishment.

In the words of Kofi Annan, former Secretary-General of the United Nations, whereas –<sup>53</sup>

[a]ccess to safe water is a fundamental human need and, therefore, a basic human right. Contaminated water jeopardises both the physical and social health of all people. It is an affront to human dignity.

Dignity has to be read in conjunction with other fundamental rights set out in the Constitution, such as the right to equality and to non-discrimination (Article 10). The dignity of a person is inseparably linked to environmental rights and environmental justice. A person's health, well-being and respect-worthiness are subject to environmental rights and justice. To mention but a few in this context, access to clean and sufficient water, sanitation services, and waste disposal are aspects relevant to human dignity.<sup>54</sup>

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52 Herz (2008:173–281).

53 See <http://www.un.org/waterforlifedecade/background.html>; last accessed 8 January 2010.

54 Thus, the Legal Assistance Centre (LAC) intends taking the Otavi Municipality to court for allegedly failing to adequately service the town's informal settlement residents. The LAC – representing the community members of Otavi's informal settlements – says that, during consultations with community members this year, it witnessed that municipal facilities were in a “deplorable state”. Water in the toilets, built to service the more than 4,000 residents, had been turned off. Instead, people used the entrance and surrounding area of the toilets to relieve themselves, leaving a pool of human waste surrounding the area, according to an LAC statement. Residents said that the waste – worse during the rainy season – “flows with the water

Water is needed for food, hygiene, securing livelihoods, households, etc.<sup>55</sup>

In 2002, the UN Committee on Economic, Social and Cultural Rights concluded that there was a human right to water embedded in Article 11 of the ICESCR, which defined the right to livelihood as including adequate food, clothing and housing. The General Comment on the right to water was adopted by this Committee in 2002, so the 145 countries that ratified the Covenant agree that the human right to water entitles everyone to sufficient, affordable, physically accessible, safe water acceptable for personal and domestic use, and that they are required to develop mechanisms to ensure that this goal is realised.<sup>56</sup> The Committee recognised that —<sup>57</sup>

... the right to water clearly falls within the category of guarantees essential for securing an adequate standard of living, particularly since it is one of the most fundamental conditions for survival.

In the recent South African case of *Lindiwe Mazibuko & Others v City of Johannesburg & Others*,<sup>58</sup> the Constitutional Court had to decide over an alleged violation of the right to have access to sufficient water under Section 27 of that country's Constitution. This case was the first in which the Constitutional Court had considered the obligations imposed by the right to access sufficient water, as set out in Section 27(2) of the Constitution.

Under the Namibian Constitution, the right to water is not explicitly included in the fundamental rights, but is an implicit component of existing fundamental human rights. Such requires the right to water accessibility. In respect of adequate quality, water for personal or domestic use must be assured in a quantity of supply that is sufficient and continuous.<sup>59</sup> The protection of the right to water is an essential prerequisite to the fulfilment of many other human rights.<sup>60</sup> Without guaranteeing access to a sufficient quantity of safe water, respect for human dignity and other human rights may be jeopardised. Formal recognition of the right to water would mean acknowledging the environmental dimension of existing human rights.<sup>61</sup>

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into our yards", and that those most affected were the children and the elderly. The LAC said the situation was so dire that community members were being affected by diseases such as malaria and cholera. See Shejvali (2009).

55 WHO (2003:18ff).

56 See [http://www2.ohchr.org/english/issues/water/docs/CESCR\\_GC\\_15.pdf](http://www2.ohchr.org/english/issues/water/docs/CESCR_GC_15.pdf); last accessed 8 January 2010.

57 (ibid.).

58 *Lindiwe Mazibuko & Others v City of Johannesburg & Others* Case CCT 39/09 [2009] ZACC 28.

59 See Mapaure (2010). Mapaure's research on hydropolitics formed part of his LLM thesis being co-supervised by the author of this article.

60 Ruppel (2008a:107).

61 Mapaure (2010). Through a rights-based approach, victims of water pollution and people deprived of essential water to meet their basic needs are provided with access to remedies. The explicit recognition of water as a human right could represent a tool for civil society to hold governments accountable for ensuring access to sufficient water of adequate quality.

In 2002, Namibia adopted a National Water Policy that states that all Namibians have a right to access sufficient safe water for a healthy and productive life. Moreover, sections 2 and 3 of the Water Resources Management Act<sup>62</sup> state that the state has an obligation to ensure that water resources are managed in ways consistent with fundamental principles so that to ensure equitable access to water resources by every citizen. Although Parliament approved the Water Resources Management Act, the rather outdated Water Act<sup>63</sup> remains in force until the new Water Resources Management Act comes into force upon signature by the Minister.<sup>64</sup>

### ***Article 10: Equality and freedom from discrimination***

As part of the Bill of Rights under Chapter 3 of the Constitution, Article 10 provides as follows:

- (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.

The equality clause strongly supports the notion of *environmental rights and justice*, and puts the state under the obligation to protect its people equally and to ensure that benefits are distributed fairly, that is to the greatest possible extent.<sup>65</sup> Human vulnerability, also endangered by means of global warming and climate change, is felt most acutely by those segments of the population who are already in vulnerable situations due to factors such as poverty, gender, age, minority status, and disability. Vulnerability and impact assessments in the context of climate change largely focus on the economic sector, i.e. impacts on health and water, for example, rather than on the vulnerabilities of specific segments of the population, such as women, children and indigenous peoples.<sup>66</sup>

### ***Article 15: Children's rights***

A recently conducted, rather comprehensive study on children's rights has shown that Namibia can be applauded for initiating law reform for the improvement of such rights.<sup>67</sup> This reflects Namibia's remarkable commitment to protecting children's rights by, amongst other things, incorporating a broad variety of international legal instruments into the domestic system. Namibia is a State Party to the most relevant legal instruments on the protection of children's rights at the global, regional and sub-regional level. Thus, the Convention on the Rights of the Child (CRC) explicitly states that the child has a right to "clean drinking water, taking into consideration the dangers and risks of

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62 No. 24 of 2004.

63 No. 54 of 1956.

64 The Water Act was still applied by the High Court in Windhoek in the recently decided case concerning the use of groundwater by the Valencia Uranium Mine; see Hinz & Ruppel (2008:48) with further references.

65 Bilchitz (2003:1–26).

66 Ruppel (2008c).

67 Ruppel (2009a).

environmental pollution”.<sup>68</sup> Of course, effective implementation and the entire reporting system, which are imperative for enhancing the situation of children, can only work if States Parties collaborate to improve the situation in which children find themselves.<sup>69</sup> In this context, there can be no doubt that the recognition of environmental rights and justice are not only supportive to, but in all means in the best interest of, the child. Although the Namibian Constitution does not seem to envisage the concept of the *best interest of the child* to be of paramount consideration,<sup>70</sup> international human rights standards must be applied accordingly.<sup>71</sup>

### **Article 16: Property**

Article 16(1) regulates that –

[a]ll persons shall have the right in any part of 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 by legislation prohibit or regulate as it deems expedient the right to acquire property by persons who are not Namibian citizens.

Although the Namibian state welcomes foreign investment,<sup>72</sup> it reserves the right to limit the acquisition of property by foreign nationals. What is the relevance of this restriction to the environment? Namibia is not only known for its considerable resources such as diamonds, copper, uranium, zinc, and fish,<sup>73</sup> but also for its water scarcity. Like climate change, water scarcity poses a significant threat to the environment, human vulnerability and sustainable development in the country.<sup>74</sup> Moreover, the Southern African Development Community (SADC) region is one of the poorest in the world: approximately 35% of the total population live on US\$1 per day.<sup>75</sup> This makes Namibia a lower-middle-income economy, which is particularly attractive to foreign companies.

The case of Ramatex, a Malaysian multinational company that operated in Namibia, demonstrated how globalised investment can intersect with human rights and environmental damage. Ramatex’s decision to locate production in southern Africa was motivated by the objective to benefit from the Africa Growth and Opportunity Act (AGOA), which allows for duty-free exports to the United States (US) from selected African countries who meet certain conditions, set by the US Government.<sup>76</sup> The plant turned cotton – imported duty-free from West Africa – into textiles for the US market.

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68 Article 24(2)(c).

69 Ruppel (2009a:2–3).

70 Naldi (1995:79).

71 Ruppel (2009b:53–100).

72 See e.g. Article 99 of the Constitution.

73 Hinz & Ruppel (2008).

74 Mfune et al. (2009a; 2009b); Ruppel & Bethune (2007).

75 UNDP (2008).

76 AGOA was signed into law on 18 May 2000 as Title 1 of the Trade and Development Act of 2000. The Act offers tangible incentives for African countries to continue their efforts to open their economies and build free markets.

This was achieved by offering concessions in the form of an export processing zone (EPZ).<sup>77</sup> The Namibian Export Processing Zones Act<sup>78</sup> exempts companies from sales or value added tax payable in Namibia, and from all customs or excise duties for goods imported into the EPZ or manufactured in the EPZ. In order to attract the foreign direct investment, the City of Windhoek and the Ministry of Trade and Industry put together a scheme with an incentive package that included subsidised water and electricity, a 99-year tax exemption on land use, and over N\$1 billion to prepare the site, including the setting up of electricity, water and sewerage infrastructure. From the beginning, a debate focused on controversies surrounding the Malaysian textile company's environmental impact and working conditions. Since 2002, disputes concerning human rights protection and labour standards<sup>79</sup> were topped by alleged environmental offences.<sup>80</sup>

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

The closure of the Ramatex factory in Windhoek marked the end of one of the most controversial investments in Namibia since Independence.<sup>82</sup> The case characterises aggressive foreign investment driven by mere profit motives that can seriously threaten ecosystems, intergenerational equity, and the right to a clean environment.<sup>83</sup> The

77 See also *New Era*, 14 March 2008.

78 No. 9 of 1995.

79 According to *The Namibian* on 12 March 2008, a study carried out in 2003 found widespread abuses of workers' rights, including forced pregnancy tests for women who applied for jobs; non-payment for workers on sick leave; very low wages and no benefits; insufficient health and safety measures; no compensation in case of accidents; abuse by supervisors; and open hostility towards trade unions. Tensions reached breaking point on several occasions. After spontaneous work stoppages in 2002 and 2003, Ramatex finally recognised the Namibia Food and Allied Worker's Union (NAFAU) as the workers' exclusive bargaining agent in October 2003. The recognition agreement was supposed to pave the way for improved labour relations and collective bargaining. However, the union was unable to make progress on substantive issues, and on several occasions reported Ramatex to the Office of the Labour Commissioner for unfair labour practices and the company's unwillingness to negotiate in good faith.

80 Winterfeldt (2007:65ff).

81 *The Namibian*, 21 December 2004; 4 November 2005.

82 *The Namibian*, 12 March 2008.

83 On 27 January 2009, a team of consultants commissioned by the City of Windhoek publicly presented an Environmental Audit on the Ramatex site and its historical operations. The study aimed to determine and address concerns associated with past activities, including health investigations. It concluded that "the environmental impacts were minor" and "no significant affects on humans could be detected", whereas "no occupational health effects were monitored for the audit". The author of this article was present at this public event, as was Advocate John

company managed to mislead Namibia – and the government in particular – by providing false information to hide its true intentions of using the country merely as a temporary production location.<sup>84</sup>

Especially in the wider context of land, water and related reform, as well as equitable access to Namibia's natural resources, the onus rests on the state to protect the environment for the benefit of the Namibian people on the one hand, and to enable and capacitate the individual citizen (and especially the previously disadvantaged citizen) to gain equitable access to land on the other.<sup>85</sup>

To this end, Article 16(2) provides the state or a competent body authorised by the law – which surely refers to authorities responsible for, for instance, the railway, roads and water – to expropriate property in the public interest, subject to the payment of just compensation. Such expropriation may also become relevant in cases where the environmental rights of a group or certain individuals are negatively affected by activities that cause harm to the environment.

### ***Articles 18 and 5: Administrative justice***

The Constitution deals with administrative justice in two of its Articles: 18 and 5. Article 18 requires that administrative bodies act fairly and reasonably, and that they comply with the requirements stipulated in common law and relevant legislation. Article 18 obviously plays an eminent role in the proper implementation of administrative measures, by serving as a means of achieving compliance with environmental laws and, thus, promoting environmental rights in Namibia.

Article 5 contains the fundamental obligation enshrined in modern constitutionalism according to which the three organs of the state – thus, including the executive – are obliged to uphold and respect the fundamental rights and freedoms set out in Chapter 3 of the Constitution. Thus, Article 5 reaches beyond Article 18: the yardsticks of Article 5 are the fundamental rights and freedoms. Article 5 requires substantial compliance by confronting administrative actions and the law authorising such actions with the comprehensive catalogue of human rights. The placement of Article 5, as an integral part of Chapter 3's fundamental freedoms, expresses – in line with what follows later, namely in Article 21(1) and Article 22 – that the fundamental rights and freedoms are at the very centre of constitutional gravity.<sup>86</sup>

Administrative justice is a prerequisite for environmental justice. Directives, abatement notices, compliance notices and statutory provisions empowering the granting or withdrawal of authorisations such as licences, permits and exemptions are administrative

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Walters, the Ombudsman of Namibia. During the presentation, the question was raised whether the audit had been conducted independently or with a specific aim, namely to downscale the violations.

84 *The Namibian*, 12 March 2008.

85 See, among others, Gutto (1995).

86 Hinz (2009a:81–89).

measures that regulate specific aspects of human activity that have an impact both on the environment and on individuals.<sup>87</sup> Special mention needs to be made of the provision of Article 18 of the Constitution in relation to Rule 53 of the High Court Rules, which vests in the High Court the jurisdiction to review administrative action. Thus, the High Court has original jurisdiction not only over cases involving the fundamental rights of the individual, but also in the development of the law relating to administrative justice by Namibian courts.

Also left over to the court are the terms of interpretation of common law principles. However, these principles often provide the administrator with an unclear mandate in terms of what the administrative action requires in certain instances. Furthermore, judicial review and access to administrative justice is not clearly regulated under the Namibian legal set-up, meaning that the procedures and remedies for judicial review against administrative action are not stipulated in a specific piece of legislation dealing with administrative law and procedure.<sup>88</sup> In order to promote environmental justice, efficient administration and good governance, as well as to create a culture of accountability, openness and transparency in public administration or in the exercise of public power, Namibian administrative law and procedure needs to be reviewed.<sup>89</sup>

### ***Article 19: The right to culture***

With Article 19 the right to culture is guaranteed under the Bill of Rights in the Constitution, as well as in Article 15(1)(a) of the ICESCR. In terms of these two legal obligations, the government is required to take legislative and administrative measures to ensure the fulfilment of these rights. Although Chapter 3 is not primarily aimed at protecting economic, cultural and social rights (such as Article 19), it is important to remember that Article 5 makes those listed within Chapter 3 enforceable by courts. Such arose the right to profess, maintain and promote a language in the case of *Government of the Republic of Namibia v Cultura 2000*.<sup>90</sup> Cultural diversity is also closely linked to ecological biodiversity.<sup>91</sup> The collective knowledge of biodiversity, its use and its

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87 Winstanley (2009:225ff).

88 A recent initiative of the Ministry of Justice and its Law Reform and Development Commission opened the debate on whether or not Namibia should follow the approach adopted by other countries and introduce a statutory framework to give more meaning and content to the right to administrative justice. The initiative was the result of a joint effort by the said Ministry of Justice and the Konrad Adenauer Foundation's Rule of Law Programme for Sub-Saharan Africa, and led to an international conference on the theme "Promoting Administrative Justice in Namibia". The almost unanimous opinion of the Conference was that Namibia should indeed pursue the option of introducing an administrative law statute, while at the same time taking note of the country's socio-economic conditions; cf. Hinz (2009a:81) with further references. To this end, on 25 March 2009, the Committee on the Promotion of Administrative Law and Justice in Namibia was officially constituted.

89 Such problems are not only specific to Namibia, but occur in other developing countries as well; cf. Winter (2009).

90 1994 (1) SA 407 (NmS).

91 See in detail Hinz & Ruppel (2008).



management rests in cultural diversity, and can also be regarded as an (indigenous) environmental right.<sup>92</sup>

The right to tradition also falls under Article 19, which seeks to ensure that the traditions and way of life of the different indigenous groups comprising Namibia's society are protected. Article 19 is in line with Article 17(3) of the Banjul Charter, which proclaims that the state has the duty to protect traditional values.<sup>93</sup> Traditional knowledge, without doubt, is such a value.

So far, Namibian courts have been reluctant to consider the right to culture as a means of protecting traditional knowledge. In a case decided by a Magistrate's Court,<sup>94</sup> the harvesting of almost 400 kg of hoodia was at issue. *Hoodia gordonii*, a cactus-like plant native to the Namib Desert, is widely believed to be an appetite suppressant that was used by some traditional communities.<sup>95</sup>

All *Hoodia* species are protected under the Convention on the Illegal Trade of Endangered Species (CITES), to which Namibia is a signatory. Accordingly, it is listed as a protected plant under Schedule 9 of the Namibian Nature Conservation Ordinance,<sup>96</sup> as amended after Independence by the Nature Conservation Amendment Act.<sup>97</sup> Thus, according to section 73(1) of the Ordinance, no person other than the lawful holder of a permit granted by the Executive Committee is permitted at any time to pick or transport any protected plant. The Magistrate's Court, however, discharged two alleged thieves of almost 400 kg of hoodia. In its ruling, the court held that it could not be proved that the confiscated plants were of the specific *Hoodia gordonii* species. Taking into consideration that Schedule 9 of the Ordinance lists all *Hoodia* species as protected plants, the reasoning

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92 (ibid.:57).

93 Naldi (1995:97).

94 The case was decided at the end of 2007 by the Mariental Magistrates' Court; cf. *Allgemeine Zeitung*, 8 January 2008.

95 Members of the San community used this plant for centuries when hunting. As hunting usually took several days, they used to eat the hoodia to still their hunger. The San name for the hoodia is *!khoba*. The events related to the hoodia plant are one of the cases dealing with bioprospecting (also described as *biopiracy*), describing the appropriation, generally by means of patents, of legal rights over indigenous biomedical knowledge without compensation to the indigenous groups who originally developed such knowledge. However, hoodia is registered in the name of the Council for Scientific and Industrial Research (CSIR). In 2003, after years of disputes with the CSIR, the latter concluded an agreement with the San, granting them 6% of the royalties paid to the CSIR by Phytopharm, in addition to 8% of the 'milestone income' paid by Phytopharm in case the development of the product made substantial progress. This agreement was the first of its kind, granting participation in profits to indigenous people resulting from traditional knowledge. Nonetheless, the CSIR, despite having signed the agreement with the San for good reasons, at a later stage alleged within proceedings before the European Patent Office that it was doubtful whether the San really did have knowledge about the effect of hoodia. See also Hoering (2004).

96 No. 4 of 1975.

97 No. 5 of 1996.

for the ruling in this case is hardly traceable.<sup>98</sup> The Ordinance deals with in situ and ex situ conservation by providing for the declaration of protected habitats as national parks and reserves, and for the protection of scheduled species. It regulates hunting and harvesting, possession of and trade in listed species for the propagation, protection, study and preservation of wild animal life, wild plant life, and objects of geological, ethnological, archaeological, historical and other scientific interest and for the benefit and enjoyment of the inhabitants of Namibia and other persons.

Traditional knowledge is an important part of cultural identity. CITES has links to traditional knowledge (e.g. traditional medicine) and culture (folklore, artefacts), with the essential purpose and operation of the Convention noting that Appendix III provides a practical mechanism for States Parties to list specific species for specific purposes, e.g. the protection of intellectual property rights. Notwithstanding the question whether the protection of traditional knowledge actually lies within the logic of the intellectual property system or the human rights system, intellectual property law uses the language of economic incentives to justify intellectual property protection. Apart from the economic value of protecting traditional knowledge, it must be protected for cultural reasons as well, as stated in Article 19 of the Constitution.

The Bill on Access to Biological Resources and Associated Traditional Knowledge drafted in 2000 aims at protecting biodiversity and traditional knowledge.<sup>99</sup> The Bill applies to biological resources in both in situ and ex situ conditions, the derivatives of the biological resources, community knowledge and technologies, local and indigenous farming communities, and plant breeders.<sup>100</sup> Furthermore, the Bill recognises the rights of local and indigenous communities.<sup>101</sup> Those rights include the right to collectively benefit from the use of biological resources, as well as from such communities' innovations, practices, knowledge and technology acquired through generations. Among these rights, benefit-sharing is recognised and emphasised, but the Bill does not indicate as to how such activities should be administered.<sup>102</sup>

Moreover, the Parks and Wildlife Management Bill of 2005 intends to protect all indigenous species and control the exploitation of all plants and other wildlife.<sup>103</sup> The preamble of the Bill clearly states that it intends to give effect to paragraph (1) of Article 95 of the Constitution by establishing a legal framework to provide for and promote the maintenance of ecosystems, essential ecological processes, and the biological diversity of Namibia; and to promote the mutually beneficial coexistence of humans with wildlife,

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98 This corresponds to the view held by Ben Beytell of the Ministry of Environment and Tourism; see article in the *Allgemeine Zeitung*, 8 January 2008.

99 The Bill has not been passed yet.

100 Section 1 of the Bill.

101 Section 17 of the Bill.

102 However, section 23 of the Bill elaborates on how the benefit should be obtained, and who should deal with the issue of contracts as far as the collector, the state and the local community or communities involved are concerned.

103 The Bill has not been passed yet.

in order to give effect to Namibia's obligations under relevant international legal instruments, including CITES.<sup>104</sup>

### ***Article 25: Enforcement of fundamental rights and freedoms***

Article 25(2) of the Constitution provides that –

[a]grieved persons who claim that a fundamental right or freedom guaranteed by this Constitution has been infringed or threatened shall be entitled to approach a competent Court to enforce or protect such a right or freedom, and may approach the Ombudsman to provide them with such legal assistance or advice as they require, and the Ombudsman shall have the discretion in response thereto to provide such legal or other assistance as he or she may consider expedient.

Article 25(2) plays an important role in the constitutional framework, as it makes clear reference to the Ombudsman. Chapter 10 of the Constitution deals with the Ombudsman in more detail. In Namibia, ombudsmanship was already introduced in 1986 by the enactment of the Ombudsman of South West Africa Act.<sup>105</sup> After Independence in 1990, the Office of the Ombudsman was established as a constitutional Office. The legal foundations of the institution of the Ombudsman in Namibia are to be found in Articles 89–94 of the Constitution. In addition to the constitutional provisions, the Ombudsman Act<sup>106</sup> defines and prescribes the powers, duties and functions of the Ombudsman, and provides for matters incidental thereto.<sup>107</sup>

Article 25(3) obliges the state to make all necessary and appropriate orders to respect and uphold fundamental rights and freedoms, including by interdict and injunction. Namibian courts have stated in the past that the Constitution requires a generous interpretation, avoiding the austerity of tabulated legalism, in order to give individuals the full measure of their rights. However, Namibian courts also adhere to the presumption of constitutionality, meaning that the onus is on the applicant to prove that a fundamental right or freedom has been infringed upon and that s/he has locus standi as an aggrieved person under Article 25(2). Generally speaking, the common law test for locus standi is that the person applying for standing either has a private right or is able to demonstrate that s/he has a special interest in the subject matter of the action before the relevant court.<sup>108</sup> The special interest does not need to involve a legal or pecuniary right, but can also be of an intellectual or emotional concern. It must, however, be an interest that is different from that of an ordinary member of the public,<sup>109</sup> especially since Namibia does not know the actio popularis. Environmentalists often want to take action in the interests of the environment or in the public interest, rather than in their own interest. They are,

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104 Hinz & Ruppel (2008:55).

105 No. 26 of 1986, as amended by the Ombudsman of South West Africa Amendment Act, 1988 (No. 11 of 1988).

106 No. 7 of 1990.

107 See the discussion on this earlier herein.

108 Fisher & Kirk (1997:372).

109 (ibid).

however, largely barred from doing so because they do not have a personal (special) interest in the relief claimed and, thus, do not have legal standing.<sup>110</sup>

### **Article 66: Customary law**

After Independence, Namibia provided the necessary space for the recognition of customary law (Article 66), if it is in line with the country's new constitutional dispensation. Customary law is the law according to which most of the Namibian population live.<sup>111</sup>

Customary law has been found to play an important role in the wider context of the environment, for the sustainable development of natural resources, and for the protection of biological diversity.<sup>112</sup> Thus, customary law is the type of law that is closest to the very peculiarities of traditional knowledge.<sup>113</sup> It has the capacity to accommodate what is special to traditional knowledge: its grounding in tradition, and its being bound to a societal (collective) network. Most customary rules are not written down but are transmitted orally from generation to generation. However, some exceptions exist in Namibia in terms of what have become known as the *self-stated*<sup>114</sup> laws of traditional communities.<sup>115</sup> The Laws of Oukwanyama<sup>116</sup> provide for the protection of trees – fruit trees in particular – and other plants and water. It is an offence to cut fruit trees, for example, and all water has to be kept clean.<sup>117</sup> The Laws of Ondonga<sup>118</sup> provide for the protection of trees with specific reference to fruit trees, palm trees and the marula tree (section 8), and the use of fishing nets in the river is prohibited without permission from the Traditional Authority (section 19). The Laws of Uukwambi provide for the protection of water (section 13), the protection of trees (section 14A), wild animals (section 14B), and grass (section 14C). The Laws of the Sambyu provide for the protection of water: anyone who pollutes or contaminates water commits an offence (section 16). In the Caprivi Region, the Laws of the Masubiya prohibit the cutting of fruit trees (section 37), causing veld fires (section 36), and the use of fishing nets to catch small fish (section 39).<sup>119</sup> These are only some examples. Since the quoted self-stated laws are not a codification of the

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110 In this respect, the Namibian legal set-up is quite different from many others. Such contains the 1996 South African Constitution, for example, a rather generous allocation of legal standing. People seeking protection for their environmental right need not prove a direct interest in proceedings in order to have locus standi; see Du Plessis (2008:261) with further references.

111 Hinz (2003a).

112 Hinz & Ruppel (2008).

113 (ibid.:56ff).

114 As to the concept of *self-stating customary law*, cf. Hinz (2009b:109ff).

115 The ascertainment of customary law is currently in progress within a project of the University of Namibia's Human Rights and Documentation Centre (HRDC). A first collection of self-stated customary laws will be published in 2010. For further information, see also Ruppel (2008b:131ff) and Hinz (2009b:109ff).

116 *Evetamango dhOukwanyama*; a copy of the laws can be inspected at the HRDC.

117 Sections II 8 and 15, *Laws of Oukwanyama*.

118 *OoVeta (OoMpango) dhoShilongo shOndonga*.

119 Copies of various self-stated laws can be inspected at the HRDC.

respective customary law, meaning that they reflect only certain principles of customary law while the body of unwritten law remains in force,<sup>120</sup> one can anticipate that, in addition to what has been referred to, there are many unwritten rules of importance for the protection of natural resources and biodiversity.<sup>121</sup> They form part of the environmental rights of the people of Namibia. Thus, section 3(2)(g) of the Environmental Management Act regulates that –

Namibia's cultural and natural heritage[, including] its biological diversity, must be protected and respected for the benefit of present and future generations.

### ***Article 78: The judiciary***

Chapter 9 of the Constitution deals with the administration of justice.<sup>122</sup> The administration of justice is required to be independent from the other organs of state. The sacrosanct nature of this value was expressed by the Supreme Court.<sup>123</sup> As was already elaborated in the paragraph on the concept *environmental justice*,<sup>124</sup> the judiciary is most essential in the protection and promotion of environmental rights and justice. It leads the way in interpreting relevant legislation and settles disputes arising between citizens and/or between citizens and the state. For this reason, the United Nations Environment Programme (UNEP) has paid increasing attention to the judiciary and other legal stakeholders as a focal point for the promotion of environmental rights at national level. Indeed, –<sup>125</sup>

UNEP has thus started a Judges Programme, targeted at the more specific needs of judicial stakeholders. The initiative is based on the idea that the role of the Judiciary is fundamental in the promotion of compliance with and enforcement of international and national environmental law. It aims at promoting judiciary networking, sharing of legal information, and harmonisation of the approach to the implementation of global and regional instruments. Courts of Law of many countries have demonstrated sensitivity to promoting the rule of law in the field of sustainable development through their judgments and pronouncements, e.g. through applying international environmental law principles such as the polluter pays principle, the precautionary principle and the principle of intergenerational equity.

In 2007, UNEP conducted a Symposium for Judges and Magistrates on Environmental Law in Namibia.<sup>126</sup> The Symposium was the first of its kind in Namibia's history.<sup>127</sup> In

120 Hinz (2003b:46ff).

121 Hinz & Ruppel (2008:58–59); Ruppel (2006).

122 Amoo (2008:69–95).

123 See *Ex Parte: Attorney-General. In re: The Constitutional Relationship between the Attorney-General and the Prosecutor-General* 1995 (8) BCLR 1070 (NmSC).

124 See *supra*.

125 [http://www.unep.org/law/Programme\\_work/Judges\\_programme/index.asp](http://www.unep.org/law/Programme_work/Judges_programme/index.asp); last accessed 8 February 2010.

126 <http://www.unep.org/law/Calendar/indexpast.asp>, last accessed 28 December 2009.

127 The symposium was opened by Mr Simon Nhongo, the UN Resident Coordinator in Namibia; Dr Iwona Rummel-Bulska, UNEP's Principal Legal Officer and Chief of the Environmental Law Programme, and Namibia's Chief Justice Peter Shivute.

its quest, the platform sensitised judges and magistrates in the country about current national and international issues pertaining to environmental rights and justice.<sup>128</sup> It ultimately transpired at the Symposium that the judiciary played an important role in interpreting existing laws in a way that needed to take into account recent developments incorporating environmental concerns.

### ***Article 91: Mandates of the Ombudsman***<sup>129</sup>

The institution of the Ombudsman in Namibia intends to be characterised as independent, impartial, fair, and acting confidentially in terms of the investigation process.<sup>130</sup> Negotiation and compromise between the parties concerned are the main objectives when handling complaints.<sup>131</sup> Through investigating and resolving complaints, the institution of the Ombudsman in Namibia promotes and protects human rights, and fair and effective public administration; it also protects the environment and natural resources. In order to effectively fulfil all these functions, the Ombudsman has to be impartial, fair, and independent.<sup>132</sup> The underlying rationale for independence in this context is that an Ombudsman has to be capable, within the institution's field of competence, of conducting fair and impartial investigations that are credible to both the complainant and the authorities.<sup>133</sup>

Complaints may be submitted to the Office of the Ombudsman by any person free of charge and without specific form requirements. The Office cannot investigate complaints regarding court decisions, however. Neither can it assist complainants financially or represent a complainant in criminal or civil proceedings. Authorities that may be complained about include government institutions,<sup>134</sup> parastatals,<sup>135</sup> local authorities, and – in case of the violation of human rights or freedoms – private institutions and persons.<sup>136</sup> It is important to note that, although neither the Constitution nor the Ombudsman Act contain an explicit provision allowing the Ombudsman to investigate without having received a complaint, the Ombudsman may decide to undertake an own-motion (ex mero motu) investigation, in case such investigation is about issues and authorities that would be within the institution's competence if they had been brought by a complainant.<sup>137</sup>

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128 The author of this article had the opportunity to give two presentations during the symposium.

129 The following passage(is based largely on an article by Ruppel-Schlichting (2008:271–289).

130 As to the characteristics of the classic Ombudsman in general, see Gottehrer & Hostina (1998).

131 Article 91(e) of the Constitution and section 5(1) of the Act.

132 For a more detailed discussion on the independence of the Ombudsman in Namibia, see Ruppel-Schlichting (2008).

133 UNDP (2006:12).

134 These include all Offices, Ministries and Agencies; the National Assembly; the National Planning Commission; and the Attorney-General.

135 These include NamPower, Telecom, NamWater, NamPost, and the Namibian Broadcasting Corporation.

136 Gawanas (2002:104).

137 Especially in cases of human rights violations, own-motion investigations have been conducted repeatedly; cf. interview with J Walters, Ombudsman of Namibia, conducted by OC Ruppel on 12 August 2008. Cf. Ruppel-Schlichting (2008:283f).

The Office of the Ombudsman is intended to ensure that citizens have an avenue open to them, free of red tape, and free of political interference.<sup>138</sup> The Ombudsman has relatively broad mandates and corresponding powers. According to Article 91 of the Namibian Constitution, the mandates of the Ombudsman mainly relate to four broad categories: human rights, administrative practices, corruption,<sup>139</sup> and the environment. At this stage, an imbalance as to complaints by specific mandates can clearly be pointed out.<sup>140</sup> Although the categories of maladministration and human-rights-related issues play the most important role in the Office's work,<sup>141</sup> the other categories deserve equal attention. In 2006, a total of 2,060 complaints were brought to the Office of the Ombudsman.<sup>142</sup> A statistical breakdown of complaints by mandates<sup>143</sup> shows that, of this total, 1,286 related to the mandate of maladministration, 177 to human-rights-related issues, 39 to the mandate of corruption, and only 2 referred to environmental matters. The remaining 556 complaints covered miscellaneous issues.

Environmental concerns have significantly gained in importance within the legal environment worldwide for the past few decades. In Namibia, the Constitution – besides a multitude of statutory enactments and policies – underlines the importance of environmental matters in the country.<sup>144</sup> Part of these legal provisions endows the Ombudsman with the constitutional power to play a significant role within the wide field of environmental protection. Article 91(c) of the Constitution and section 3(1)(c) of the Act provide that the Ombudsman has –

... the duty to investigate complaints concerning the over-utilization of living natural resources, the irrational exploitation of non-renewable resources, the degradation and destruction of ecosystems and failure to protect the beauty and character of Namibia[.]

The power granted to the Ombudsman to investigate complaints concerning the environmental issues mentioned in Article 91(c) represents a unique provision that goes beyond the traditional powers and functions of an Ombudsman institution. The Ombudsman's environmental mandate is a progressive and innovative step towards environmental protection, and may have the character of a role model. However, the provision could be given a more vital role within the Ombudsman's activities. Two major points can be made in this context. Firstly, to date, the Office of the Ombudsman has

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138 Tjitendero (1996:10).

139 With the Namibian Constitution Second Amendment Bill, "corruption" is removed from the list of the functions of the Ombudsman; see [http://www.parliament.gov.na/bills\\_documents/36\\_namibian\\_constitution\\_second\\_amendment\\_bill.pdf](http://www.parliament.gov.na/bills_documents/36_namibian_constitution_second_amendment_bill.pdf), last accessed 10 January 2010. The intention behind this amendment is to avoid concurrent overlapping competences between the Office of the Ombudsman and the Anti-corruption Commission, and to divert all corruption-related complaints to the Commission. The latter was established by the Anti-corruption Act, 2003 (No. 8 of 2003), and inaugurated in early 2006.

140 Cf. Office of the Ombudsman (2007:37).

141 Walters (2008:121ff).

142 Office of the Ombudsman (2007:4).

143 (*ibid.*:37).

144 For further reference, see Ruppel (2008a:101ff).

not dealt with many complaints under the environmental mandate – despite the fact that the Office endeavours to raise public awareness of the institution and takes its function to the grass-roots level.<sup>145</sup> Indeed, the awareness of the potential of the Ombudsman in environmental matters is very scant: many are completely unaware that the institution can be enlisted to deal with environmental matters.<sup>146</sup> Secondly, the lack of sufficient, specifically trained staff,<sup>147</sup> inadequate financial resources, and the heavy workload are further challenges to the Ombudsman’s activities in environmental matters. Nevertheless, the environmental mandate provides an opportunity for the promotion of rights and environmental protection in Namibia, and it is hoped that despite – or rather because of – the multifunctionality of the Office, this mandate receives the necessary prominence.

Fulfilling the Ombudsman’s environmental mandate may be one way of effectively addressing environmental rights in Namibia. For this purpose the Office needs to become more proactive, especially in view of its role as a national human rights institution.

### ***Article 95(1): The environmental principle of state policy***

Chapter 11 contains principles of state policy that cannot be categorised as constitutional rights in the strictest sense.<sup>148</sup> Such states Article 101 that the principles of state policy are not legally enforceable, but merely serve as societal goals in making and applying laws to give effect to the fundamental objectives of the different principles. The principles must also be employed in the interpretation of Namibian law and guide the state in its decision-making processes.<sup>149</sup>

Article 95(l) compels state organs to be directed by the environmental principle of state policy.<sup>150</sup> Article 95 stipulates that –

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145 Tours all over the country are taken by the Office of the Ombudsman from time to time to expose the Office to the population and to enhance publicity. Besides the main Office of the Ombudsman in Windhoek, the institution maintains branches in Keetmanshoop and Oshakati.

146 Many cases of environmental concern regrettably still do not find their way to the Office of the Ombudsman. The case of the Epupa Dam might serve as a prominent example. In the latter case, a hydropower scheme was proposed by NamPower (the Namibian parastatal for the bulk supply of electrical power) for the lower Kunene River in north-western Namibia. Local and international attention was focused on the issue when the Himba community opposed the project in 1998. However, in this case, the Office of the Ombudsman was not approached by Chief Hikumunue Kapika of the Himba. For further reference on the case, see Daniels (2003:52). For more details on traditional government, customary law and the administration of natural resources, see Hinz (2003b:82ff). The Ombudsman was also approached in respect of Ramatex: a complaint was brought to the Office of the Ombudsman by Earthlife Namibia, an environmental non-governmental organisation (NGO). In this regard, see Ruppel (2008a: 116ff).

147 However, this author has conducted several training courses on environmental issues, such as a workshop on environmental law in Namibia, in order to educate staff. Further projects of this kind are on the Ombudsman’s agenda for the near future.

148 Naldi (1995:99).

149 Watz (2004:186).

150 Hinz (2001:77).



[t]he State shall actively promote and maintain the welfare of the people by adopting, inter alia, policies aimed at the following:

...

- (l) maintenance of ecosystems, essential ecological processes and biological diversity of Namibia and utilization of living natural resources on a sustainable basis for the benefit of all Namibians, both present and future; ... .

Constitutional principles of state policy serve as a stimulus for new initiatives or endeavours – especially where existing policy, law or programmes seem inadequate to attain the principles’ objectives.<sup>151</sup> The principles must similarly be employed as direction indicators in setting government priorities. Also, the judiciary should apply the principles of state policy in constitutional interpretation and use them to fill gaps in the legislative framework when and where necessary. These generic features of constitutional principles of state policy arguably also apply to the environmental principle of state policy in the Constitution of Namibia. The language used in Article 95 indicates that the fulfilment of the principles of state policy requires positive action on the part of government, i.e. “[t]he State *shall* ... promote and maintain” [emphasis added]. At first sight, this creates the impression that such state principles create enforceable obligations that must be fulfilled.<sup>152</sup> Although this is not the case in Namibia, the state is expected to promote and maintain the welfare of the people by adopting policies aimed at maintenance.<sup>153</sup>

Recent policy and legislative reforms have created a unique opportunity for Namibia to incorporate environmental sensitivity, including that aimed at human rights protection. Namibia’s Vision 2030<sup>154</sup> was launched by the Founding President, Dr Sam Nujoma, in June 2004. The Vision’s rationale is to provide long-term alternative policy scenarios on the future course of development in the country at different points in time up until the target year of 2030. Chapter 5 of Vision 2030 states the following:<sup>155</sup>

The integrity of vital ecological processes, natural habitats and wild species throughout Namibia is maintained whilst significantly supporting national socio-economic development through sustainable low-impact, consumptive and non-consumptive uses, as well as providing diversity for rural and urban livelihoods.

One of the long-term aims of Vision 2030 is the availability of clean, unpolluted water, and productive and healthy natural wetlands with rich biodiversity.<sup>156</sup> Vision 2030 regards the sequential five-year National Development Plans (NDPs) as the main vehicles for achieving its long-term objectives.

The successive NDPs will contain the goals and intermediate targets (milestones) that will eventually lead to the realisation of Vision 2030. The NDP2,<sup>157</sup> which spanned the

151 Du Plessis (2008:177–179).

152 (ibid.).

153 (ibid.).

154 GRN (2004); text also available at <http://www.npc.gov.na/>; last accessed 10 January 2010.

155 (ibid.:167).

156 For more detailed information on wetlands in Namibia, cf. Ruppel & Bethune (2007:14).

157 GRN (2002).

period 2001/2– 2005/6, sought sustainable and equitable improvement in the quality of life of all of the country’s inhabitants. The national development objectives were to –<sup>158</sup>

- reduce poverty
- create employment
- promote economic empowerment
- stimulate and sustain economic growth
- reduce inequalities in income distribution and regional development
- promote gender equality and equity
- enhance environmental and ecological sustainability, and
- combat the further spread of HIV/AIDS.

The NDP3 spans the five-year period 2007/8–2011/2.<sup>159</sup> The draft guidelines for the formulation of the NDP3 were prepared in the latter part of 2006, and approved by Cabinet in December that year.<sup>160</sup> The predominant theme of the NDP3 is defined as accelerated economic growth through deepening rural development,<sup>161</sup> while the productive utilisation of natural resources and environmental conservation are key result areas. Principal environmental concerns include water, land, marine, natural resources, biodiversity and ecosystems, drought, and climate change. Waste management and pollution will grow in significance with increasing industrialisation.

The NDP3 recognises that, with the country’s scarce and fragile natural resource base, the risk of overexploitation is considerable, and that sustained growth is highly dependent on sound management of these resources. The guidelines for preparing the NDP3 stipulate that the renewable resource capital needs to be maintained in quantity and quality. This is to be achieved by reinvesting benefits into natural resources by way of diversifying the economy away from resource-intensive primary sector activities, and by increasing productivity per unit of natural resource input. Two NDP3 goals ensuring the protection of environmental concerns are the optimal and sustainable utilisation of renewable and non-renewable resources on the one hand, and environmental sustainability on the other.

The sectoral legislation relevant to environmental rights is wide-ranging. Namibia has numerous legislative instruments that provide for the equitable use of natural resources for the benefit of all. Within its legislative framework, Namibia has provided extensively for safeguard measures to protect the environment. The implementation of this legislative framework is a mammoth task, however. Although this article is not the forum to introduce the said statutory instruments dealing with the environment in the country, one particular law worth mentioning is the Environmental Management Act.<sup>162</sup> Its aim is 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

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158 Ruppel & Bethune (2007:14).

159 GRN (2007).

160 (ibid.).

161 (ibid.).

162 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.

Only time will tell how far this piece of environmental legislation will cross-fertilise in respect of protecting and implementing human rights.<sup>163</sup> The Environmental Management Act is expected to give effect to Article 95(1) of the Namibian Constitution by establishing general principles for the management of the environment and natural resources. It will promote the coordinated and integrated management of the environment and sets out responsibilities in this regard. Furthermore, it is intended to give statutory effect to Namibia's Environmental Assessment Policy, and to enable the Minister responsible for the environment to give effect to Namibia's obligations under international environmental conventions, and to provide for associated matters. Environmental impact assessments and consultations with communities and relevant regional and local authorities are provided for to monitor the development of projects that potentially impact on the environment. According to the Act, Namibia's cultural and natural heritage – including its biological diversity – is required to be protected and respected for the benefit of present and future generations. A Sustainable Development Advisory Council (still) is to be established to advise the Minister on the development of a policy and strategy for the management, protection and use of the environment, as well as on the conservation of biological diversity, access to genetic resources in Namibia, and the use of components of the environment, in a way and at a rate that does not lead to long-term environmental decline. However, the delayed promulgation and implementation of this important piece of legislation hampered the development of environmental law and justice in Namibia.<sup>164</sup>

### ***Article 100: Sovereign ownership of natural resources***

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. To this extent, the Namibian Constitution establishes sovereign state ownership of natural resources not under the control of others.<sup>165</sup>

The international run for Namibia's natural resources continues.<sup>166</sup> The expected depletion of fossil fuels like oil and gas and the resulting increase in electricity prices are forcing the world's energy industry to look at nuclear power to meet future needs for electricity provision. Namibia also came under the spotlight, with foreign investors hailing from Canada, China, Japan and Russia, among other countries, arriving in droves to secure supplies or mining rights.<sup>167</sup>

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163 Ruppel (2008a:111).

164 See also Du Plessis (2008:199).

165 Watz (2004:182–186).

166 Goanikontes, Langer Heinrich, Rössing, and Trekkopje are names related to major Namibian mining projects.

167 *The Namibian*, 4 January 2008.

*The Namibian* reported in June 2009<sup>168</sup> that Namibia had now overtaken Russia as the fourth largest uranium supplier in the world, on track to meet its target of becoming the world's third largest supplier by 2015. Uranium production in Namibia increased by 6% in 2009, and total uranium production for Namibia rose to 5,429 t in the same year.<sup>169</sup> Uranium undoubtedly means huge sums of money for investments. Mega-investments in uranium projects also mean new job opportunities. However, such extensive natural exploitation of resources does not only bring benefits: it is also deemed to have destructive effects to ecosystems and habitats that support essential living resources. Mining activities also need to be monitored with regard to their impacts on human – and, thus, environmental – rights. In regard to the state ownership of natural resources, this entails that the state should accordingly take environmentally related responsibility with a special focus on the principle of sustainability and respect for the rights of present and future generations.<sup>170</sup>

### ***Articles 102–111: Regional and local government***

It would certainly go beyond the scope of this article to address and elaborate on the issues relating to the environmental rights of regional and local government structures. One aspect that may, however, be worthwhile mentioning is that, following the inception of Chapter 12 in the Namibian Constitution, Parliament enacted the Regional Councils Act<sup>171</sup> and the Local Authorities Act.<sup>172</sup> Both laws introduced decentralisation and its administration. These enactments were subsequently followed by a Decentralisation Policy that was given legal force through a series of new laws, most notably the Decentralisation Enabling Act.<sup>173</sup>

Decentralisation contributes to creating participatory democracy in which people at the grass roots can have a direct say in decisions that affect their lives, giving more powers to regional councils. Regional councillors, who have clear links to their constituents, can play an important role in this process.<sup>174</sup>

The Traditional Authorities Act<sup>175</sup> addresses traditional leadership and its functions. These functions include promoting welfare amongst the community members who fall under a particular Traditional Authority, and supervising and ensuring the observance of customary law. According to section 3(2)(c) of the Traditional Authorities Act, traditional leaders have the –

... duty to ensure that the members of the respective communities 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.

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- 168 Duddy (2009).  
169 *The Namibian*, 28 January 2010.  
170 Ruppel (2008a:119).  
171 No. 22 of 1992.  
172 No. 23 of 1992.  
173 No. 33 of 2000.  
174 Hopwood (2005).  
175 No. 25 of 2000.

In addition, the Communal Land Reform Act<sup>176</sup> provides for the allocation and administration of all communal land.

The aforementioned acts make it clear what an important role traditional leadership and local governance play in the context of environmental governance.<sup>177</sup>

### ***Article 144: International law***

*International law* refers to the vast body of rules which binds the actions and reciprocal relations of nation states to certain common principles, procedures and standards. These rules are implicit in many international and regional instruments, the decisions of international and regional courts and tribunals, and international customs and practices.<sup>178</sup>

Environmental rights are covered by and regulated in many international and regional legal instruments and, even though the Namibian Constitution does not explicitly mention these rights, they exist by way of application of international law. Namibia is party to various international human rights<sup>179</sup> and environmental covenants,<sup>180</sup> treaties, conventions and protocols and is, therefore, obliged to conform to their objectives and obligations. As to the application of international law, a new approach was formulated after Independence, as embodied in the Namibian Constitution. Article 144 therein provides that –

[u]nless 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.

Thus, the Constitution explicitly incorporates international law and makes it part of the law of the land. *Ab initio*, public international law is part of the law of Namibia.<sup>181</sup> No transformation or subsequent legislative act is needed.<sup>182</sup> A treaty will become binding upon Namibia in terms of Article 144 of the Constitution if the relevant international and constitutional requirements have been met.

The 1981 African (Banjul) Charter on Human and Peoples' Rights<sup>183</sup> is a human rights treaty that proclaims environmental rights in broadly qualitative terms. It protects the right of peoples both to the "best attainable state of physical and mental health"

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176 No. 5 of 2002.

177 See also Du Plessis (2008:203ff).

178 See Dugard (2005:7–46).

179 As far as can be established, Namibia has formally recognised the African Charter in accordance with Article 143 read with Article 63(2)(d) of the Constitution. Thus, the provisions of the Charter have become binding on Namibia, and form part of Namibian law in accordance with Articles 143 and 144 of the Constitution. See also Viljoen (2007:549f).

180 See e.g. Hinz & Ruppel (2008:13ff).

181 See Tshosa (2001:79ff).

182 Erasmus (1991:94).

183 Hereafter *African Charter*.

(Article 16) and to a “general satisfactory environment favourable to their development” (Article 24). Article 24 of the African Charter establishes a binding human-rights-based approach to environmental protection, linking the right to environment to the right to development.<sup>184</sup>

In the *Ogoni* case, for example, the African Commission on Human and Peoples’ Rights held, inter alia, that Article 24 of the African Charter imposed an obligation on the state to take reasonable measures to “prevent pollution and ecological degradation, to promote conservation, and to secure ecologically sustainable development and use of natural resources”.<sup>185</sup> The *Ogoni* case decided by the African Commission on Human and Peoples’ Rights in 2001 and communicated to the parties in 2002 is considered to be a landmark decision with regard to the effective protection of economic, social and cultural rights in Africa, particularly the protection of the right of peoples to a satisfactory environment.

Article 24 of the African Charter should also be viewed together with the Bamako Convention and the first Organisation of African Unity (OAU) treaty on the environment, the Convention on the Conservation of Nature and Natural Resources, which predates the African Charter.<sup>186</sup> It has to be noted that Namibia is not a signatory to the original Convention. However, Namibia has signed the Revised African Convention on the Conservation of Nature and Natural Resources. The latter was adopted by the Second Ordinary Session of the African Union (AU) Assembly of Heads of State and Government in Maputo, Mozambique, in July 2003. It has, however, not yet come into force. The Bamako Convention, which was adopted after the African Charter, was drafted in reaction to the human suffering caused by the dumping of petrochemical waste. It bans the import of waste to the continent.

The Southern African Development Community (SADC) was established in Windhoek in 1992 as the successor to the Southern African Development Coordination Conference (SADCC), which was founded in 1980. SADC’s objectives include the achievement of development and economic growth; the alleviation of poverty; the enhancement of the standard and quality of life; support of the socially disadvantaged through regional integration; the evolution of common political values, systems and institutions; the promotion and defence of peace and security; and achieving the sustainable utilisation of natural resources and effective protection of the environment.<sup>187</sup>

It might appear that the promotion and protection of human rights are not SADC’s top priority as an organisation that furthers socio-economic cooperation and integration as well as political and security cooperation among its 15 member states. However, the

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184 Van der Linde & Louw (2003:169).

185 See Communication 155/96 available at <http://www.cesr.org/ESCR/africancommission.htm>. For further details see *The Social and Economic Rights Action Center & the Center for Economic and Social Rights v Nigeria* (27 October 2001); Coomans (2003:749–760); Ebeku (2003:149–166).

186 Viljoen (2007:287ff).

187 These are some of the SADC objectives laid down in Article 5 of the SADC Treaty.

protection of human rights plays an essential role in economic development as it has an impact on the investment climate, which in turn contributes to growth, productivity and employment creation – all being essential for sustainable reductions in poverty. Other SADC objectives such as the maintenance of democracy, peace, security and stability refer to human rights, as do the sustainable utilisation of natural resources and the effective protection of the environment. With the 2003 Declaration on Agriculture and Food Security, the Heads of State and Government in SADC have given substantial means to some specific objectives laid down in Article 5 of the SADC Treaty, namely the promotion of sustainable and equitable economic growth and socio-economic development to ensure poverty alleviation with the ultimate objective of its eradication; the achievement of sustainable utilisation of natural resources and effective protection of the environment; and mainstreaming of gender perspectives in the process of community- and nation-building. The Declaration is of specific importance for the human right to food, and covers a broad range of human-rights-relevant issues. The SADC Tribunal is the judicial institution within SADC.<sup>188</sup>

The African Charter and, AU and SADC law automatically form part of Namibian law in so far as the relevant legal instruments have been adopted by the country.<sup>189</sup> Despite the absence of a justiciable environmental right in the Namibian Constitution, government incurs environmental-rights-based duties in terms of Article 24 of the African Charter.<sup>190</sup> Thus, Namibian courts are under the obligation to take judicial notice of the aforementioned international instruments as a source of national law.<sup>191</sup> In this context, Article 144 is an important constitutional mechanism.<sup>192</sup>

## **Strengthening environmental rights**

It seems that Namibia is at the dawn of environmental advocacy, which refers to the act of speaking out in favour of, supporting, and defending the environment with the aim of having an impact on a decision or policy. Environmental advocates seek to preserve the natural and man-made environment, and to protect the relationships that people have with their environment. One of the principle aims of this article was to demonstrate that human rights concerns are closely related to environmental issues. Cities, villages, communities and individuals can experience a wide array of threats to the environment that may require advocacy. Business interests may be moving forward with a development project such as a dam, without addressing the needs and interests of the communities that will be affected by it. A factory may be polluting air or water, thereby posing risks to public health; or the government or other resource users might be proposing an activity that threatens humans and wildlife alike. Many problems can potentially be addressed through environmental advocacy. Through environmental

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188 For a more detailed review of the SADC Tribunal, see Ruppel (2009c, 2009d, 2009e); Ruppel & Bangamwabo (2008).

189 Ruppel (2008a:101ff).

190 Du Plessis (2008:193).

191 (ibid.) with further references.

192 Ruppel (2008a:108–111).

advocacy, environmental rights can be strengthened. Through more public participation in environmental affairs, more participatory democracy<sup>193</sup> and environmental justice can be achieved. Unfortunately, more often than not, the people who suffer from violations of their environmental rights are incapable of instituting litigation due to a number of factors, including poverty, access to information, and access to justice.

## Conclusion

Undoubtedly, the recognition of a real individual right to an environment of a reasonable standard involves confirmation of the emergence of a new generation of rights. However, the interconnection between the environment and human rights clearly highlights their interdependence and indivisibility. In Namibia, 20 years after Independence, a legal culture upholding environmental rights still needs to be created. Moreover, the holistic fulfilment of the constitutional environmental principles of state policy requires even more political will at different levels. There is also a need for the Namibian society as a whole and each individual in particular to live in and pass on a healthy and viable environment to future generations. For this purpose, it is imperative that Namibia reaffirms its international commitment to issues regarding the environment, considers it (at least implicitly) a fundamental right of citizens, and accepts it as a duty to enable them to live in a healthy environment. The right to information, public participation and the right of access to justice should also be underlined in this respect.

Whatever the approach may be at statutory level in terms of granting a human right to environment, the courts' role cannot be overestimated. Internationally, the experience of courts that have been asked to decide on cases with regard to a human right to environment show that the judiciary is crucial when it comes to interpreting existing laws in a way that takes into account recent developments incorporating environmental concerns. While the inclusion of environmental concerns into human rights jurisdiction is still in its infancy in African jurisprudence, relevant rulings from other courts in the world such as the European Court of Human Rights<sup>194</sup> and the Indian Supreme Court<sup>195</sup> may be taken

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193 Ruppel & De Klerk (2009:2–4).

194 *TATAR v Romania* (Application No. 67021/01) Judgment 27.1.2009; *Okyay & Others* (Application No. 36220/97) Judgment 12.07.2005; *Fadeyeva v Russia* (Application No. 55723/00) Judgment 9.06.2005; *Öneryildiz v Turkey* (Application No. 48939/99) Judgment 30.11.2004; *Moreno Gómez v Spain* (Application No. 143/02) Judgment 16.11.2004; *Taskin and others v Turkey* (Application No. 46117/99) Judgment 10.11.2004; *Hatton & Others v United Kingdom* (Application No. 36022/97) Judgment 02.10.2001, see Heselerhaus & Marauhn (2005:549); *Athanassoglou & Others v Switzerland* (Application No. 27644/95) Judgment 06.04.2000; *Guerra & Others v Italy* (Application No. 14967/89) Judgment 19.02.1998; *Balmer-Schafroth & Others v Switzerland* (Application No. 22110/93) Judgment 26.08.1997, Reports 1997–IV; *López Ostra v Spain* (Application No. 6798/90) Judgment 09.12.1994; *Powell & Rayner v United Kingdom* (Application No. 9310/81) Judgment 21.02.1990.

195 One prominent example of Indian jurisdiction on environmental concerns and fundamental rights is the Delhi vehicular pollution case of *MC Mehta v Union of India* (No. 13029/1985) Judgment 28.07.1998. For further details see Rosencranz & Jackson (2003:228).



as examples when it comes to the linkage between human rights and environmental concerns and the recognition and judicial enforcement of a right to environment.

In the recent 2009 South African case of *Lindiwe Mazibuko & Others v City of Johannesburg & Others*, O’Reagan J held that –<sup>196</sup>

[t]he purpose of litigation concerning the positive obligations imposed by social and economic rights should be to hold the democratic arms of government to account through litigation. In so doing, litigation of this sort fosters a form of participative democracy that holds government accountable and requires it to account between elections [for] specific aspects of government policy. When challenged as to its policies relating to social and economic rights, the government agency must explain why the policy is reasonable ... .

Litigation concerning environmental rights cannot only lead to more environmental justice for the individual, but will also exact more detailed accounting from government and, in doing so, impact beneficially on the policymaking process.

In so far as the Namibian Constitution does not include an enforceable environmental right, it may be necessary to consider constitutional environmental protection in a more holistic manner to optimise its meaning. In this context, the Namibian jurisdiction will inevitably be confronted with the dilemma of *judicial activism* versus *judicial self-restraint*.<sup>197</sup> While the latter refers to a situation in which the judge tries to avoid developing the law beyond its clearly established parameters in order not to take over a lawmaker’s function, *judicial activism* describes a situation in which judges extend or modify certain legal provisions as living legal instruments by interpreting them in the light of present-day conditions.<sup>198</sup> Specifically with regard to environmental concerns linked to fundamental human rights, a certain degree of judicial activism is indispensable.

In this spirit, it is hoped that, in the course of dealing with practical cases through an increase of environmental rights litigation, Namibian courts will gradually clarify the substance of those rights, drawing together approaches from international experience.

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196 *Lindiwe Mazibuko & Others v City of Johannesburg & Others*, Case CCT 39/09, [2009] ZACC 28.

197 The term was coined by Mahoney (1990:57–88).

198 White & Boussiakou (2009:42).

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