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The Enforceability of Environmental Rights as Human Rights: A Tale of Two Countries

Abstract

Increasingly, states are including environmental rights as human rights either in their Constitutions or in other human rights legislation. South Africa, a relatively young democracy, entrenched the right to a healthy environment in section 24 of its Constitution. This section states that everyone has the right to an environment that is not harmful to their health or well-being. Moreover everyone has the right to the protection of the environment to ensure inter-generational justice, balanced with the aim of justifiable economic and social development. Little more than a decade later, and with several Acts of Parliament further, the question needs to be asked whether and to what extent this right has been given practical content. It is found that the South African legislature and judiciary have been robust in their enforcement and interpretation of both the constitutional right to a clean and healthy environment, as well as the legislation enacted to give effect to this right. From this developing nation perspective, the paper then examines the Netherlands as an example a developed country where such a right is also recognised as a human right. Despite a longstanding reputation of judicial activism on, and popular ease of access to, environmental justice in this country, it is found that this tradition is facing a serious political and governmental threat which is only obviated by the Netherlands' accession to European legislation. The paper concludes that, from these examples, it is clear that the enforceability of constitutionally protected environmental rights depend to a large extent on the way in which the right itself is constituted and classified, and that in both instances the support of both the judicial and the executive branches of the *trias politica* are crucial in order for the constitutionalisation itself to be of practical significance.

1. INTRODUCTION

From as far back as 1972 the link between human rights and the environment has been recognised: The first principle of the Declaration of the United Nations Conference on the Human Environment¹ (the Stockholm Declaration) states that:-

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

Since then it seems logical that this right has increasingly featured in national and international law.²

Bearing this in mind, it should be stated at the outset that this paper agrees with, and takes as a starting point the premise that constitutional protection of the environment, and even better, constitutional protection of the environment *as a fundamental human right*, is a sensible idea. Commentators have already made compelling arguments as to why constitutions should provide for the protection of the environment as a human right.³ In fact, as far as the protection of the environment is concerned, constitutional rights could be of crucial importance, mainly because in most instances such rights are inalienable and built into the nation's legal system.⁴ In principle, also, inalienable fundamental rights offer individuals the potential of challenging state decisions that may amount to violations of the constitution. Fundamental rights could also provide a framework for legislation to be drafted in, as well as goals for governments to achieve.⁵

On the one hand in certain countries, notably South American states, fundamental environmental rights are seen to be self-executing and enforceable.⁶ These, however, are in the minority, with most jurisdictions requiring further delegated legislation and/or sometimes placing insurmountable hurdles

¹ United Nations Conference on the Human Environment, 1972 Stockholm Declaration (1972) 11 ILM 1416.

² Even though subsequent international treaties and conventions have carefully steered clear of wording environmental concerns in the language of human rights: At both the United Nations Conference on Environment and Development, 31 ILM, 814, 876 (1992) as well as the Johannesburg Declaration on Sustainable Development in *Report of the World Summit on Sustainable Development*, U.N. Doc. A/CONF.199/20, the focus shifted from a substantive environmental right to the concept of sustainable development.

³ Cf. Tim Hayward, *Constitutional Environmental Rights* (Oxford University Press, Oxford 2005); Jan Hancock, *Environmental Human Rights: Power, Ethics and Law* (Aldershot: Ashgate 2003); and Earthjustice 2007 Environmental Rights Report < <http://www.earthjustice.org/library/references/2007-environmental-rights-report.pdf> > accessed 23 August 2009 p 9.

⁴ SJ Turner, *A Substantive Environmental Right: An Examination of the Legal Obligations of Decision-Makers towards the Environment* (Kluwer Law International BV, The Netherlands 2009) 27.

⁵ *Ibid.*

⁶ J May, 'Constituting Fundamental Environmental Rights Worldwide' (2006) 23 *Pace Env'tl.L.Rev.* 114: 121-122.

before would-be litigants. May points out that ‘...of the 130 constitutions that address the environment, only about sixty grant individuals what may fairly be characterized as a fundamental right to a “clean,” “healthful,” or “favourable” environment.’⁷ Moreover, out of these sixty very few make the leap from theory to practice by granting to individuals and/or organisations legally enforceable rights. Thus, while many nations generically address the environment in their constitutions, few of them actually embody fundamental environmental rights. This is an important distinction, as constitutionally entrenched fundamental rights are generally more unassailable than mere procedural norms or statements of policy and tend to be less subject to political whims.

Human rights have traditionally been categorized into three broad groups: First generation or civil and political rights; second generation or economic, social and cultural rights; and third generation or solidarity rights.⁸ Civil and political rights are the most enforceable and ‘core’ right of all the human rights, and refer to the individual and her rights in society, both vis-à-vis authority and other citizens. Examples include the right to life, the right to freedom of expression and the right to personal liberty. Economic, social and cultural rights tend to represent goals that states should try and achieve for their citizens. As such they focus on both individuals and communities. Examples include the right to health and education. Finally, third generation rights, the least enforceable of them all, relate to issues such as peace and development and usually involve organs of state and private and international bodies. The focus here is mostly on groups or communities of people rather than the individual.

Turner makes the following useful distinction between ‘substantive’ and ‘procedural’ rights: The former ‘...would entitle the holder to a specific quality of environment’ while the latter ‘...would entitle the holder to processes such as: appropriate access to information concerning the environment, participation in decision-making processes and access to justice relating to environmental matters.’⁹

Potentially, environmental rights can fall within each, or several, of the generations or classifications of human rights. Looking at these distinctions in more detail it may well be argued that an unenforceable right is hardly a right at all. How then do constitutionalising environmental rights in the two ways described above translate to the woman on the street who directly feels the effects of environmental degradation? In what follows, an example of both modes of constitutionalising

⁷ May (n 6). 114.

⁸ M A Kidd, *Environmental Law: A South African Guide* (Juta: Cape Town 1997) 34-35; Turner (n 4) 16.

⁹ Turner (n 4) 6-7.

environmental rights will be examined. The South African example looks at the enforceability of an environmental right that has been constitutionalised as directly enforceable (substantive) human right, while the Dutch example looks at the enforceability of a fundamental environmental right that is constitutionalised mainly as a governmental aim (a procedural right).

SECTION A

2. SOUTH AFRICA

2.1 Introduction

South Africa is a country rich in natural wealth. For example, it is ranked as the world's third most biologically diverse country, and 80% of its 18,000 plant species occur nowhere else on earth. It contains areas of breathtaking natural beauty and world renowned protected areas. However, it is also a country that ranks as the eighth highest global per capita emitter of CO₂ and one that is threatened by incipient water scarcity. It further faces severe socio-economic challenges, with increased urbanisation and growing population numbers adding additional strain and demands.¹⁰ As a developing country, one of its main challenges is to redress not only the historical inequalities left over from the Apartheid regime, but to try and reverse current extreme inequalities that have seemingly only deepened since democratization.

In most African states, fundamental/constitutionalised environmental rights have yet to be found enforceable directly by individuals. South Africa is the noticeable exception, with a fundamental environmental right firmly entrenched in section 24 of its Constitution.¹¹ The South African Constitution, adopted in its final form two years after democratization, is the supreme law of South Africa, and any law or conduct inconsistent with it is invalid.¹² Chapter 2 of the Constitution contains the Bill of Rights, which is the cornerstone of the South African democracy. All organs of the State must respect, protect, promote and fulfil the rights in the Bill of Rights¹³ and furthermore,

¹⁰ Louis J Kotzé and Alexander R Paterson (eds), *The Role of the Judiciary in Environmental Governance: Comparative Perspectives* (Kluwer Law International BV: The Netherlands 2009) 558-510.

¹¹ Constitution of the Republic of South Africa Act 108 of 1996 ('the Constitution').

¹² S. 2.

¹³ S. 7.

the Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.¹⁴

However, none of the fundamental rights contained in Chapter 2 is absolute. Section 36 contains instructions as to how and when a fundamental right may be limited. It states that a right may only be limited in terms of a law of general application, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. The following then need to be taken into account: the nature of the right; the importance and purpose of the limitation; the nature and extent of the limitation; the relation between the limitation and its purpose; and less restrictive means to achieve the purpose.

2.2 Wording of the right

Section 24 of the Constitution says:

[24] Everyone has the right –

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

Section 24 does not confer an absolute right to a clean and unpolluted environment, but recognises that pollution is inevitable in an industrialized society.¹⁵ The section refers to health as well as well-being. The latter is a wider concept than ‘health’, and is therefore open to wide environmental interpretation. In *Hichange Investments (Pty) Ltd v Cape Produce Company (Pty) Ltd t/a Pelts Products and Others (Hichange)*¹⁶ the High Court (albeit indirectly) endorsed the idea that the environment itself may have an intrinsic value to people.

2.3 Application and ranking of the right

¹⁴ S. 8(1).

¹⁵ Kotzé and Paterson (n 10) 300.

¹⁶ *Hichange Investments (Pty) Ltd v Cape Produce Company (Pty) Ltd t/a Pelts Products and Others* [2004] 2 SA 393 ECD.

It can justly be said that s 24 provides the foundation for all environmental efforts in South Africa.¹⁷ Because it is a fundamental right contained in the highest law of South Africa, it means that individuals can assert the right at all levels including and up to the highest South African adjudicating body, the Constitutional Court. Section 24 can justly be interpreted as containing both a fundamental justiciable right in sub-section (a); and a socio-economic right in sub-section (b).¹⁸

Section 8 states that the Bill of Rights applies to all law in South Africa, and binds the legislature, the executive, the judiciary and all organs of the State, and binds not only the state, but also natural and juristic persons. As ‘everyone’ as meant in s 24 includes all human beings, this means that corporations may be sued by individuals or groups in an action based on s 24. S 24 is therefore applicable both vertically and horizontally.

It is also clear that the environmental right is on par with other socio-economic rights in the Bill of Rights. Where competing interests and norms are concerned, a balancing of rights will be required. In *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation and Land Affairs*¹⁹ (*BP Southern Africa*), the court stressed that not only is s 24 ‘on a par with the right to freedom of trade, occupation, profession and property entrenched in ss 22 and 25 of the Constitution’, but that ‘[t]he balancing of environmental interests with justifiable economic and social development is to be conceptualised well beyond the interests of the present living generation.’²⁰

2.4 Locus standi and participatory governance

2.4.1 Locus standi

Before the Constitution came into effect, South African common law, notably the law of delict, dictated that only persons whose rights were directly affected or who were actually or potentially harmed by an action, could bring a suit. Section 38 of the Constitution has now broadened this with the effect that public interest litigation, which characterises a significant portion of environmental suits, is recognised for the first time.²¹ Section 38 provides that:

¹⁷ Louis J Kotzé, ‘The Judiciary, the Environmental Right and the Quest for Sustainability in South Africa: A Critical Reflection’ (2007) 16(3) *RECIEL* 298 – 311: 299.

¹⁸ Jan Glazewski, *Environmental Law in South Africa*, (2nd edn LexisNexis Butterworths: Durban 2005) 75.

¹⁹ *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation and Land Affairs* [2004] 5 SA 124 WLD.

²⁰ *Ibid.* 143.

²¹ Kidd (n 8) 30-31.

[38] Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are –

- a) anyone acting in their own interest;
- b) anyone acting on behalf of another person who cannot act in their own name;
- c) anyone acting as a member of, or in the interest of, a group or class of persons;
- d) anyone acting in the public interest; and
- e) an association acting in the interest of its members.

Section 32 of the National Environmental Management Act²² (NEMA) mirrors this. Furthermore, subsequent actions brought by, among others, environmental authorities²³ and non-governmental organisations (NGOs)²⁴ bear testimony to the increased access to courts in environmental matters allowed by section 38.

2.4.2 Participatory Governance

The Constitution specifically recognises public access to and participation in the law-making process.²⁵

Section 165 of the constitution prescribes that:

- (1) The judicial authority of the Republic is vested in the courts.
- (2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice.
- (3) No person or organ of state may interfere with the functioning of the courts.
- (4) Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts.
- (5) An order or decision issued by a court binds all persons to whom and organs of state to which it applies.

It is important to note that s 165(2) empowers the courts to declare unconstitutional legislation unlawful, as unconstitutional law is perceived as unlawful *per se*.

²² National Environmental Management Act 107 of 1998.

²³ Cf. *Minister of Health and Welfare v Woodcarb (Pty) Ltd and Another* 1996 3 SA 155 NPD and *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Company Ltd and Others* 2006 5 SA 333 W.

²⁴ Cf. *Van Huyssteen NO and Others v Minister of Environmental Affairs and Tourism and Others* 1996 1 SA 283 C; and *Wildlife Society of Southern Africa and Others v Minister of Environmental Affairs and Tourism of the Republic of South Africa and Others* 1996 3 SA 1095 Tk. The notable exception to this liberal interpretation of standing in environmental matters can be found in *Raubenheimer NO v Trustees Johannes Bredenkamp Trust* 2006 1 SA 124 CP and in *Merebank Environmental Action Committee v Executive Member of Kwa-Zulu Natal Council for Agriculture and Environmental Affairs* Case No. 2691/01 D (unreported).

²⁵ S. 59 provides for national government participation and s. 156 for local government.

2.5 Legislation enacted to give form and content to the right

The principal environmental framework statute enacted in South Africa is the National Environmental Management Act (NEMA) referred to above. This Act accords the ability to participate in environmental governance directly to the public. Section 32 states that everyone has legal standing to enforce environmental laws, while several other sections ensure, inter alia, promotion of participation of all interested and affected parties in environmental governance, as well as the inclusion of vulnerable and disadvantaged persons (s 2(4)(f); access to information (s 2(4)(k)); recognition of the vital role of women and youth in environmental management (s 2(4)(q)); and finally government has to ensure adequate and appropriate opportunity for public participation in decisions that may affect the environment (s 32(2)(d)).

However, as has been pointed out by commentators, just because the legal framework enables interested and affected parties to participate in environmental decision-making, it does not necessarily mean that this happens in practice.²⁶ One has to remember that South Africa is a developing country where lack of resources is a constant constraint. As one writer commented:

The poor and marginal suffer the brunt of environmental pollution and natural resource degradation. Indeed they often suffer outright expropriation of land, forests, fisheries and other natural resources. Moreover, because the rights of the poor to have a political voice receives the least protection, they are often the least able to press for just compensation – or to just say ‘no’ to unwanted development.²⁷

The poor in South Africa certainly do not find themselves in a more favourable situation than those in most other developing countries. Furthermore, from what follows it will be seen that the participatory right is not always consistently recognised or enforced by the courts.

2.6 Case law

Since the enactment of the Constitution, South African courts at all levels, right up to the Constitutional Court, have not hesitated to interpret and enforce the environmental right contained in s 24. The contexts in which s 24 came into play were as diverse as considering economic versus

²⁶ Cf. Kotzé (n 17) and Kotzé and Paterson (n 10).

²⁷ Luby Zarsky, ‘Conflicts, Ethics and Globalisation’ in Luby Zarsky (ed) *Human Rights and the Environment: Conflicts and Norms in a Globalising World*, (2002 Earthscan Publications Ltd, London) 1.

environmental matters,²⁸ sustainability and governmental responsibility,²⁹ and corporate governance,³⁰ amongst others. In what follows a selection of decisions considering s 24 is examined. For ease of reference, case discussions will be grouped thematically.

2.6.1 Sustainability and inter-generational equity

In *BP Southern Africa*³¹ the applicant sought permission to construct a new petrol filling station from the defendant. In order to obtain permission, it had to conduct an environmental impact assessment (EIA) in terms of the predecessor to NEMA.³² Based on the EIA, the Department for Agriculture, Conservation and Land Affairs refused permission for the development to proceed. The applicant contended that the Department's refusal was mainly one based on attempts to regulate the economy (as there were already two other filling stations near the proposed site of the applicant's development).³³ The Department on the other hand contended that its main motivation in refusing to authorise the development was environmental, and that in so doing it was fulfilling, amongst others, its mandate in terms of the Constitution.

In interpreting s 24, the High Court stated that the environmental right should be ranked equally with the rights to freedom of trade, occupation, profession and property contained in ss 22 and 23 of the Constitution, and that these rights should be balanced. However, in doing so, '[t]he balancing of environmental interests with justifiable economic and social development is to be conceptualized well beyond the interests of the present living generations' as s 24(b) states that the environment should be protected for both present and future generations.³⁴

The court spelled it out in so many words:

Development, which may be regarded as economically and financially sound, will, in future, be balanced by its environmental impact, taking coherent cognisance of the principle of *intergenerational equity* and *sustainable use of resources* in order to arrive at

²⁸ *All the Best Trading CC trading as Parkville Motors and Others v S N Nayagar Property Development and Construction CC and Others* [2005] 3 SA 396 T.

²⁹ Cf. *HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* [2006] 5 SA 512 T and *Fuel Retailers Association of Southern Africa v Director General Environmental Management, Department of Agriculture, Conservation and Environment Mpumalanga Province* (unreported, CCT 67/06, 7 June 2007).

³⁰ *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Company Ltd and Others* 2006] 5 SA 333 W.

³¹ *BP Southern Africa* (n 19).

³² Sections 21 and 23 of the Environment Conservation Act 73 of 1989.

³³ *BP Southern Africa* (n 19) Para. B at 137.

³⁴ *Ibid.* Para. E at 143.

an integrated management of the environment, sustainable development and socio-economic concerns. By elevating the environment to a fundamental justiciable right, South Africa has irreversibly embarked on a road, which will lead to the goal of attaining a protected environment by an integrated approach, which takes into consideration, *inter alia*, socio-economic concerns and principles.³⁵

In *In Re Kranspoort Community*³⁶ (*Kranspoort*) the South African Land Claims Court (tasked with the restitution of land expropriated from communities during the Apartheid rule), in its ruling restoring land to an applicant community, did so subject to certain conditions aimed at eliminating the risk of unsustainable depletion of renewable resources on the land, stating that such an interpretation of the Restitution of Land Rights Act 22 of 1994 “...’promotes the spirit purports and objects’ of s 24(b) of the Constitution ‘and that such conditions would ensure equal access to the restored asset also by younger members of the community in the future’.³⁷

2.6.2 Administrative law aspect of the right: the right to be heard

Three years after the enactment of the Constitution, the South African Supreme Court of Appeal addressed an administrative issue related to s 24 in *Director: Mineral Development, Gauteng Region and SASOL Mining (Pty) Ltd v Save the Vaal Environment and Others*³⁸ (*Save the Vaal*). The oil company Sasol planned to expand coal mining activities next to the Vaal River, which provides water to the densely populated Johannesburg and its metropolitan surroundings. The respondents were a concerned citizens group. Before issuing a licence to Sasol, the Department of Minerals and Energy did not give the citizens’ group an opportunity to raise their concerns about, *inter alia*, the possible destruction of a wetland; pollution; loss of water quality; decrease of property values; and the threat to flora and fauna posed by the proposed development.³⁹

Amongst others, the appeal centred on the question whether interested and/or affected parties had a right to be heard by the licensing body (i.e. an administrative law question relating to the South African administrative law principle of *audi alteram partem*), as well as whether they had the right to

³⁵ *BP Southern Africa* (n 19) Paras. B-D at 144 (own emphasis). See however, *All the Best Trading CC trading as Parkville Motors and Others v SN Nayagar Property Development and Construction CC and Others* [2005] 3 SA 396 T where the High Court refused the applicants’ reliance on S 24 in an attempt to halt the respondents from further developing their own filling stations – here the respondents’ EIA permitted them to do so, and the Court found that the applicants were suing to protect their commercial interests without indicating that they needed to protect an interest of an environmental nature.

³⁶ *In Re Kranspoort Community*, [2000] 2 SA 124 LCC.

³⁷ *Ibid.* 36 Para. 117, at 183.

³⁸ *Director: Mineral Development, Gauteng Region and SASOL Mining (Pty) Ltd v Save the Vaal Environment and Others* 1999 2 SA 709 SCA.

³⁹ *Ibid.* Para. 6 at 714-716.

raise environmental objections to the grant of the license.⁴⁰ The respondents contended that the constitutional entitlement to the environment contained in s 24 would be prejudiced by the grant of a licence by the Director.⁴¹ The court agreed with them, stating that:

Our Constitution, by including environmental rights as fundamental, justiciable human rights, by necessary implication requires that environmental considerations be accorded appropriate recognition and respect in the administrative processes in our country. Together with the change in the ideological climate must also come a change in our legal and administrative approach to environmental concerns.⁴²

It has to be pointed out that s 39 of the Constitution assures the right to just administrative action and that since 2000 the *Promotion of Administrative Justice Act*⁴³ (PAJA) has further fleshed out the right, leading to a proliferation of challenges to the decisions of environmental authorities.⁴⁴

2.6.3 Scope of the right to environmental 'well-being'

In *Hichange Investments (Pty) Ltd v Cape Produce Company (Pty) Ltd t/a Pelts Products and Others*⁴⁵ (*Hichange*) the High Court examined the scope of the right to environmental 'well-being'. *Hichange Investments* was the owner of land adjacent to that of *Cape Produce*, whose tannery business produced a number of chemical waste products. At issue, *inter alia*, was the interpretation of s 28 of NEMA, which states:

Every person who causes...significant pollution or degradation of the environment must take reasonable measures to prevent such pollution or degradation from occurring, continuing or recurring, or, in so far as such harm to the environment is authorized by law or cannot reasonably be avoided or stopped, to minimize and rectify such pollution or degradation of the environment.

In interpreting the phrase "significant pollution" the court referred to s 24 of the Constitution and found that the right to well-being is relevant in the pollution context in that it encompasses a sense of

⁴⁰ *Save the Vaal* (n 38) 714-716.

⁴¹ *Ibid.* 716-717.

⁴² *Ibid.* 719.

⁴³ *Promotion of Administrative Justice Act* 3 of 2000.

⁴⁴ Cf. the following decisions by the Supreme Court of Appeal: *MEC for Agriculture v Sasol Oil (Pty) Ltd and Another* 2006 5 SA 483 SCA; *Oudekraal Estates (Pty) Ltd v City of Cape Town and Others* 2004 6 SA 222 SCA; *Foodcorp (Pty) v DDG, Department of Environmental Affairs and Tourism: Branch Marine and Coastal Management* 2006 2 SA 191 SCA; and the Constitutional Court decisions in *MEC: Department of Agriculture, Conservation and Environment and Another v HTF Developers (Pty) Ltd* 2008 2 SA 319 CC and *Bato Star Fishing (Pty) Ltd v Minister Environmental Affairs and Others* 2004 4 SA 490 CC.

⁴⁵ *Hichange Investments (Pty) Ltd v Cape Produce Company (Pty) Ltd t/a Pelts Products and Others* 2004 2 SA 393 E.

environmental integrity which entails the idea that the environment ought to be used in a ‘morally responsible, considered and ethical manner.’⁴⁶

2.6.4 Development and sustainable development

The importance of sustainability of development was also emphasised in *BP Southern Africa* and *Kranspoort* discussed above. But one of the most significant and far-reaching judgements on the environmental right and its contents was that of the Constitutional Court in *Fuel Retailers Association of Southern Africa v Director General Environmental Management, Department of Agriculture, Conservation and Environment Mpumalanga Province*⁴⁷ (*Fuel Retailers*).

The facts of *Fuel Retailers* are similar to those of *BP Southern Africa*. An environmental authority had granted a permit to a developer to build a new petrol station in an area where similar filling stations already existed. The applicant appealed against this decision, first to the High Court, then to the Supreme Court of Appeal. In both instances the appeal failed. The applicant then appealed to the Constitutional Court relying on the provisions of section 24(b)(iii) of the Constitution as well as sections 2 and 23 of NEMA. The Constitutional Court upheld the appeal on various grounds, including the fact that the relevant authority did not exercise its duty under NEMA to consider the impact of the proposed filling station on socio-economic conditions but instead effectively delegated the decision to the local authority, whose prior (purely town planning motivated) decision to rezone the relevant area was seen as sufficient consideration for the environmental authority.⁴⁸ The court added that regardless of what the applicant’s motive in raising an objection was (it seems trite that its primary motivation was to protect its own economic interests), valid legal objections were raised that had to be considered by both the environmental authority as well as the courts.

On the potential conflict of interests, be they economic, social or environmental, the court emphasised the balancing role of the notion of sustainable development:

Our Constitution does not sanction a state of normative anarchy which may arise where potentially conflicting principles are juxtaposed. It requires those who enforce and implement the Constitution to find a balance between potentially conflicting principles. It is founded on the notion of proportionality which enables this balance to be achieved. Yet in other situations, it offers a principle that will

⁴⁶ *Hichange* (n 45) 80.

⁴⁷ *Fuel Retailers Association of Southern Africa v Director General Environmental Management, Department of Agriculture, Conservation and Environment Mpumalanga Province* unreported, CCT 67/06, 7 June 2007, Para. 44.

⁴⁸ *Ibid.* Para. 89.

facilitate the achievement of the balance. The principle that enables the environmental authorities to balance developmental needs and environmental concerns is *the principle of sustainable development*.⁴⁹

The Constitutional Court thereby confirmed the centrality of the notion of sustainable development. Of particular importance for a developing nation such as South Africa, is the question where environmental concerns should be ranked vis-à-vis developmental needs. Recognising the importance of economic and social development, the court took pains to point out that this is not an overriding aim: development cannot subsist upon a deteriorating environmental base, and promotion of development requires the protection of the environment.⁵⁰

Furthermore, in an aside the court severely criticised government departments with failing to exercise due care in considering the environmental impact of this proposed development, and stated that proper exercise of the precautionary principle should have obliged them to do so.⁵¹

2.6.5 Judicial activism?

In *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Company Ltd and Others*⁵² (*Stilfontein*) the Department of Water Affairs and Forestry ordered the respondents (the directors of a gold mining company) to follow certain directives in terms of s 19 of the National Water Act 36 of 1998 in mopping up their gold mining activities. Failure to do so would have led to severe pollution of water resources, damage to property and even, possibly, loss of life. The respondents failed to comply with the order, and the applicants lodged an urgent application to the High Court for an order declaring the mines in contempt of court.

Shortly before the hearing was set to take place, all the directors of the respondent had resigned *en masse*. In terms of South African corporate law, a corporate entity such as a mining concern is a legal entity in its own right, with directors and shareholders separated from it by a ‘corporate veil’. Resigning, therefore, would theoretically have absolved the directors from liability. The court, however, would have none of it and held that the directors ‘...cannot be allowed to merely walk away because it is convenient for themselves to do so’.⁵³

⁴⁹ *Fuel Retailers* (n 47) Para. 91 (own emphasis).

⁵⁰ *Ibid.* Para 44.

⁵¹ *Ibid.* Para. 99.

⁵² *Stilfontein* (n 30).

⁵³ *Ibid.* Para. 16.6.

The court found that, based on amongst others the environmental right contained in s 24, the respondents were to be held responsible. In coming to this conclusion, the court stated that:

Unless Courts are prepared to assist the State by providing suitable mechanisms for the enforcement of statutory obligations an impression will be created that mining companies are free to exploit the mineral resources of the country for the profit over the lifetime of the mine, thereafter they may simply walk away from their environmental obligations. This simply cannot be permitted in a constitutional democracy which recognizes the right of all citizens to be protected from the effects of pollution and degradation.⁵⁴

(It is unfortunate, to say the least, that on appeal the Supreme Court of Appeal overturned this decision in *Kebble v Minister of Water Affairs*.⁵⁵)

A year after the High Court decision in *Stilfontein*, the Constitutional Court in *Fuel Retailers*⁵⁶ concluded that it is primarily the judiciary's role to ensure that sustainability is reflected in environmental authorities' practices. Furthermore, it pointed out that this is a mandate placed upon courts by the Johannesburg Principles which were adopted by the Global Judges Symposium⁵⁷ at the World Summit on Sustainable Development in 2002.

It therefore seems that the courts' role as watchdog in environmental and/or sustainability issues is seen by the courts not as judicial activism, but rather as a judicial duty placed upon them by the Constitution and confirmed by the Johannesburg Principles mentioned above.

2.6.6 Balancing conflicting rights

In *Petro Props (Pty) Ltd v Barlow and Another (Petro Props)*⁵⁸ the respondent in her capacity as chairperson of an environmental NGO opposed the development of a petrol station on land owned by the applicant, due to its possible detrimental effects on a neighbouring wetland. To this end she launched a media campaign and held a number of public meetings. The applicant sought an interdict against her alleging unfair infringement on its right to use and enjoy its property. The respondent in her turn relied on the right to freedom of expression which is protected by s 16 of the Constitution, as well as the environmental right in s 24. Although the High Court upon evaluating the relevant

⁵⁴ *Stilfontein* (n 30). Para. 16.9.

⁵⁵ *Kebble v Minister of Water Affairs* 2007 SCA 111. For a critique of this decision, see Kotzé 2009 p 589 - 590.

⁵⁶ *Fuel Retailers* (n 47).

⁵⁷ United Nations Environment Programme – Division of Policy Development and Law, *Global Judges Symposium on Sustainable Development and the Role of Law - The Johannesburg Principles on the Role of Law and Sustainable Development* adopted at the Global Judges Symposium held in Johannesburg, South Africa on 18-20 August 2002, <<http://www.unep.org/Law/Symposium/Principles.htm>> accessed on 30 August 2009.

⁵⁸ *Petro Props (Pty) Ltd v Barlow and Another* 2006 (5) SA 150 WLD.

competing fundamental rights in the case stated that in the context of this case, the environment right in section 24 is subsumed under a debate on freedom of expression,⁵⁹ it nevertheless found in favour of the respondent. Importantly, praising the selfless nature of the Respondent's actions, the court stated that:

...it should be borne in mind that the Constitution does not only afford a shield to be resorted to passively and defensively. It also provides a sword, which groups like the Association can and should draw to empower their initiatives and interests.⁶⁰

However, it seems that even the South African Constitutional Court is not above political expediency. In *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Others (Kyalami)*,⁶¹ the Constitutional Court had to weigh up the environmental right against the right to access to housing, which is contained in s 26 of the Constitution. Residents of an area adjacent to government owned land in Kyalami objected to the resettlement of flood victims to a transit camp on the land based on the fact, inter alia, that the camp could pose significant environmental risks to the area. The court avoided directly addressing the conflict of the two constitutional rights and instead focused solely on interpreting NEMA, in terms of which it upheld the government's decision to establish the transit camp. This decision was criticised by commentators as it seemed that it had '...purposely misconstrued the enabling environmental regime to achieve a socially and politically satisfactory outcome.'⁶² It was also speculated that the decision was the result of judicial error.⁶³

2.7 Summary

From the above it is clear that the courts have addressed the environmental right on several occasions, and have thereby given body to the right. As stated by Ngcobo J in the Constitutional Court: 'Courts ... have a crucial role to play in the protection of the environment. When the need arises to intervene in order to protect the environment, they should not hesitate to do so.'⁶⁴

⁵⁹ *Petro Props* (n 58) Para. 73.

⁶⁰ *Ibid.* Para. 55.

⁶¹ *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Others* 2001 (3) SA 1151 CC.

⁶² M A Kidd, 'Greening the Judiciary' (2006) 3 *Potchefstroom Electronic Law Journal* 3

<www.puk.ac.za/fakulteite/regte/per/issue06v3.html> accessed 26 August 2009.

⁶³ See Kotzé and Paterson (n 10) 578 and M A Kidd, 'The Constitutional Court's Dilution of NEMA: Minister of Public Works and Others v Kyalami Ridge Environmental Association and Another' (2001) 8 *South African Journal of Environmental Law and Practice* 119-127.

⁶⁴ *Fuel Retailers* (n 47) Para. 104.

But, are the South African courts going far enough? And are they always consistent in interpreting and enforcing what amounts to one of the most liberal constitutionally protected environmental rights in the world? Kotzé points out that, based mainly on the court's reasoning in *Fuel Retailers*, it is to be expected that South African courts, who had in the past been reluctant to intervene in executive matters, may increasingly become directly involved 'where environmental rights are not adequately protected and enforced by government.'⁶⁵ It is submitted that this does not necessarily mean a blurring of the separation of powers in terms of the *trias politica* doctrine, but signals a shift to both judicial and executive adherence and submission to the supremacy of the Constitution.

On the other hand the role of the judiciary can be criticized. Feris points out that there are relatively few instances where the courts attempted a really in-depth conceptualisation of the right, and in some instances courts avoided addressing the matter at all.⁶⁶ The reason for this seems to be that the judiciary on occasion tend to resolve potentially constitutional matters on procedural rather than substantive grounds.⁶⁷

Nevertheless, given the relative youth of both the South African democracy and the constitutional right contained in its constitution, it is submitted that on balance the courts show a favourable disposition towards interpreting and enforcing s 24.

Furthermore, it seems as if the South African government is increasingly taking environmental protection seriously. This was evidenced by the creation of a new South African Environmental Management Inspectorate (EMI). The EMI is a network of environmental enforcement officials from different government departments (national, provincial and municipal), created upon the amendment to NEMA on 1 May 2005, and tasked with monitoring compliance with and enforcing the EMI as well as related legislation.⁶⁸

It is early yet to evaluate the possible impact of the replacement of Thabo Mbeki by Jacob Zuma as president of the RSA, but it may be taken as an encouraging sign that the new government, in its

⁶⁵ Kotzé and Paterson (n 10) 311.

⁶⁶ Loretta Feris, 'Constitutional Environmental Rights: An Under-Utilised Resource' (2008) 24(1) *SAJHR*, 29-49 at 30.

⁶⁷ Kotzé and Paterson (n 10) 579.

⁶⁸ Department of Environmental Affairs and Tourism, 'Environmental Management Inspectorate' <<http://emi.deat.gov.za/login/index.asp?ReturnUrl=%2findex.asp>> accessed on 27 August 2009.

Medium Term Strategic Framework (MTSF)⁶⁹ stated as strategic priority number nine the sustainable use and management of resources.⁷⁰ This is coupled with the next strategic priority, which is to build ‘a developmental state including improvement of public services and strengthening democratic institutions, which in turn includes building partnership with society and strengthening democratic institutions’.⁷¹

SECTION B

3. THE NETHERLANDS

3.1 Introduction

The Netherlands is a constitutional monarchy. Its political and judicial system is predicated on the separation of powers following the *trias politica* model, which includes the principle of legality. The idea that government action must be based on prior general rules laid down by a democratic legislature; that there must be independent judicial review of government activities; and that fundamental human rights must be recognised is considered to be a requirement for the rule of law.⁷²

The Netherlands is a highly industrialized and densely populated country with the usual array of environmental issues this brings about.⁷³ In addition to this, the country is unique in that a large proportion (almost half) of its land mass lies below sea level, bringing about further environmental challenges. It is not surprising, therefore, that the Netherlands had a reputation for environmental activism, also in its judiciary.⁷⁴ But recently, it seems that this tradition is being seriously challenged. What is the status of environmental rights in the Netherlands today?

Chapter 1 of the Constitution of the Kingdom of the Netherlands 2002 sets out certain fundamental rights, including, in article 21, protection of the environment. However, despite the inclusion of *an*

⁶⁹ Minister in the Presidency: Planning, Republic of South Africa, July 2009 ‘A Framework to Guide Government’s Programme in the Electoral Mandate Period (2009 – 2014)’ *Medium Term Strategic Framework* available at <<http://www.info.gov.za/view/DownloadFileAction?id=103901>> accessed on 14 August 2009.

⁷⁰ MTSF Strategic Priority 9: 38-39.

⁷¹ MTSF Strategic Priority 10: 39.

⁷² C A J M Kortmann and P P T Bovend’Eert, *Constitutional Law of the Netherlands: An Introduction* (Kluwer Law International, Amsterdam 2007) 30.

⁷³ See Jonathan M Verschuuren, ‘Chapter 1: The Netherlands’ in Louis J Kotzé and Alexander R Paterson (eds), *The Role of the Judiciary in Environmental Governance: Comparative Perspectives* (Kluwer Law International BV: The Netherlands 2009) 56-57 for a concise summary of the major environmental issues facing the Netherlands today.

⁷⁴ *Ibid.* 55.

environmental right under the chapeau of ‘fundamental rights’, the reality about the nature of this ‘fundamental’ right seems to be somewhat different. May points out that some Western European countries have declined to elevate constitutional procedural rights into fundamental environmental rights and that courts in the Netherlands have in their turn declined to infer fundamental rights into constitutional provisions requiring sound environmental policy.⁷⁵

What, then, is the status of article 21? Is it a case of form rather than substance, as far as justiciable environmental rights are concerned in the Netherlands?

3.2 Wording of the right

Chapter 1, article 21 of the Dutch Constitution states: ‘It shall be the concern of the authorities to keep the country habitable and to protect and improve the environment.’

The Dutch Ministry of Internal Affairs clarifies the Dutch interpretation of the difference between ‘classic’ and ‘social’ fundamental rights: The former, such as the right to freedom of expression, is directly enforceable by the citizen and places a negative (non-intervening) duty on government. The latter, such as the environmental right, is characterised as entailing an active duty placed on government, with the other side of the coin being a ‘revendication’ or expectation by citizens that such governmental duty will be carried out. Put another way, they can be viewed as ‘*instructienormen*’: ‘...instructions addressed to the public authorities to take certain action to promote the economic, social and cultural well-being of subjects.’⁷⁶ Importantly, such “*instructienormen*” are not directly justiciable or enforceable by citizens.⁷⁷ This corresponds to the classification of first and second generation rights discussed above. It is trite that article 21 falls in the second category.

3.3 Application and ranking of the right

⁷⁵ May (n 6) 126.

⁷⁶ Kortmann and Bovend’Eert (n 72) 59..

⁷⁷ Ministerie van Binnelandse Zaken en Koninkrijksrelaties “Grondwet en Statuut: Grondrechten” <<http://www.minbzk.nl/onderwerpen/grondwet-en/grondwet-en-statuut/grondrechten>> accessed 19 August 2009: ‘Het gaat dan om instructienormen die niet juridisch rechtsreeks afdwingbaar zijn.’

Although four ministers⁷⁸ share responsibility for national environmental policy in the Netherlands, primary responsibility for environmental matters lays with the Minister for Housing, Spatial Planning and the Environment. At provincial and municipal level, administrative authorities implement environmental policies and laws. Because most environmental matters in the Netherlands fall within the scope of administrative law, most such cases are adjudicated by administrative sectors within the Dutch District Courts, with possible appeals going to the Administrative Law Division of the Council of State. Environmental issues can also be addressed in the civil or criminal courts such as the District Courts, the Courts of Appeal and the Supreme Court (except for criminal matters.)⁷⁹

3.4 Legislation enacted to give form and content to the right

Article 21 tasks the government with the duty to care for the protection and improvement of the environment, a task which it has so far fulfilled mainly by enacting legislation. Legislation in this sense includes also delegated legislation both at the level of central government (ministerial ordinances) and regulation by decentralized bodies. Furthermore, EU law exercises a heavy influence. The most important environmental statute is the Environmental Management Act (EMA)⁸⁰ supplemented by a range of sectoral Acts, such as for example the Air Pollution Act.⁸¹ At present, therefore, various Acts govern an environmental permit system – this is foreseen to be consolidated to a “one stop shop” regime when the Environmental Law (General Provision) Act and the Water Act come into effect.⁸²

3.5 Limiting access to environmental justice

Of course, having robust statutory environmental protection becomes meaningless when prospective litigants are effectively denied standing through a plethora of procedural and jurisdictional hurdles – and this seems to be the emerging trend in recent years in the Netherlands.

3.5.1 Legislative changes and the demise of the environmental *actio popularis*

⁷⁸ The Minister of Transport, Public Works and Water Management; the Minister of Agriculture, Nature and Food Quality; the Minister of Economic Affairs, and the Minister of Housing, Spatial Planning and the Environment.

⁷⁹ Verschuuren (n 73) 59.

⁸⁰ Environmental Management Act [*Wet milieubeheer*] 13 June 1979.

⁸¹ Air Pollution Act [*Wet luchtverontreiniging*] 26 November 1970.

⁸² Verschuuren (n 73) 58-59.

Verschuuren shows how, since 2005, two developments have led to the narrowing of access to environmental justice. The first development relates to procedural aspects. Before 2005, administrative actions impacting on the environment (mostly decisions about granting permits) were subject to a special procedure called the ‘extensive public preparation procedure’, while others were taken under the ‘public preparation procedure’. These have now been integrated into one procedure called the ‘uniform public preparation procedure’. This has significantly limited access to courts in environmental matters.⁸³ The second development was the abolition of the Dutch environmental *actio popularis*.

The General Administrative Law Act⁸⁴ (GALA) provides procedural rules for administrative law, which is the area of law under which most environmental matters fall to be adjudicated in the Netherlands.⁸⁵ Until 2005, access to adjudication in this area was very broad: there existed an indirect *actio popularis* in Dutch environmental law in procedures against environmental permits. In practice, *anyone* could bring an action against the granting of an environmental permit.⁸⁶ More specifically, as long as a person, group, or NGO had entered the decision-making process relating to the permit, they also had a right to subsequently go to court, provided they objected on the grounds put forward by them in the decision-making process.⁸⁷ In 2005, the EMA was amended⁸⁸ restricting this – in effect, after 25 years’ existence, the *actio popularis* was thereby abolished. This was the result mainly of a fierce political debate in which it was argued that environmental NGOs and citizens had too much power in environmental decision-making, often hampering governmental attempts to stimulate the economy.⁸⁹

The procedure regulating locus standi in administrative tribunals now operates like this: A uniform public preparation procedure regulates the decision-making process on applications for all environmental permits. Article 8.1 of the EMA forbids setting up, operating or changing installations that might have adverse effects on the environment, unless one has a permit to do so issued by the competent authority. At the decision-making stage, anyone can object to the grant of such a permit. However (after the 2005 amendment of the GALA), at later stages this is not the case.

⁸³ Verschuuren (n 73) 60.

⁸⁴ General Administrative Law Act [*Algemene Wet Bestuursrecht*] 4 June 1992.

⁸⁵ See T Buck, ‘European Methods of Administrative Law Redress: Netherlands, Norway and Germany’ (2004) *DCA Research Series 2/04* 5-15 for a detailed explanation of the procedural rules of GALA.

⁸⁶ Hanna Tolsma, Kars de Graaf and Jan Jans, ‘The Rise and Fall of Access to Justice in the Netherlands’ (2009) 21(2) *JEL* 309; 311.

⁸⁷ Verschuuren (n 73) 61.

⁸⁸ *Staatsblad* [Bulletin of Acts] 2005, 282.

⁸⁹ Tolsma *et al* (n 86) 310.

Once the uniform public participation procedure has been completed, the matter can be appealed to the Administrative Law Division of the Council of State (directly, without having to object to the relevant administrative authority first). However, this right is reserved for *interested parties* only.⁹⁰ ‘Interested parties’ are defined as ‘...those people that can show a special interest in the decision.’⁹¹

The obvious question here is: Who exactly would be an ‘interested party’? Is it only the company applying for the permit, the relevant authority, and people near the proposed site of the business? Or could it be interpreted wider? Article 1:2 of GALA states that an interested party means the person whose interest is directly affected by an order. Subsection 3 of article 1:2 further states, regarding legal persons: ‘...their interests are deemed to include the general and collective interests which they specially represent in accordance with their objectives and as evidenced by their actual activities.’

In general, case law shows that courts leaned towards favouring NGOs in interpreting this clause.⁹² In other words, until recently it has been presumed in the Netherlands that environmental NGOs do have an interest that would qualify them as ‘interested parties’. However it is worrying to note that it was suggested in the Dutch Parliament that this presumption should be dropped.⁹³ The courts seem willing to comply: on 1 October 2008 the Judicial Jurisdiction Division of the Council of State [*Afdeling Bestuursrecht, Raad van Staten*] ruled *against* the admissibility of an environmental NGO in terms of s 1:2(3).⁹⁴ (For a more detailed discussion of this ruling see 5.3 below.) Thus the tendency in the Netherlands seems to be a political (and juridical) consensus that the role of environmental interest groups should be decreased.⁹⁵

It therefore seems that access to environmental justice is being curtailed (or at the very least there is a serious attempt by the legislature to try and do this) by narrowing the criteria for standing. It must also be noted that there is yet a further way in which access is being limited, namely by severely curtailing the number of decisions against which appeal is possible at all. Verschuuren points out that:

⁹⁰ Two other procedures that used to be open to anyone were also restricted to ‘interested parties’ after the 2005 amendment, namely the right to request to update or withdraw the permit, when that was necessary to protect the environment (Art. 8.22 EMA), as well as the right to request enforcing measures from an administrative body when it was felt that it was remiss in doing so (Art. 18.14 EMA).

⁹¹ Verschuuren (n 73) 60.

⁹² *Ibid.* 64.

⁹³ *Ibid.*. See also the records of the Dutch Lower House II 2007/08, 21 200, nr 19.

⁹⁴ *Stichting Openbare Ruimte v College van Gedeputeerde Staten van Gelderland* ABRvS 1 October 2008.

⁹⁵ Tolsma *et al* (n 86) 310.

[t]hese [environmental decisions which cannot be appealed] include all forms of legislation, including orders in council, ministerial orders and also national environmental policy plans...in many cases environmental permits have been replaced by general rules for certain categories of installations, laid down in orders in council (*75% of all installations no longer need a permit*)...[Therefore] this can be criticised from the point of view of access to justice.⁹⁶

This limiting of access to adjudication has been criticised on a variety of grounds, not least that it may well be contrary to the implementation of the Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus Convention), which aims at improving access to environmental justice, and which the Netherlands had ratified through approval in February 2008.⁹⁷ As far as limiting access of environmental NGOs (as has been called for in the Dutch parliament), this would probably be contrary to the Aarhus Convention itself as well as the EU Directive implementing the Aarhus Convention, which states that environmental NGOs are considered to have an interest in environmental matters.⁹⁸

Granted, there is always access under the law of tort for individuals whose interests were injured, as well as for NGOs in terms of the Dutch Civil Code, art. 3.305a. However, a major drawback for this route is the prohibitive costs of proceedings before a Dutch civil court, coupled with the spectre of an adverse costs order for the losing party.

3.5.2 Significant changes in the political climate

It is not surprising, given the above, that the number of cases before the Administrative Law Division of the Council of State has declined.⁹⁹ In many instances, it is simply not possible any more to approach this court, with its relatively fast, cheap and simple procedure. At a stroke (as explained in par 3.4.1 above), by taking environmental decision-making away from local authorities and making it a national directive-driven imperative, no appeal is possible against 75% of all installations.

⁹⁶ Veschuuren (n 73) 65 – own emphasis.

⁹⁷ United Nations Economic Commission for Europe website on the Aarhus Convention, <<http://www.unece.org/env/pp/prtr.htm>> accessed on 19 August 2009.

⁹⁸ Council Directive 2003/35/EC providing for Public Participation in Respect of the Drawing up of Certain Plans and Programmes relating to the Environment and Amending with Regard to Public Participation and Access to Justice Council Directives 85/337/EEC and 96/61/EC, OJ L156/17, 2003.

⁹⁹ See Veschuuren (n 73) 69 and the revealing figures in the annual reports of the Council of State, Raad van State, “Council of State: Advisory Body and Administrative Court”, obtainable at <www.raadvanstate.nl>, accessed 26 August 2009.

On top of that, two other issues may have influenced the decline in environmental cases.¹⁰⁰ The first setback occurred when an employee of the *Vereniging Milieuoffensief*, up to then a very active and effective environmental NGO, assassinated Pim Fortuyn, the leader of a right-wing political party. This led to the virtual halt of all the *Vereniging Milieuoffensief*'s legal activities since. The second setback is the realization by NGOs that court victories in environmental matters are often pyrrhic: More often than not, the grant of a permit is set aside by the court on mere technical terms. The applicant then rectifies the technical aspect of its application and the development goes ahead anyway.¹⁰¹

3.6 Case law dealing with environmental rights

In the Netherlands with its mainly civil law tradition, the significance of case law of course differs from that in a common law system such as is followed in South Africa. Nevertheless, case law (*jurisprudentie*) is recognised as an important source of Dutch constitutional law. It is also important to note that by acceding to the Treaty of Rome, the Netherlands has recognized the legal authority of the European Court of Human Rights (ECtHR) and therewith the right of individual petition. Increasingly the judgements of the ECtHR have required adjustments of Dutch law, including constitutional law.¹⁰² ¹⁰³ For this reason court findings from national as well as European courts will be looked at, but restricted to only a few landmark cases.

3.6.1 Administrative Law Case on EU Habitats Directive (*Cricetus cricetus*)¹⁰⁴

Around the turn of the century an important case relating to environmental governance came before the Dutch courts. A combination of citizens' groups and environmental NGOs opposed the proposed development of land comprising the habitat of a protected hamster species in terms of EU conservation law.¹⁰⁵ It was decided by the Administrative Law Division of the Council of State that the competent authorities in the Netherlands had not, as required by the EU directives, rightfully applied the relevant derogation clauses in that they failed to demonstrate: (1) that there were

¹⁰⁰ Veschuuren (n 73) 69.

¹⁰¹ Veschuuren (n 73) 71 notes that approximately 70% of environmental cases won in the administrative courts were won on formal grounds.

¹⁰² Kortmann and Bovend'Eert (n 72) 33.

¹⁰³ *Ibid.*.

¹⁰⁴ Case LJN: AA9523, Raad van State, ('*cricetus cricetus*') available at < <http://zoeken.rechtspraak.nl/ResultPage.aspx>>, accessed 28 August 2009.

¹⁰⁵ Council Directive 79/409/EEC of 2 April 1979 on the protection of wild birds and their habitat; Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora.

satisfactory alternatives (to destroying the habitat of the protected species); (2) that the derogation was not detrimental to the maintenance of the populations of the species at a favourable conservation status in their natural range; (3) and that the derogation was necessary for an imperative reason of overriding public interest (the employment data relied on was dated, for example.)¹⁰⁶

This case, and its successors in the District, Court of Appeal and Supreme Court, had an enormous impact on all types of development projects throughout the country, making it clear that EU directives such as these had to be carefully applied when making environmental developmental decisions.¹⁰⁷

3.6.2 Civil Law Case on EU Nitrates Directive

Commencing in the early 1990s, the Dutch authorities were embroiled in a dispute concerned the non-implementation by the Dutch government of the European Directive concerning the Protection of Waters against Pollution Caused by Nitrates from Agricultural Sources (Nitrates Directive).¹⁰⁸ After requests by the European Commission as well as national environmental NGOs directed to the government to implement the directive was ignored, Dutch NGOs filed a lawsuit in 1999 against the government for not having implemented the Nitrates Directive. Their suit was successful in the District Court,¹⁰⁹ but on appeal was overturned in the Court of Appeal.¹¹⁰ Among others,¹¹¹ the court agreed with the State's argument that implementing the Directive would have necessitated an amendment of a national statute (the *Animal Manure Act*¹¹²) or the enactment of new legislation. Strictly following the separation of powers doctrine, the Court stated that this was therefore a matter for the government to decide and not for the Courts. Upon referral by the NGOs, the Dutch Supreme Court agreed with the Appeal Court's interpretation.¹¹³

¹⁰⁶ *Cricetus cricetus* (n) paras. 2.7.4 and 2.7.5.

¹⁰⁷ Verschuuren (n 73) 73.

¹⁰⁸ European Commission Directive 1991 91/676/EEC concerning the Protection of Waters against Pollution Caused by Nitrates from Agricultural Sources OJ L 375/1.

¹⁰⁹ District Court The Hague, 24 November 1999 (2000) 27 *Milieu en Recht* 63-67.

¹¹⁰ Court of Appeal The Hague, 2 August 2001, (2001) *Milieu en Recht*, 258-261.

¹¹¹ The decision also gave a highly criticized pronouncement on the direct effect of EC Directives in Dutch law. See Verschuuren's analysis (n) 72-75.

¹¹² 27 November 1986.

¹¹³ Netherlands Supreme Court, 21 March 2003, (2003) *Milieu en Recht*, 314-315.

This decision provides proof for the contention that administrative as well as civil courts in the Netherlands ‘...tend to only marginally test government decisions, leaving them as much room as possible, within the limits of the law, to set their own policies.’¹¹⁴

Subsequently, in 2003, the European Court of Justice (ECJ) condemned the Netherlands for its non-implementation of the Nitrates Directive.¹¹⁵

3.6.3 Standing of NGOs: Article 2:1(3) GALA

In *Stichting Openbare Ruimte*¹¹⁶ the appellant was an environmental NGO dedicated to promoting a healthy and sustainable environment and good spatial planning. As such its stated aims included ‘striving towards achieving a sustainable living environment for all living beings...local, national and global.’¹¹⁷ The Administrative Law Division of the Council of State had to decide whether the NGO had standing to bring an action in terms of GALA; in other words, whether it could be considered an ‘interested party’ in terms of art. 1.2 of GALA.

To recoup: Article 1:2 of GALA states that an interested party means the person whose interest is directly affected by an order. Subsection 3 of art. 1:2 GALA states that the interests of NGOs are deemed to include the ‘general and collective interests which they specially represent in accordance with their objectives and as evidenced by their actual activities.’

The court examined the stated aim of the NGO, as well as its actual activities. In doing so, it interpreted the concept of ‘actual activities’ very restrictively.¹¹⁸ It came to the conclusion that, in addition to the very wide aims and objectives stated above, its actual activities, namely expressing views and bringing actions relating to the environment before courts, did not amount to the protection of a public interest.¹¹⁹ The court therefore found that the NGO was not an ‘interested party’ and had no standing before it.

¹¹⁴ Veschuuren (n 73) 76.

¹¹⁵ *European Commission v The Netherlands* Case No. C-322/00 2003 ECR I-11267.

¹¹⁶ *Stichting Openbare Ruimte* ABRvS 1 October 2008.

¹¹⁷ *Stichting Openbare Ruimte* para. 2.2.

¹¹⁸ Tolsma *et al* (n 86) 318.

¹¹⁹ *Stichting Openbare Ruimte* para. 2.3.

This decision has been criticised as restricting access of environmental NGOs to the courts without an express mandate from the legislature, and moreover without applying sound legal arguments.¹²⁰

3.7 The European Influence

From the above it is clear that the trend in the Netherlands is to increasingly restrict access to environmental adjudication. How does the Netherlands' accession to the Aarhus convention impact on this? The preamble to the Aarhus convention¹²¹ adopted by the United Nations Economic Commission for Europe (UNECE) states that 'every person has the right to live in an environment adequate to his or her well-being and the duty, both individually and in association with others, to protect and improve the environment for the benefit of present and future generations'.

It has been observed that the Aarhus convention is the most far-reaching manifestation to date of Principle 10 of the Rio Declaration, because convention parties pledge to '...introduce laws that provide rights of access to information, public participation in decision-making and access to justice in environmental matters.'¹²² Furthermore, the parties to the Convention are required to generally provide for the recognition of and support to environmental NGOs.¹²³ However, it must be remembered that as far as access to environmental justice is concerned, this convention provides for procedural rather than substantive rights.

Article 9 provides for the right to have environmental decisions legally reviewed. Parties are required to ensure access to justice in cases concerning other relevant provisions of the Convention – but, as Ebbesson points out,¹²⁴ this is subject to the caveat '*where so provided under national law*'.¹²⁵ Further, in terms of Article 9(3), each party must also ensure that 'where they meet the criteria, if any, *laid down in its national law*, members of the public have access to administrative or judicial procedures to challenge acts or omissions by private parties and public authorities which contravenes provisions of its national law relating to the environment' (own emphasis). Thus, although the

¹²⁰ Tolsma *et al* (n 86) 319.

¹²¹ United Nations Economic Commission for Europe, Convention on Access to Information, Public Participation and Decision-Making and Access to Justice in Environmental Matters. Ministerial Conference, Aarhus, 25 Jun. 1998 (in force 30 Oc. 2001); U.N. Doc. ECE/CEP43 (1998).

¹²² Turner (n 4) 14.

¹²³ Article 3.4.

¹²⁴ Jonas Ebbesson, 'Information, Participation and Access to Justice: the Model of the Aarhus Convention' *Joint UNEP-OHCHR Expert Seminar on Human Rights and the Environment* 14-16 January 2002, Geneva: Background Paper No. 5. <<http://www2.ohchr.org/english/issues/environment/environ/bp5.htm>> accessed 23 August 2009.

¹²⁵ Article 9.2, own emphasis.

objective of the Aarhus Convention is to give the public wide access to justice,¹²⁶ it remains essentially a matter for national law to determine what constitutes a sufficient interest.¹²⁷

Although there seems to be agreement amongst commentators that abolition of access to the courts under subsection 3 of art. 1:2 GALA is in conflict with the Aarhus convention,¹²⁸ the possibility of the convention countering the trend of curtailing access to environmental adjudication in the Netherlands is unclear. An answer may be provided by the ECJ soon: In a Swedish case referred to the ECJ¹²⁹ the question of whether participation in environmental decision making by NGOs should also ensure access to the courts¹³⁰ waits to be answered.

3.8 Summary

In terms of the separation of powers doctrine as followed in the Netherlands, Dutch courts are not allowed to carry out constitutional review of Acts of Parliament. The courts are, however, empowered to test all regulations of a lower status than Acts of Parliament against the constitution.¹³¹ It is therefore highly significant that in many instances permit granting (where environmental objection making is highly likely) have been made subject to national rather than local regulation.¹³²

Importantly, Dutch courts are empowered to test the application of Acts of Parliament against all directly applicable treaty provisions. It is for this reason that European Union law, with its tendency to broaden access to environmental justice, may well be the saving grace for Dutch environmental interests.

4. CONCLUSION

In both countries examined, it is difficult to amend the constitution – the procedures for amendment in both are more cumbersome than that for ordinary Acts of Parliament.¹³³ Therefore both can be

¹²⁶ Article 9(2).

¹²⁷ Ebbesson (n 124) on access to justice.

¹²⁸ Tolsma *et al* (n 86) 320; Verschuuren (n 73) 62.

¹²⁹ Case C-24/09.

¹³⁰ Tolsma *et al* (n 86) 320.

¹³¹ Kortmann and Bovend'Eert (n 72) 33.

¹³² See the discussion at 5.1 above.

¹³³ Revision of the Dutch Constitution requires a two-thirds majority vote in both Chambers of Parliament, after two readings of the proposed amending Bill. See Kortmann and Bovend'Eert p 30-31 for more detail on the Dutch procedure. Section 74 of the South African Constitution requires, for some instances, a 75% majority, and in other instances a two thirds majority vote in the two houses of Parliament.

seen as rigid constitutions. However, the status of the constitution differs in each country. In the Netherlands, the concept of Parliamentary sovereignty and the separation of powers dictate that the interpretation of national legislation remains up to parliament, not the judiciary. Acts of Parliament cannot be tested against the Constitution,¹³⁴ and the interpretation of the Constitution by the legislature is binding upon the administration and judiciary. In South Africa, it is the other way around. The courts interpret all legislation in accordance with the Constitution and all Acts or parts of legislation that cannot be interpreted in harmony with the Constitution are unlawful. If there is a dispute about the interpretation of the Constitution itself, the Constitutional Court has the final say.

In terms of content of the Dutch constitution, the tendency is towards flexibility, and in many instances, such as with the environmental right, the Constitution leaves it up to the legislature or the executive to set norms.¹³⁵ There is therefore no directly enforceable environmental right. Section 21 of the Dutch constitution is a second or even a third generation right. In South Africa, Section 24 of the Constitution contains the right to a healthy environment as a fundamental human right, arguably on a par with other fundamental rights in the Bill of Rights. The right is directly justiciable and has both horizontal and vertical effect.

In the Netherlands, access to the courts in environmental matters used to be very liberal, but has recently seen a significant narrowing. The abolition of the environmental *actio popularis*, amendments to legislation such as GALA, potentially restricting access to environmental justice by NGOs, and transferring environmental powers from local to national authorities, have all led to a real erosion of the ways in which the Dutch can enforce their environmental rights. For example, procedures in Dutch administrative tribunals are characteristically:¹³⁶

- Speedy (a final decision, including judicial review, usually takes no longer than one and a half years);
- Informal (Judicial assistance not obligatory and there are no strict formal rules for the formulation of complaints or letters of appeal); and
- Inexpensive. Furthermore there are government financed bureaus of legal aid, some of which specialize in environmental matters.¹³⁷

However, such access to administrative tribunals are now restricted, with the alternative to go to the civil courts in tort. A suit in the Dutch civil court is expensive and legal representation is necessary.

¹³⁴ Kortmann and Bovend'Eert (n 72) 35.

¹³⁵ *Ibid.* 30.

¹³⁶ Veschuuren (n 73) 65.

¹³⁷ Veschuuren (n 73) 65.

The losing party also faces an adverse costs order. So in fact, all the advantages listed above are negated if a person needs to go to the civil court – which is what restricting access to the administrative courts is doing.¹³⁸

Procedural environmental rights, such as the right contained in the Dutch constitution, are not totally meaningless. By giving citizens participatory rights in environmental decision-making, they have the potential to improve the legitimacy of such decision-making and may furthermore improve the quality of environmental decisions because a wider range of interests and concerns are taken into account. Additionally, they may lead to greater scope for public-interest litigation, such as by environmental NGOs.¹³⁹ The danger, as can be seen from the discussions above, is that procedural environmental rights are easily eroded.

It is therefore submitted that the entrenchment as a fundamental constitutional right following the South African model provides a far greater guarantee for the durability and enforceability of environmental rights. It seems as if ensuring that the environmental right is a fundamental right with concomitant direct justiciability cuts through the Gordian knot of access to environmental justice. It may well be argued that by giving content to the environmental right and showing a readiness for judicial activism in environmental matters in the manner described in paragraph 2.6 above, the South African judiciary is making a major contribution to environmental governance.¹⁴⁰

For South Africa, there are also lessons to be learned from the Dutch example. Although the South African environmental right looks good on paper, in reality it faces many constraints. The Judiciary can only hear those matters that are actually brought before it, and in South Africa, court proceedings are prohibitively expensive. This means a *de facto* denial of access to environmental justice for the poor. NEMA in section 32(2) does give the court a discretion not to award costs against an unsuccessful applicant if the court is of the opinion that the applicant acted reasonably out of a concern for the public interest, or in the interest of protecting the environment, and had made due effort to use other means reasonably available for obtaining the relief sought.¹⁴¹ But this still assumes that the matter gets to the court in the first place.

¹³⁸ *Ibid.* 66-67.

¹³⁹ Turner (n 4) 6-7.

¹⁴⁰ Kotzé and Paterson (n 10) 594.

¹⁴¹ Section 32(2) was applied in *Silvermine Valley Coalition v Sybrand van der Spuy Boerderye* 2002 1 SA 478 CPD.

There are indications that the South African government are attempting to address possible environmental conflicts at the pre-adjudication stage. Examples include the establishment of the Environmental Management Inspectorate and the stated governmental priority of strengthening engagement between government and the people by involving citizens in governance and service provision.¹⁴² Nevertheless, massive investment in an overstrained and under-resourced judicial system seems vital. Commentators also find it strange that there is much political support for specialist labour, commercial and land reform disputes, but seemingly none for an environmental court.¹⁴³

Hayward states that the challenge is

...not to show that constitutions should say *something* about the environment, as there is little controversy about this; rather, it is to show that the constitutional commitment should be to provide for its protection as a *fundamental right*. That is to say, the provision should not take the form of some less binding constitutional commitment such as a statement of social policy; it should not be classed merely among ‘social rights’ as such a category is sometimes distinguished from fundamental rights proper; and it should not provide solely procedural rights (such as the rights to information, access to justice, and to environmental decision-making).¹⁴⁴

The experience in the two countries discussed above bear out the sensibility of this statement. In the Netherlands, where the environmental right is constitutionalised as a second generation right, we are witnessing an onslaught on the extent to which the law can be utilised by citizens and NGOs to protect the environment. Indeed, it seems from the analysis that the fact that the Dutch constitution contains such a right is barely mentioned, much less utilised in environmental cases. It also seems that a tradition of judicial willingness to accommodate environmental concerns and –NGOs is just that: a tradition, open to the vagaries of political expediency. Without the external modifier in the form of EU legislation, the question is wide open as to how far curtailment of environmental access to justice in the Netherlands would have progressed.

On the other hand, in a constitutional democracy like South Africa, where all three arms of the *trias politica* are subject to the Constitution as the highest law of the country, a right protected in the Constitution as a fundamental, first generation right enjoys privileged status indeed. All action, be it private, governmental, parliamentary, legislative, administrative or otherwise, can be and are tested

¹⁴² MTSF Strategic Priority 10. It is foreseen that this objective will be achieved by measures such as reviewing government’s systems of public participation; involving citizens in governance and service provision and strengthening the capacity of representative bodies by, among others, improving their research and representative support capacity..

¹⁴³ Kotzé and Paterson (n 10) 595.

¹⁴⁴ Hayward (n 3) 5.

against the Constitution. Acts and actions found to be unconstitutional are immediately declared unlawful and inoperative. In this context the main challenges facing the environmental right include instances where the right conflicts with other fundamental rights and bread and butter issues such as litigation costs and the sophistication of the citizenry. In this area much can be learned from the Dutch system of administrative courts, with their ease of access, low cost, speedy resolution of disputes and informal procedures. A powerful instrument like s 24 of the South African Constitution is of little use if the very people who are supposed to be protected by it are barred from using it by lack of money.