

THE ENVIRONMENTAL RIGHTS ENTRENCHED

IN THE CONSTITUTIONS: A CRITIQUE

CHOMA Hlako¹

(University of Venda Law School)

¹ Academic Title: Advocate, Senior Lecturer and Head of Department: Public and International Law: Private Bag X5050 THOHOYANDOU 0950, SOUTH AFRICA

Abstract

Although environmental law is a relatively a new field of scholarship in South Africa, it is growing rapidly. The right to access to social security including environmental rights is found in the South African Bill of Rights, is being amplified by legislative and constitutional reforms, and developing case law in the courts. There is therefore a clear need to increase the understanding of the discipline through systematic research and teaching at various levels¹. The notion of including an “environmental right” in a domestic constitution is not novel in Africa. Most African countries have incorporated a constitutional provision that ensures the right to a healthy environment. Most of the problems that exists with environmental rights under the international and regional systems are absent under the domestic South African system. The way in which environmental rights have been formulated in international instruments, section 24 of the South African Constitution has been framed as an individual right and not as a collective one. Environmental degradation often affects groups of people and it could consequently argued that the right should protect groups and not just individuals².

Key Words: The environmental rights in the constitutions; A Critique

1. INTRODUCTION

It is fortunate that the South African Constitution³ makes it so clear that constitutional rights are to be judicially protected and enforced. It is indeed a striking feature of the

¹ MP Olivier *et al* *Introduction to Social Security*, preface iii

² D Brand *et al*, *Socio Economic Rights in South Africa* at 259

³ Act 108 of 1996, as adopted on 8 May 1996 and amended on 11 October 1996 by the Constitutional Assembly.

South African Constitution that courts are given the widest possible powers to develop and forge new remedies for the protection of constitutional rights and the enforcement of constitutional duties.⁴

There are scholars who have criticised the constitutions for the provisions of economic and social rights they contain. The South African Constitution is one of those constitutions that protect socio-economic rights.⁵ The critics of the inclusion of socio-economic rights in the constitutions, contend that such provisions may invite, or require, judicial activity verging on legislation, and it is likely to offend the doctrine of separation of powers. Some of the concerns reflect free market ideologies. The incorporation of social and economic rights is likely to imply state intervention, whereas traditional, negative, rights, are viewed as being restrictive on state power.⁶ One of the United States commentator held that:

A constitution that pretends to “guarantee” rights which cannot be judicially enforced should not be considered a serious legal document. Moreover, the presence of such rights in a constitution may end up discrediting negative rights as well.⁷

⁴ Adv. Wim Trengove, *Judicial Remedies for violation of Socio-economic Rights*. Paper delivered in May 2004: God Governance Programme University of Pretoria, Centre for Human Rights.

⁵ Chapter 2 of the Constitution – Bill of Rights

⁶ EG Sustein “*Against Positive Rights: Why Social and Economic Rights do not belong in the New Constitutions of Post-Communist States*” 2 EECR

⁷ Jill Cottrell *Environmental Protection by Constitution: A paper on conference on Trends in Contemporary Constitutional law*: University of Hong Kong 13-14 December 1996.

The most important conceptual issue however, is that socio-economic rights impose duties on the states which civil and political rights, for example, do not. Generally state have duties to respect, protect, promote and fulfill the socio-economic right.⁸

Respecting socio-economic rights means, for example, that states must not carry out evictions for people from their ancestral lands. Similarly, it is a violation of the duty of states to pollute the rivers they drink from. Respect is intended to recognise the fact that certain rights already exist which must be respected. On the other hand, protect entails having a procedure and mechanism that ensures that deprived persons are redressed. Courts quite often play the protection mandate. Similarly, protection can be through policies and actions that aims at protecting jobs, for examples, from being lost. States have a duty to ensure the protection of the job market as for other socio-economic rights. Promotion, on the other hand, is to have policies and goals aimed at providing for these rights. Finally, fulfilling the socio-economic rights is to give the benefits of such rights to beneficiaries. Food aid to poor people, for example, fulfils the duty of the state.

1.1 Judicial Remedies for violations of environmental rights

Section 24 of the South African Constitution⁹ provides that,

Everyone has the rights

⁸ Prof. Michalo Hansungule *Socio-economic Rights in the African Regional Human Rights System*: A paper in the form of lecture: University of Pretoria 24-28 May 2004.

⁹ Act 108 of 1996. Many matters relating to the environment fall within the legislative and executive competence of provincial and local government. Section 152 (1) (d) provides that one of the objects of local government is to promote a safe and healthy environment.

- (a) to an environment that is not harmful to his/her 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.

It must be noted that traditional constitutions were neutral regarding issues relating to the second and third generation rights (socio-economic rights) particularly environmental rights. The first generation (political and civil rights) was individual rights, like those found in the International Covenant on Civil and Political Rights, and the Bill of Rights of the US Constitution. The second generation rights were exemplified by the

International Covenant on Economic Social and Cultural Rights, which tended to require positive action on the part of government, as opposed to the first generation rights which could, it is often assumed, be achieved by governmental restraint. The third generation rights are those like the rights to development or the rights of indigenous people, which are not attached to individuals and need to be enforced at the behest of groups.¹⁰

¹⁰ Jill Cottrell *supra*. See also DM Chirwa: 'A Fresh Commitment to Implement Economic, Social and Cultural rights in Africa in 3(2) *ESR Review* (September 2002); *Minister of Health and Others v TAC and Others* 2003 95) SA 721 (cc).

1.2 Practical problems regarding environmental rights

It is argued that environmental rights are liable to create particular problems of interpretation and enforcement. It is suggested that concept such as “healthy environment” are extremely imprecise and very difficult for a court to operationalise. Second, there is the issue of who is to enforce such “third generation rights.”¹¹

2. THE COURTS’ REMEDIAL POWERS

The Southern African courts are empowered, whenever they decide “any issue involving the interpretation, protection or enforcement of the Constitution” to make any order that is “just and equitable” (ss172 (1) (b) and 167 (7) of the South African Constitution. Justice and equity are their only lodestar in the exercise of their remedial discretion.¹²

The same message is repeated in the Bill of Rights. Section 38 provides that, whenever, a fundamental right has been violated or threatened, is determined only by what is just, equitable and appropriate.¹³

¹¹ Jill Cottrell, *supra*. See also *De Kock v Minister of Water Affairs and Forestry and Others* 2005 (12) BCLR 1183

¹² *Mkontwana v Nelson Mandela Metropolitan Municipality* 2005 (1) SA 530 (cc), 2005 (2) ECLR 150 (cc).

¹³ It is clear that the protection and enforcement of the Bill of Rights and particularly those of its provisions which impose positive duties on the State, will require the courts to develop and create novel remedies. Justice Ackermann made it clear in *Fose v Minister of Safety and Security* 1997 (3) SA 786 (cc) that the Constitutional Court is alive to this need.

2.1 Standing to sue in environmental cases

The question of standing to sue may be more complex in environmental cases than any other type. The response in some countries, of the courts or the legislature, has been public interest litigation. In Latin America there have been in the last decade a number of interesting cases of litigation. For example, there have been a decision in Ecuador on mining and road building in a National Park, a decision of the Supreme Court of Peru ordering the closure of shrimp farm and the rehabilitation of mangroves. One of a court in Colombia ordered a shipping company to return waste it had imported away. In *Ferreira v Levin*,¹⁴ a South African case, the Court held that standing provisions must be interpreted generously and expansively consistent with the mandate given to uphold the Constitution, thus insuring that the rights in the constitution enjoy full measure of protection to which they are entitled.

2.2 Direct Access to Constitutional Court

*De Kock v Minister of Water Affairs and Forestry and others*¹⁵ a South African case. It appears from the judgment of this case, that the Applicant might have complied with the standing requirements and further that his rights might have been infringed and/or threatened. Environmental rights are not unique and do not require unique remedies. But the litigation around those rights often presents features which call for the development

¹⁴ 1996 (1) SA 984

¹⁵ 2005 (12) BCLR 1183 (cc). See Adv Wim Trengove, *Judicial Remedies for violation of Socio-Economic Rights*. Paper delivered in May 2004: Good Governance Programme University of Pretoria: Centre for Human Rights

and creation of new and more effective remedies. These features typically include the following:

- The litigation is undertaken in the interests of communities or classes of people and not only in the interests of specified individuals.
- The litigation is undertaken in the interests of communities or classes of people and only in the interests of specified individuals. Those people are usually poor and politically and socially weak. They are the ones who are dependant on the State for the provision of basic socio-economic services and who lack the political and social power to get it without judicial intervention.
- They accordingly have a particular interest in the enforcement of the positive duties of the State to take action toward the provision of socio-economic services. The rich and powerful can look after themselves and usually invoke the Constitution only to prevent or strike down State action which interferes with their lives.

In *De kock v Minister of Water Affairs and forestry and others*¹⁶, it is apparent that the Applicant complied with the above requirements. The applicant based his application on the infringement of his environmental rights and his property rights arising from pollution caused by ISCOR's factory activities in Vanderbijlpark. Various Respondents were accordingly cited whom Applicant alleged had failed to implement legislation aimed at containing pollution and to prosecute ISCOR for causing pollution. Applicant was not

¹⁶ *Supra* See also *Mnguni v Minister of Correctional Services and Others* 2005 (12) BCLR 1187 (CC). The Applicant in this case applied for the direct access to the Constitutional Court in terms of section 167 (5) of the Constitution and Rule 18.

represented and sought direct access to the Constitutional Court. The Constitutional Court is the Court of Final instance with regard to the interpretation and enforcement of the provisions of the Constitution.¹⁷ Direct access to the Constitutional Court can be granted only in the exceptional circumstances. It must be borne in mind that the Applicant was not represented in this matter. There are requirements to comply with in order to be granted a direct access to the Constitutional Court, pursuant Rule 18 and in terms of section 167 (6)(a) of the Constitution.¹⁸

It would be difficult to grant direct access if the issues raised, though important but are complex such that they weigh against the Court being a court of first and final instance. Considering the importance and complexity of the issues in *De Kock's* case, the Constitutional Court needed to be assisted by views of other court. The court *a quo* perhaps in its *ratio decidend* could have raised an important point that would have turned to be persuasive in the Constitutional Court's judgment.

It is important that the issues must be set out clearly for the purpose of adjudication. The issues raised by the Applicant relate to environmental law and appeared to be of public interest. The Applicant did not comply with requirements of Rule 18 (2) and the provision of section 167 (5) of the Constitution. The application was therefore dismissed.

¹⁷ *The Permanent Secretary, Department of Welfare, Eastern Cape Provincial Government and Another v MN Ngxuzza and Others Case Number 2001 (4) SA 1184 (SCA)*, SCA the court confirmed that the quintessential requisites for class action are: that class is so numerous that joinder of all members is impracticable; there are questions of law and fact common to class; the claims of applicants representing the class are typical of the claim of the rest and applicant will fairly and adequately protect the interests of the class.

¹⁸ *Government of the Republic of South Africa and Others v Grootboom and Others 2002 (5) SA 721 (CC)*.

It must be further noted that it is not always practical for unrepresented Applicant to set out issues clearly for the purpose of adjudication. For example:

- The grounds on which it is contended that it is in the interest of justice that an order for direct access be granted;
- The nature of the relief sought and the grounds upon which such relief is based;
- Whether the matter can be dealt with by the Court without the hearing of oral evidence and, if is not; and
- How such evidence be adduced and conflicts of fact resolved.

It is impractical to expect applicants acting *pro se* to comply with these requirements. It was stated previously that the Constitution empowers the courts to develop and build their own arsenal of remedies, these powers are supplemented and underpinned by a number of specific constitutional remedies.¹⁹ These include: orders of invalidity (section 172 (1) (a), the development of the common law to give effect to constitutional rights (section 173, 8(3)), constitutional rights (section 173), and procedural remedies derived from some of the substantive rights (e.g sections 32 (1), 33 (2) and 34). The Court in *De Kock's* case accordingly, dismissed the application for direct access.

¹⁹ [2005] Env. L.R. 36. Directive is intended to ensure that waste disposal operations and waste recovery operations carried out under such permits are consonant with the objectives laid down in the first paragraph of article 4 of the Directive.

2.3 The Waste Directive

Commission v Ireland,²⁰ the Commission brought proceeding against Ireland under Art. 226 EC, requesting a declaration that Ireland had failed to comply with its obligations under the Waste Framework Directive. The Commission received a number of complaints regarding waste management and disposal at a range of sites across Ireland.

The Commission submitted that Ireland had failed to take appropriate measures to establish an integrated and adequate network of waste disposal operations, as required by Article 5. The Commission submitted that the lengthy absence of an operational permit system in compliance with Articles 9 and 10 of the Directive was sufficient in itself to establish that Ireland has not taken the measures required to ensure the recovery or disposal of waste without endangering human health and without using processes or methods which could harm the environment, as it was obliged to do pursuant to the first paragraph of Article of the Directive.

The issue raised in this case is different from the one raised in *De Kock*.²¹ It is conceded that both cases relate to environmental rights. In the above case, Ireland (Respondent) was directed what to do in order to avoid endangering human health , and Respondent failed to act accordingly. This case does not raise technical issues, for example, whether Applicant (Commissioner) had standing to prosecute this matter. It would appear that the

²⁰ 2005 (12) BCLR 1183 (CC). Article 4 of the Directive sets out various objectives which the Member States must observe in their performance of the more specific obligations imposed in them by other provisions of the Directive. The Court cited *Commission v Greece* [2000] E.C.R 1-5047 as persuasive and decisive in this matter.

²¹ Referred to above.

Waste Framework Directive granted standing and direct access to the Applicant to pursue direct access prosecute this matter in court. It is common cause that the Respondent contravened certain provision and/or Articles of the Waste Framework Directive and appropriate relief was granted. In *De Kock* the Court did not entertain the merits of the case and therefore the case was technically dismissed.

3. THE ENVIRONMENTAL LITIGATION CONSISTS OF PUBLIC INTEREST ACTIONS

In Brazil the possibility of public interest litigation has been recognized by legislation creating the civil public action,²² and it has noted that some constitutions recognise public interest litigation. The Hungarian law is particularly interesting, for there is no requirement of standing at all to take a case to the Constitutional Court, nor a prohibition of “hypothetical” litigation, indeed the Court decides only whether norms are constitutional, not the outcome of individual application of norms.²³

It is Public Interest Litigation in India which has perhaps attracted the widest attention. Since the early 1980s the Indian High Court has developed a bundle of procedures to be used in cases intended to represent the interests of the voiceless poor, which depart considerably from the classic common law model of the gladiatorial dispute between

²² The core of environmental litigation in Latin America consists of public interest actions, particularly those formulated in human rights terms. Jose L Fernandez, “State Constitutions, Environmental Rights Provisions, and the Doctrine of Self-Execution : A political Question” (1993) 17 *Harv En LR* 333 Andriana Fabra Aguitar, “Enforcing the Right to a Healthy Environment in Latin America (1994) 5 (4) *RECEIL* 215.

²³ Sajo, “Reading the Invisible Constitution : Judicial Review in Hungary” (1995) 15 *Oxford J Leg Studies* 253.

affected parties fought out before a passive judicial umpire. At its core is an expanded concept of *locus standi* embracing organizations or individuals which are not even a segment of the affected classes, and who would previously have been regarded as busy-bodies. Actions may be begun informally, even by letter addressed to the court, and not necessarily supported by affidavit. The High Court itself may appoint individuals or organizations to carry out factual investigations or may in effect require the state to produce evidence.¹ Orders made may go beyond the formal parties to the litigation, and are more likely to involve future action rather than backward looking remedies, and respondents may be required to report progress in implementation to the court.

The High Court's original jurisdiction is based on article 32 of the Indian Constitution for the enforcement of fundamental rights and these "public interest litigation" cases must be anchored to this, although an expansive view of particular human rights provisions has often been taken and remedies have been tailored to the circumstances going far beyond what courts are accustomed to award.²⁴

The Court has sometimes suggested that this is not really an adversary form of litigation, since it is directed towards realizing rights to which the authorities are already committed under the Constitution and litigation.

¹ "Taking Suffering Seriously" in Baxi ed., *Law and Poverty* (Bombay, Tripathi, 1988). P J Jaswal, *Directive Principles Jurisprudence and Socio-Economic Justice in India* (New Delhi : APH Publishing Corp 1996).

²⁴ Rosencranz et al, *Environmental Law and Policy in India : Cases, Materials and Statutes* (Bombay : Tripathi, 1991). Bharat Desai *Water Pollution in India : Law and Enforcement* (New Delhi : Lancers, 1990).

In *State of Himachal Pradesh v Ganesh Wood Products*²⁵ the High Court of India upheld the action of a citizen of Himachal Pradesh (a citizen who is a member of the Legislative Assembly of the State, and the President of some environmental association) in bringing a public interest petition to prevent the state government approving the establishment of more industry involving the cutting down of a certain sort of trees. The case itself is not a particularly significant environmental sections of the Indian Constitution, though the Court did call in aid notions of sustainable development, inter-generational equity and the Brundtland Report. The Court ordered not only that the respondent should not start a factory, but also that the state government should carry out a survey of resources of Khair wood in the state, through an expert committee which the government should appoint, only then should the High Court makes a final determination of whether new factories could be started.²⁶ The pollution involved emanated from stone crushing carried on near a village, despite a 1992 government order to move the activity, itself following an earlier High Court public interest case.²⁷ The respondents claimed to be carrying out their activities under a state licence and to be taking necessary precautions against pollution, they also claimed that the petitioner was a busy-body and had no standing to bring the petition. The court ordered the stone crushing unit closed. Its decision is of interest especially for two aspects :

- its elaboration of the situations in which citizens can bring such litigation (though it adds nothing to existing jurisprudence)

²⁵ AIR 1996 P & H 30. See also *Arco Iris v Instituto Ecuatoriano de Mineraiy de Agricultruy Ganaderia Tribunal de Garantias Constitucionales caso No. 224/90, Resolucion No. 054-93 CP.*

²⁶ Another case was in the Haryana High Court, *Ishwar Singh v State of Haryana* AIR 1996 P & H 30.

²⁷ *M.C. Mehta v Government of Haryana* (1992) 3 Scc 256.

- and
- its direction on claims for compensation.

As far as compensation was concerned, the Court ordered that claims for compensation from those who claimed to have been injured by the stone-crushing activities should be decided within three months of being received, and should be paid by the business involved. The Court anticipated that the State would set up a special body to determine these claims which it suggested should be headed by some-one with a judicial background. If any firm failed to pay compensation awarded they should be refused a licence for future stone-crushing. Thus the Court effectively by-pass the entire delictual litigation process, and granted a right to compensation for breach of constitutional rights.²⁸

A final example of public interest litigation comes from the Philippines. In *Minor Oposa v Factoran*²⁹ the High Court recognized the right of future generations. It also held that section 16 Article II of Philippines Constitution was self executing, contending that the fact that it was in the section of the Constitution on Principles and State Policies did not mean that it was less important than provisions in the Bill of Rights. (The decision was not a final one, it simply refused to strike out the action for an order to cancel licences to cut timber). The majority held that :

²⁸ *Rural Litigation and Enlightenment Kendra v State of UHar Pradesh* AIR 1989 SC 594 read with *M.C. Mehta v Union of India* (1987) 4 SCC 463.

²⁹ (1994) 33 ILM 173.

Petitioners minors asserted that they represented their generation as well as generations yet unborn. The Court find no difficulty in ruling that they can, for others of their generation and for the succeeding generations, file a class action. Their personality to sue on behalf of the succeeding generations can only be based on the concept of intergenerational responsibility insofar as the right to a balanced and healthy ecology is concerned. Every generation has a responsibility to the next to preserve that rhythm and harmony for the full enjoyment of a balanced and healthy ecology. The minors' assertion of their rights to a sound environment constitutes, at the same time, the performance of their obligation to ensure the protection of that right for the generations to come.³⁰

In South Africa the existence of the constitutional provision (under the 1996 Constitution) was used as a basis for holding that the Minister of Health had the standing to apply for an interdict (equivalent of an injunction) to stop a process which was causing pollution, even though this remedy was not provided for under the legislation in question (for which the Minister was the responsible authority).³¹

One of the bases for holding that provisions are exhortatory rather than enforceable has been the difficulty of giving content to the provision.³² One of the submissions before the

³⁰ Nelivigi et al, "This is perhaps shown also in the decision of the Bombay High Court at Goa when it refused to halt the construction of a railway line pending environmental clearance stating that, "It is not open to frustrate the project of public importance to safeguard interests of a few persons" *Goa Foundation v Konkan Rly Corpn* (1994) Mah LJ 21, 26.

³¹ *Minister of Health and Welfare v Woodcarb (Pty) Ltd* 1996(3) SA 155.

³² Jill Cottrell *Environmental Protection by Constitution* : A paper on Conference on Trends in Contemporary Constitutional Law : University of Hong Kong 13-14 December 1996.

South African Constitutional Court in connection with the acceptable of the 1996 Constitution, was to the effect that,

the right should include a concise formulation of how “pollution and ecological (environmental) degradation” is to be prevented and controlled.³³

The issue does not seem to have been addressed by the Court, but it does demonstrate the sorts of concerns which courts and litigants will have.

Sometimes the enforcement of an environmental constitutional right would not involve the insistence that government pass legislation but requiring it to stop doing something which is clearly a violation, not so different, from what courts often are called upon to order in human rights cases.³⁴ In some countries, it is clear beyond doubt that action must be taken and that the government is breaching environmental rights by any standards. Some countries face state lawlessness, which may be as damaging to the environment as it has been to political opponents and unpopular minorities. The more egregious the infringement, the easier it is for the court to step in, if the government is permitting the importation of hazardous waste, or if the government is failing to make

³³ Certification of the Amendment Text of the Constitution of the Republic of South Africa, 1996. *In re Certification of the Republic of South Africa* 1995, 1996 (10) BCLR 1253 (CC).

³⁴ Schwartz, “Do Economic and Social Rights Belong in the Constitution?” 1995) *10 Am Int Law and Policy* 1233. It is similar to the difference between the position of the Inter-American Court of Human Rights and the European Court of Human Rights. The latter deals with issues like the closed shop and freedom of speech and homosexual rights. The former is likely to have to deal with state sponsored murder and disappearances.

any attempt at all to control a potentially dangerous situation, or if anyone can see that what is happening is wrong, the court may be able to step in.³⁵

3.1 Summary

There is a wide variety of provisions in domestic constitutions intended to protect the environment in some form or other, in most instances to the benefit of *homo sapience*.

The precise scope to the protection offered, and who is entitled to take advantage of it and against whom is not easy to generalize about. Even if there are rights and duties enforceable by the courts there are likely to be substantial difficulties faced by litigants and the courts in resolving tensions between environmental protection and other values such as economic development.³⁶ There are also problems in giving content to the provisions in terms of standards, and also in terms of giving a voice to those whose interests the provisions are supposed to protect.

Some courts have made some headway in approaching these issues, and there are developments in other areas of the law which offer some potential for the environmental field. However, a court like the High Court of India, in its particular context, can not even be called upon to realize environmental rights, and if they are, may find it impossible to operationalise even an explicit “right to environment.”³⁷ It is a main thrust

³⁵ *Lookshmikant Pande v Union of India* AIR 1984 SC 469 also *Elumalai v Tamil Nadu* ILR 1984 I Mad 312.

³⁶ Edesio Fernades, “Defending Collective Interests in Brazilian Law : An Assessment of the ‘Civil Public Action’” (1994 3 *RECIEL* 243). See also Antonio GM Law Vina, “The Right to a Sound Environmental in the Philippines : The Significance of the *minors oposa case*” (1994) 3 *RECIEL* 246.

³⁷ *Buffalo Traders Welfare Association v Maneka Gandhi v Territory of Delhi* (1994) DLT 229.

of this paper that how these provisions are used will be dependent far more upon the expectations of the constitution and the courts in particular countries and politico-constitutional systems than of the wording of the constitutional provisions themselves.³⁸

3.2 Right to be heard in environmental proceedings

South African Constitution, by including environmental rights as fundamental, justiciable human rights, accorded appropriate recognition and respect in the administrative processes.³⁹ It was further held that, together with the change in the ideological climate must also come a change in our legal and administrative approach to environmental concerns.⁴⁰

Director, Mineral Development, Gauteng Region, Save the Vaal Environment,⁴¹ this appeal raises the question whether interested parties, wishing to oppose an application by the holder of mineral rights for a mining licence in terms of section 9 of the Mineral Act,⁴² are entitled to raise environmental objections and be heard by the first appellant, who is the official designated to grant or refuse such licence (the Director). *In casu*, the Director, taking the view that consideration of such objections would be premature at that stage, refused the respondents a hearing. The Director was successfully taken on review. The Appeal is aimed at reversing the outcome of that review.

³⁸ Jill Cottrell *Environmental Protection by Constitution* : A paper on Conference on Trends in the Contemporary Constitutional Law : University of Hong Kong 13-14 December 1996.

³⁹ *Director, Mineral Development, Gauteng Region v Save the Vaal Environment* 1999 (8) BCLR 845 (SCA).

⁴⁰ See the above case.

⁴¹ 1999 (8) BCLR 845 (SCA).

⁴² 50 of 1991.

The second appellant (Sasol Mining) is the holder of extensive mineral rights, including those in respect of an area comprising three farms in the Sasolburg district. These forms are in the front of Vaal River.

During May 1996 Sasol Mining was in urgent need of extending its coalmining activities to the area in question. It was established that the only feasible manner of mining for coal in that areas was by open-cast mining. The envisaged mining site was in the north-west part of the area and very close to the southern bank of the Vaal River. Sasol Mining then applied to the Director for a mining licence in terms of section 9 of the Act.⁴³

The first respondent (Save) is an unincorporated association. Its members are people who own property and live along the Vaal River. Its object, according to its written constitution, is to assist its members to protect and maintain the environmental integrity of the Vaal River and its environs for current and future generations. The other respondents are either members of Save or property owners in the affected area.

In 1996, while Sasol Mining's application was still under consideration by the Director, Save's Attorneys, raised the contention that Save is entitled to be heard in the said application. The Director informed Save Attorneys that he was not obliged to hear Save at the stage and issued a mining license to Sasol Mining in respect of the envisaged open-cast mine.

⁴³ 50 of 1991. *S v Mercer and Another* 2003 (6) BCLR 616 (NC).

The environmental concerns raised by the respondents (Save) can be summarized as follows :⁴⁴

- the destruction of the Rietspruit westland
- the threat to *fauna* and *flora*
- pollution
- loss of water quality
- decreased value of property

The respondents argued that the rule in *audi alteram partem* should have been applied by the Directors. The rule comes into operation, whenever, a statute empowers a public official or body to do an act or give a decision prejudicially affecting a person in his or her liberty or property or existing rights or interest, or whenever such a person has a legitimate expectation of a hearing, unless the statute expressly or by necessary implication indicates the contrary, or unless there are exceptional circumstances which would justify a court in not giving effect to it.⁴⁵

The Court⁴⁶ held that the rule *audi alteram partem* applies when application for a mining licence is made to the Director in terms of section 9 of the Act. Such a hearing need not necessarily be a formal one, but interested parties should at least be notified of the

⁴⁴ *Director, Mineral Development, Gauteng Region v Save the Vaal Environment* 1999 (8) BCLR 845 (SCA).

⁴⁵ *Du Preez and Another v Truth and Reconciliation Commission* 1997 (3) SA 204 (A) also reported at 1997 (4) BCLR 531.

⁴⁶ *Director, Mineral Development, Gauteng Region v Save the Vaal Environment* 1999 (8) BCLR 845 (SCA).

application and be given an opportunity to raise their objections in writing. If necessary, a more formal procedure can be initiated. Nothing in section 9 or in the rest of the Act either expressly or by necessary implication exclude the application of the rule, and there are no considerations of public policy militating against its application.⁴⁷

4. CONSTITUTIONAL CULTURE

What the constitution provides is, of course, only, at the best, half of the battle. If people do not or cannot go to court, or if the courts respond without enthusiasm or even creativity to the opportunities presented by the constitution, there is some⁴⁸ risk that the constitution may remain a dead document. The constitution is viewed as a living document, which embodies fundamental values which are applicable to the issue and which arise as society develops.⁴⁹ The meaning of the constitution is not fixed but changes over time, especially where a clause in a constitution is open to various interpretations, it is the judge's function to seek out and apply that meaning which most accords with the provisions of the constitution and the circumstances prevailing at the time.

⁴⁷ *Brundtland Report : World Commission on Environment and Development, Our Common Future*, (Oxford University Press 1987).

⁴⁸ These go further than the 1993 Constitution which stopped at well-being, for a brief account of the suggestions and their source see du Bois "Well-being" and "the Common man" : A critical Look at Public Interest Environmental law in South Africa and India" in Robinson and Duckley, *Pulic Interest Perspectives in Environmental Law* (Chichester : Wiley Chancery, 1995)135.

⁴⁹ *Devenish Interpretation of Statutes*, chapter two.

The constitution is viewed as an enduring document which accommodates changing circumstances and the values of the society as it evolves.⁵⁰ Within this context, the function of the judiciary, as an institution to which the application of law is entrusted, is to discover, define, proclaim and apply society's fundamental values as embodied in the constitution.⁵¹

It is contended in this paper that a value-oriented approach to interpretation of a constitution, as a living document, is intended to deal with the affairs of society in accordance with the values, ideals and aspirations of that society as embodied in its constitution at any given time. It further takes into account the purpose of law in that society which seek to harmonize such purpose with the whole legal system. This is an appropriate approach to the interpretation of the South African Constitution, which has as its features the principle of constitutional supremacy, entrenched fundamental human rights and judicial review of legislation and executive acts.⁵²

The complex of social and professional attitudes and expectations, traditions and practices about the role of the constitution and its institutions may be termed the "constitutional culture." This is something one should be on guard against, especially where, as so often happens, constitutional provisions in one country influence those in another country.

⁵⁰ Sandalow "Constitutional Interpretation" Michigan Law Review, 1033.

⁵¹ *S v Majavu* 1994(4) SA 268(CK); 1994(2) SACR 265, the Court tends in its judgement to emphasize the importance of language as well as the underlying values of the Constitution.

⁵² *Devenish Society of Law Teachers Bulletin 21* a bold value-based approach to interpretation is more in keeping with the spirit and ethos of the Constitution, and is thus sounder jurisprudential approach to adopt.

Different conceptions of constitutions may be embodied in the documents themselves. Some authors have distinguished two broad conceptions of constitutions, the “traditional – institutionalized” and the “radical-democratic,” of which the United States would be the classic example of the former, and the latter would be, most often, poorer countries, with a programmatic concept of the role of the constitution.⁵³ Socialist constitutions have often been described as “programmatic” though most of the people would hesitate to describe these constitutions as “democratic.” Chris Osakwe stated that :

A socialist constitution is a living document which never was intended by its authors to be a legal dogma, but rather was conceived only as a legal platform for political action.⁵⁴

He concluded that rights in socialist constitutions were not self-executing but required legislation to “breath life” into them.⁵⁵ Although the state should comply with the constitution, it was not supreme over the party, and thus the “real rather than the apparent constitution of the communist party-state is the communist part programme.” The declaratory nature of human rights provisions is in accordance with these realities. There are now very few socialist constitutions in the world. It is possible that some of the Eastern European countries may have relics of old attitudes to constitutions remaining. On the other hand, it is clear that there are some which are developing a vigorous tradition of court activism.

⁵³ *The Common law of Constitutions of the Communist-Party States* (1977) 3 Rev. Soc. L 155.

⁵⁴ Chris Osakwe above 195.

⁵⁵ Ruti Teitel above 168.

More often, however, it is less the words of the constitution which dictate its place in the life of a country than contextual factors. An American writer suggested that, despite perceptions to the contrary, the United States courts cannot, except in rare situations, produce significant social reforms. The writer highlighted a number of constraints on court actions, including the restricted nature of constitutional rights, a lack of judicial independence from the other branches of government, the fact that “courts lack the tools to readily develop appropriate policies and implement decisions ordering significant social reform.” Among the failures which he attributed to these constraints is that to persuade the High Court to create a right to a healthy environment, in the early 1970’s.⁵⁶ It has been noted that, even when the state courts have such a right in the constitutions, they have tended to leave implementation to the political branches of government.

The United States constitutional scholarship tends to emphasise very much human rights and limitations on legislative powers from other constitutional jurisprudence tends to be concerned with negatives, with what the state cannot do. Even in Western Europe there has been sometimes a more “positive” approach, though not to the extent of requiring legislation. In Germany there has been a sense that the constitution represents a consensus of societal values and that is the role of the constitutional court to strengthen these, and there is less of a sense that the function of the constitution is to limit the powers of the state.⁵⁷ In the emerging states of Eastern Europe it is too early to suggest that there is a consensus, indeed some of the constitutions themselves reflect profound

⁵⁶ Gerald Rosenberg *The Hollow Hope : Can Courts bring about social change* (Chicago : University of Chicago Press, 1991).

⁵⁷ Caldwell “*The Crucifix and German Constitutional Culture*” 11 *Cultural Anthropology* 259 (1996).

uncertainty about values. This very fact has placed a burden on the constitutional courts, for sometimes, it has been suggested that constitutional provisions have been left vague because political compromise could not otherwise be reached, leaving constitutional courts to resolve the issues.⁵⁸

Constitutions do not remain static, even if the words do not change. In Nigeria, for example, during the five years after Independence before the military took over there were hardly any human rights cases and none of legislation being declared unconstitutional. But immediately it returned to civilian rule in 1970 there was a flood of constitutional litigation. Although the constitutional structure was rather different, the real change was in attitudes to government and to the role of law and courts. In India, Baxi has described public interest litigation and other judicial activism as the reassertion of the written over the unwritten constitution, the latter being what the executive sees when it reads the Constitution and which for many years of the High Court shared.⁵⁹ In Germany, it is said, the concept of the *Rechtsstaat* meant in the nineteenth century adherence to legality, in the twentieth century it has come to refer to a “social law-based state” (*soziale Rechtsstaat*), a progression described as from formal to material *Rechtsstaat*.⁶⁰

⁵⁸ Sajó “*Reading the Invisible Constitution : Judicial Review in Hungary*” (1995)15 Oxford J Leg Studies 253.

⁵⁹ Upendra Baxi *Courage, Craft and Contention : The Indian Supreme Court in the Eighties* (Bombay : Tripathi, 1985).

⁶⁰ Erika de Wet *can the Social State Principle in Germany Guide State Action in South Africa in the Field of Social and Economic Rights?* (1995) 11 SAJ on HR30.

Ruti Teitee has contrasted the United States courts with the more heavily politicized courts of Eastern and even of Western Europe.⁶¹ He suggested that a factor is the distrust of politicians especially in the former Soviet block, leading to a greater role for the courts, and says “American constitutional culture and notions of judicial review are inopposite.” A factor likely to be significant, one would hypothesise, is the different traditions in terms of the place of the judiciary in the development of the law. It has often been remarked that common law, as well as according to the judiciary a major role (historically the major role) in the development of the law, places them upon a sort of pedestal at the pinnacle of the legal profession. The civil law countries have career judiciaries, so there is not the same sense of the judge being by definition of exalted status. This is tied in which the restriction of judges in civil law systems being able to decide on the constitutionality of laws. The Constitutional Court is an exalted body, but it alone has the power to decide constitutional issues. In the case of Eastern Europe, it has been suggested that this restriction also serves the purpose of keeping this function in the hands of the small band of judges who have the professional competence, in the light of the lack of tradition of judicial independence during communist period :

It was hoped that, although there were insufficient qualified and uncompromised musicians for a full orchestra, at least a handful with an unspoiled ear would be available for a chamber orchestra.⁶²

⁶¹ “*Post-Communist Constitutionalism : A Transitional Perspective*” (1994-5)26 Col HRLR.

⁶² Sojo “*Reading the Invisible Constitution : Judicial Review in Hungary*” (1995) 15 Oxford J Leg Studies 254.

It is the Indian High Court which perhaps presents the most striking contrast with the courts of the United States. The distrust of politicians which marks some Eastern European countries is a factor in India. Since the Emergency of 1975, and the consciousness which produced that democracy could not be taken for granted, and the sense on the part of the judiciary of having to some extent failed the nation at that crucial juncture, the High Court especially has been remarkably activist. Even the Indian High Court cannot be activist all by itself, someone must be prepared to bring the case to it, and have the faith that they will rise to the challenge.

Already embarrassed by the charge that it was pusillanimous during the Emergency and spurred on by an inchoate alliance of social activists, lawyers, journalists and academics, some judges of the High Court sought to rethink the fundamental concerns of the Constitution and the responsibility of the judges to effectuate this concerns.⁶³

The outcome was the public interest litigation development already mentioned, a movement which has breathed life into supposedly non-justifiable directive principle.

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Indeed, the High Court has found an environmental content to constitutional provisions which makes no mention of the environment at all, such as the right in Article 21.⁶⁴ Thus they have done what the United States High Court was reluctant to do.

⁶³ Rajeev Dhavan "India" in Lawrence Beer *Constitutional Systems in Late Twentieth Century Asia* (Seattle: University of Washington Press, 1002).

⁶⁴ Jill Cottrell *Environmental Protection by Constitution* citing the paper of Prof M P Singh for the same *Conference on Trends in Contemporary Constitutional Law : University of Hong Kong* 13-14 December 2006.

The Indian Court has also manage to turn the Directive Principles into far more than exhortatory provisions, and have established a position in which the human rights provisions and the directive principles are to be treated as almost equal in importance, at least one Phillippine court has taken a similar line. The contrasts very marketable with the assumptions of the Ghanaian Committee quoted earlier, and with that of other countries such as Papua New Guinea where the courts have taken at its face value the statement that the provisions are not to be justiciable. Such differences in approach on the part to the wording of the constitutions themselves, but partly also to differences of constitutional culture.⁶⁵

4.1 Orders to enact legislation

The formulation of the socio-economic rights entrenched in the South African Constitution, is peppered with the duties imposed on the state to enact legislation. In terms of item 21(1) of schedule 6, this legislation must be enacted within a reasonable time. There can be little doubt that these constitutional obligations imposed on the legislature, are justifiable.⁶⁶

- In terms of the supremacy clause in section 2, all obligations imposed by the Constitution “must be fulfilled” and in terms of section 237 it must be done “deligently and without delay.”

⁶⁵ The doctrine calls upon the courts to leave political issues to politicians. It has been pointed out that the issue of whether environmental, or other, rights are self-executing is essentially a similar question and in the *Iminor oposai* case in the Phillipines, the court did indeed discuss the political question doctrine, only to reject it in the context of this case, Jill Cottrell.

⁶⁶ Adv Wim Trengore, *Judicial Remedies for Violations of Socio-Economic Rights*. Paper delivered in May 2004: Good Governance Programme University of Pretoria, Centre for Human Rights.

- In terms of the application clause in section 8(1), the Bill of Rights which imposes these duties, binds “the legislature.”
- It has been noted that, in terms of section 172(1)(6), the court may make any order that is “just equitable” for the protection and enforcement of the Constitution, and may in terms of section 38 grant any “appropriate relief” for a violation of the Bill of Rights.⁶⁷
- In terms of section 165(5) such an order binds “all persons to whom and organs of the state to which it applies.” Parliament and the legislatures clearly constitute “organs of state” within the meaning of the definition of this concept.
- Section 167(4)(e) indeed makes it clear that the constitutional court has jurisdiction to “decide that parliament --- has failed to fulfil a constitutional obligation.”

However, what remedy do the courts have if the responsible legislature refuses to enable the legislation required of it under the Constitution? Can a court compel an elected legislature to enact legislation against its will? The following responsibilities come to mind.

- It ought ordinarily to be enough simply to declare that the legislature in question is obliged under the constitution to enact the legislation and that its failure to do so is in violation of the Constitution. This should be the first step. A responsible legislature would ordinarily comply.

⁶⁷ Adv Wim Trengore above. Distinction between political and cultural rights as opposed to socio-economic rights is artificial, see *Nkuzi Development Association v Government of the Republic of South Africa* 1999(2) SA 733 (LCC) and *August v Electoral Commission* 1999(3) SA 1 (CC). *Government of the RSA v Grootboom* 2000(1) SA 46 (CC), the minimum core content of the right to housing is only an indicator in respect of this larger inquiry. A housing policy that did not cater for people in desperate need was clearly unreasonable and therefore unconstitutional.

- If it does not, the court may issue a mandatory order against the legislature directing it to enact the legislation on pain of being held in contempt of court for which it may be fined.
- If the legislature still resists, the court may issue a mandatory order against the members of the legislature personally, directing them to enact the required legislation on pain of being held in contempt of court for which they may be fined or imprisoned.
- As a last resort, the court may issue a *legislative order* which prescribes the rules meant to have been enacted by the legislation required under the Constitution.

It is clear that the protection and enforcement of the Bill of Rights and particularly those of its provisions which impose positive duties on the State, will require the courts to develop and create novel remedies. Justice Ackermann made it clear in *Fose v Minister of Safety and Security*⁶⁸ that the Constitutional Court is alive to this need:

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In our context an appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the right entrenched in the constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on occasions when the legal process does establish that an infringement of an entrenched

⁶⁸ 1997(3) SA 786 (CC). *Minister of Health and Others v TAC and Others* 2002(5) SA 721 (CC). Since the judgment in *Government of the Republic of SA v Grootboom* 2001(1) SA 46 (CC), the South African government has commissioned the drafting of the new chapter, to be included in the National Housing Code, on “Housing in Exceptional Urgent Situation.” When implemented, this new programme will provide subsidies for victims of natural and manmade disasters, and people threatened by eviction, to acquire temporary shelter (of a lower standard than the current RDP – style house).

right has occurred, it be effectively vindicated. The courts have a particular responsibility in this regard and are obliged to forge new tools and shape innovative remedies, if needs be, to achieve this goal.

In doing so, the courts may on occasion have to act in a more proactive and inquisitorial fashion and intrude further into legislative and executive domain than they have done in the past.⁶⁹

5. CONCLUSION

This paper has not addressed other aspects of the implementation of environmental constitutional rights. It is obviously true that the courts alone cannot carry a constitution into effect. What the legislature and the administration do is in the ultimate analysis of the real test. But it is very difficult to ascertain the legislative impact of a constitutional provision. Suppose one could show that after an environmental right was introduced into a constitution there was a spate of implementing legislation? Would this show any more than there was a current enthusiasm on the part of legislators for environmental issues, would not the legislation flow from the same impulse as the constitutional amendment?

⁶⁹ Adv Trengore above. See also *Government of the Republic of South Africa v Grootboom* 2001(1) SA 46 (CC). The Constitutional Court held that these two subsections impose on government an obligation to adopt reasonable housing policies, legislation and implementation measures, and that government's existing policy, as implemented in the metropolitan area in question, was not "reasonable" because it failed to cater to people in "desperate need." The nature and content of the right to have access to adequate housing in section 26(1) and (2) was comprehensively explored in *Grootboom*.

The fact that courts alone can achieve little is borne out by the fact that even in those countries with the most activist courts commentators are not very encouraging about the actual improvement in the environment. Thus in Brazil, which has a constitutional environmental right and a statute providing for public interest litigation, it is said that the situation has not significantly improved since the constitutional provision was introduced, which the author attributes to the political and legal systems, and the need for greater democratization of the political system, in Philippines a commentator suggests that neither courts nor government are the real keys to environmental improvement, and that the really important factor is community action.

By

Advocate Hlako Choma

Senior Lecturer : University of Venda, South Africa
Head : Department of Public and International Law

B.Iuris : University of the North, South Africa
LLM : Howard University, Washington DC
LLM : Georgetown University, Washington DC

Address : Private Bag X5050
Thohoyandou
0950
South Africa

Tel. : 27 (15) 962 8354
Fax. : 27 (15) 962 4749

E-mail Address : advchoma@yahoo.co.uk
chomah@univen.ac.za