

Chapter 29: Human Rights and the Environment

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1 Introduction

Modern human rights law is commonly considered to have its roots in the 1945 Charter of the United Nations (UN), whereas environmental concerns started to move to the centre of international activities with the UN Conference on the Human Environment held in Stockholm in 1972.¹ More than 30 African countries² participated at this conference and committed themselves – at least to some extent – to the recognition and promotion of environmental concerns on the international level.³ At the conference, the then Indian Prime Minister Indira Gandhi stated this:⁴

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

Colonialism, apartheid, and the unequal distribution of resources have curbed human rights and challenged progress in Namibia for a long time. Today, over 30 years after Independence⁵ and the promulgation of the Constitution of the Republic of Namibia,⁶ the country still faces challenges that impede, *inter alia*, the explicit recognition of environmental (human) rights. The adoption of a human rights framework and culture in terms of the Namibian Constitution of 1990 has, without doubt, been a positive attribute of the country since it gained Independence. The Constitution serves as the fundamental and supreme law, and the Namibian Government is subordinate to it.⁷ The Constitution also established a new regime relating to natural resources in the country.⁸ Regardless of the aforementioned, the legal milieu in support of environmental human rights is still far from perfect.

1 The following passages were largely taken from Ruppel (2010h).

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

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

4 Quoted in Anand (1980:10).

5 Namibia became independent on 21 March 1990.

6 No. 1 of 1990.

7 Naldi (1995:15-19).

8 Carpenter (1991:56-57).

In its first part, this Chapter examines the categorisation and concept of human rights in general, and then views the Namibian constitutional dispensation in the light of environmental concerns. The Chapter intends to establish whether, and to what extent, environmental human rights are explicitly or implicitly recognised in Namibia. At the same time this Chapter aims to show how human rights and the environment are inter-related and actually indivisible.

2 Human Rights Categories

The categorisation of human rights into generations has not been without criticism;⁹ and it must be admitted that the attempt to relegate human rights into categories, be it into generations or other classifications, always bears the risk of not being capable of determining exactly which rights belong to which category. This is inherent in the very nature of human rights in general, as human rights are universal, inalienable, indivisible, interrelated and interdependent.¹⁰

The categorisation of human rights into three generations goes back to the first Secretary-General of the International Institute for Human Rights in Strasbourg, the Czech-French lawyer Karel Vasak. As early as 1977, he divided human rights into three generations. First-generation human rights refer to traditional civil and political liberties that are considered important in Western liberal democracies, such as freedom of speech, of religion, and of the press, as well as a right of the individual to bodily inviolability, i.e. an obligation of non-interference against individuals by the state.¹¹ These rights are the classical human rights, as contained in Chapter 3 of the Namibian Constitution. For many years, the dominant position was that only these were genuine human rights.¹²

Second-generation rights are economic, social, and cultural rights. These have generally been considered as requiring affirmative Government action for their realisation. Second-generation rights are often seen to be group rights or collective rights, as they pertain to the well-being of groups, social formations, even whole societies. They contrast with first-generation rights, perceived as individual entitlements or prerogatives of individuals, as they refer to rights held, ascribed to and exercised by people collectively or by specific subgroups. Examples of second-generation rights include the right to education, work, social security, food, self-determination, and an adequate standard of living. These rights are codified in the International Covenant on Economic, Social

9 Scheinin (2009:25).

10 These important characteristics of human rights were formulated and reaffirmed by the World Conference on Human Rights held in Vienna in 1993, and are laid down in Section I(5) of the Vienna Declaration and Programme of Action.

11 Vasak (1977).

12 Steiner *et al.* (2008).

and Cultural Rights (ICESCR),¹³ and also in Articles 23–29 of the Universal Declaration of Human Rights.¹⁴ Writers reluctant to recognise second-generation rights as human rights have often based their argument on the assumption that courts are unable to enforce affirmative duties on states and that, therefore, such rights are merely aspirational. Similarly, critics have opined that, regardless of the political system or level of economic development, all states are able to comply with civil and political rights, but not all states have the means to provide the financial and technical resources for the realisation of affirmative obligations such as education and an adequate standard of living.¹⁵

Third generation¹⁶ or solidarity rights are the most recently recognised category of human rights.¹⁷ This group has been distinguished from the other two categories of human rights as their realisation is predicated not only upon both the affirmative and negative duties of the state, but also upon the behaviour of each individual. Rights in this category include self-determination as well as a host of normative expressions; their status as human rights is still controversial. Third-generation rights include the right to development, the right to peace, and so-called environmental human rights.¹⁸ Actually, and strictly speaking, environmental human rights do not really fit into any one particular category or generation of human rights. More generally, third generation rights can be viewed from different angles, somehow touching on all of the above-mentioned generations of rights. One could argue, for instance, that it should be possible to give individuals and groups access to environmental information, judicial remedies, and political participation through existing civil and political rights.¹⁹ In this context, environmental rights should be seen as empowerment rights that grant participation in environmental decision-making, compelling governments to meet minimum standards of protecting life and property from environmental hazards. This anthropocentric approach²⁰ focuses on harmful environmental effects on individuals rather than on the environment, thus leading to a ‘greening’ of human rights law. Another possibility for dealing with environmental human rights would be to treat an intact and healthy environment as an economic, social or cultural right, comparable to those codified in the ICESCR. This approach values the environment as a good in its own right, one that is vulnerable and at the same time linked to development. Like (other)

13 1966 United Nations International Covenant on Economic, Social and Cultural Rights.

14 1948 United Nations Universal Declaration of Human Rights.

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

16 See Ruppel (2008a:101ff.).

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

18 Vasak (1977).

19 1966 United Nations International Covenant on Civil and Political Rights.

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

economic, social and cultural rights, environmental rights are still largely of an aspirational nature and in many cases enforceable only through the relatively weak international supervisory mechanisms.

The fact that environmental human rights are usually not expressly recognised by the 1966 Conventions²¹ means that their status and content is often still seen to be contentious.²² Environmental human rights – for the purpose of this Chapter and, more importantly, for their improved recognition and application in Namibia – should not be seen in isolation from other human rights. They are Janus-faced, embracing simultaneously morality and the law. They are constructions rather than moral truths to be discovered and, as such, have an inherently juridical character, which entails an orientation towards a positive conceptualisation.²³

3 Constitutionality of Environmental Human Rights?

Many national constitutions cover environmental protection and establish it as a constitutional objective, an individual right, or both. These include Brazil, Ecuador, Kenya, Peru, the Philippines, South Africa, and South Korea. Among Council of Europe member countries, the constitutions of Belgium, Hungary, Norway, Poland, Portugal, Slovakia, Slovenia, Spain and Turkey acknowledge a fundamental individual right to environmental protection, while those of Austria, Finland, France, Germany, Greece, the Netherlands, Sweden and Switzerland enshrine environmental protection as a constitutional objective. In southern Africa, it can be observed that, during the past few decades, states have placed a strong emphasis on including environmental provisions in their respective legal frameworks. While some constitutions explicitly recognise the existence of such right within their respective Bills of Rights,²⁴ others include environmental concerns in the principles of state policy²⁵ rather than formulating a human right to environment as a fundamental human right.

When the Namibian Constitution came into force, it was lauded as a model for Africa because of its drafting process and content. The Constitution as adopted by the Constituent Assembly came into force on the date of Independence, namely 21 March 1990.²⁶ The Constitution can be considered to be among the most liberal and

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

22 Scheinin (2009:25).

23 Mushkat (2009:119ff.).

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

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

26 Article 130.

democratic in the world. It enjoys hierarchical primacy amongst the sources of law by virtue of its Article 1(6). It is thematically organised into 21 Chapters that contain 148 Articles relating to the Chapter title. Together, they organise the state and outline the rights and freedoms of the Namibian people.²⁷

The Namibian Constitution is special in several ways. Firstly, it was developed largely under the eyes and with the assistance of the international community. This is closely related to the fact that Namibia's decolonisation process was strongly supported by the implementation of UN Resolution 435. Secondly, the Namibian Constitution was certainly an experiment in southern Africa in putting an end to racial discrimination and apartheid.²⁸ Namibia has not totally relinquished its South African legal legacy and Article 140 provides for legal continuity, stating that all existing laws prior to Independence are to remain in force until repealed by Parliament. This does not only mean that Roman-Dutch law continues to be the ordinary law of the land, but also that Namibia has a considerable amount of pre-Independence legislation, of which some certainly needs renewal.

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

3.1 The Preamble

The Preamble of a constitution is an important tool for the interpretation of such document, because it reflects the general spirit of the drafters.²⁹ The Namibian Constitution makes no clear reference to the environment in its Preamble. However, it explicitly recognises that “the inherent dignity” and “the equal and inalienable rights of all members of the human family is indispensable for freedom, justice and peace”. The

27 Bukurura (2002:57).

28 Watz (2004:21).

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

reference to “inalienable rights” leads immediately to Chapter 3 and Article 5 therein. It states that

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

The 1996 South African Constitution aims to “establish a society based on democratic values, social justice and fundamental human rights”.³⁰

Here, the reference to “fundamental human rights” also opens the way for Chapter 2 of the 1996 South African Constitution, namely the Bill of Rights, and therein to Section 24.³¹ The 1996 South African Constitution makes it very clear from the outset that not only the Bill of Rights but also the environmental rights in Section 24 thereof apply to all laws in the country and is obligatory for all the organs of the state. However, Section 24 jurisprudence in South Africa has not always been applauded when it comes to understanding the nature of such right and how it operates vis-à-vis other rights.³² In the case of *HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others*,³³ for example, the court held that Section 24(b) was akin to a directive principle and was “aspirational in form”. The aforementioned view of the court is, however, incorrect.³⁴ Firstly, the rights in the Bill of Rights are justiciable rights, which can be distinguished from directive principles in two ways: While fundamental rights may either prohibit the state from doing something or may place a positive obligation on the state, directive principles are simply affirmative instructions to the state. While fundamental principles are legally binding, directive principles are not. Secondly, Section 24(b) is clearly not aspirational in nature. The mandate stemming from Section 24(b) “falls within the realm of real expectations”.³⁵

3.2 Fundamental Rights and Freedoms

Chapter 3 of the Namibian Constitution outlines 16 fundamental rights and freedoms, reflecting the values and spirit of the independent Namibian nation. The Constitution

30 Preamble of the 1996 South African Constitution.

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

32 Ferris (2009:132).

33 2006 (5) SA 512 (T).

34 This is in accordance with Ferris (2009:132).

35 Ibid.

excels in being a document that guarantees human rights by comprehensive coverage and provisions set out in clear language. Human rights are justiciable as their protection can be secured through the courts.³⁶ This gives citizens the right to take executive agencies to court, and the judiciary reigns as the authority to adjudicate such matters. The set of enforceable fundamental human rights and freedoms are to be respected and upheld by the Executive, the Legislative and the Judiciary, all organs of Government, its agencies, and, where applicable, by all natural and legal persons in Namibia.³⁷ Apart from the right to culture (Article 19) and the right to education (Article 20), Chapter 3 does not contain any typical socio-economic rights – such as rights to housing, water or access to health services.³⁸ Instead, such socio-economic considerations are addressed elsewhere in the Constitution, especially in the Principles of State Policy.³⁹

Chapter 11 contains Principles of State Policy that cannot be categorised as constitutional rights in the strictest sense.⁴⁰ Article 95(1) compels state organs to be directed by the environmental principle of state policy.⁴¹ Article 95 stipulates that

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

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

Article 101 states that the Principles of State Policy are not legally enforceable, but merely serve as societal goals in making and applying laws to give effect to the fundamental objectives of the different principles. The principles must also be employed in the interpretation of Namibian law and guide the state in its decision-making processes.⁴² Constitutional Principles of State Policy serve as a stimulus for new initiatives or endeavours – especially where existing policy, law or programmes seem inadequate to attain the principles' objectives.⁴³ The principles must similarly be employed as direction indicators in setting Government priorities. Also, the judiciary should apply the Principles of State Policy in constitutional interpretation and use them to fill gaps in the legislative framework when and where necessary. These generic features of constitutional principles of state policy arguably also apply to the environmental principle of state policy in the Constitution of Namibia. The language used in Article 95 indicates that the fulfilment of the Principles of State Policy requires positive action on the part of Government, i.e. “[t]he State *shall* ... promote and maintain” [emphasis added]. At first sight, this creates the impression that such state principles create enforceable

36 Bukurura (2002:21).

37 Article 5.

38 See Erasmus (1991:13).

39 Watz (2004:75).

40 Naldi (1995:99).

41 Hinz (2001:77).

42 Watz (2004:186).

43 Du Plessis (2008:177-179).

obligations that must be fulfilled.⁴⁴ Although this is not the case in Namibia, the state is expected to promote and maintain the welfare of the people by adopting policies aimed at maintenance.⁴⁵

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

3.3 Article 6: The Right to Life

Article 6 regulates, amongst others, that “[t]he right to life shall be respected and protected.”

It is clear that human life depends strongly on the state of the environment, including water, air, natural resources, plant and animal life. Environmental degradation threatens people’s lives and livelihoods. The right to life is the most basic human right: a person can exercise no other right unless this most primary of rights is adequately protected. As such, the right to life is one that should be interpreted narrowly, and this arguably requires the state to adopt positive measures. Presenting compelling facts, however, is critical for an individual to successfully present a case. Obviously, the most compelling cases involve environmental harm that is likely to cause death in the short term.⁴⁶

3.4 Article 8: Respect for Human Dignity

Article 8 of the Namibian Constitution states that:

- (1) The dignity of all persons shall be inviolable.
- (2) (a) In any judicial proceedings or in other proceedings before any organ of the State, and during the enforcement of a penalty, respect for human dignity shall be guaranteed.
(b) No persons shall be subject to torture or to cruel, inhuman or degrading treatment or punishment.

Dignity has to be read in conjunction with other fundamental rights set out in the Constitution, such as the right to equality and to non-discrimination (Article 10). The dignity of a person is inseparably linked to environmental human rights, as a person’s health, well-being and respect-worthiness are subject to environmental human rights, as e.g. access to clean and sufficient water, sanitation services, and waste disposal are

44 Ibid.

45 Ibid.

46 Herz (2008:173-281).

aspects relevant to human dignity.⁴⁷ In 2002, the UN Committee on Economic, Social and Cultural Rights concluded that there was a human right to water embedded in Article 11 of the ICESCR, which defined the right to livelihood as including adequate food, clothing and housing. The General Comment on the right to water was adopted by this Committee in 2002, so the 145 countries that ratified the Covenant agree that the human right to water entitles everyone to sufficient, affordable, physically accessible, safe water acceptable for personal and domestic use, and that they are required to develop mechanisms to ensure that this goal is realised.⁴⁸ The Committee recognised that⁴⁹

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

The 1979 Convention on the Elimination of all Forms of Discrimination against Women⁵⁰ and the 1989 Convention on the Rights of the Child⁵¹ have already identified access to water as a human right. By becoming party to these agreements, the Republic of Namibia has committed itself to protect and realise the rights of women and children to water. Namibia thus agreed to hold itself accountable before the international community for the fulfilment of its obligations in the framework of the aforementioned conventions. A right to water as an individual prerogative for all (not only for women and children), was adopted in the Sixty-fourth UN General Assembly Plenary held on 28 July 2010.⁵² The UN adopted (by a vote of 122 in favour to none against, with 41 abstentions) a resolution calling on states and international organisations to provide financial resources, build capacity and transfer technology, particularly to developing countries, in scaling up efforts to provide safe, clean, accessible and affordable drinking water and sanitation for all. Through this text on the human right to water and sanitation, the Assembly expressed deep concern that some 884 million people were without access to safe drinking water and more than 2.6 billion lacked access to basic sanitation. Bearing in mind the commitment to fully achieve the Millennium Development Goals,⁵³ it expressed alarm that 1.5 million children under five years old died each year as a result of water- and sanitation-related diseases, acknowledging that safe,

47 WHO (2003:18ff.).

48 See http://www2.ohchr.org/english/issues/water/docs/CESCR_GC_15.pdf, accessed 15 July 2021.

49 Ibid.

50 GA Res. 34/180, 18 December 1979, Article 14(2)h.

51 GA Res. 44/25, 20 November 1989, Article 24(2)c.

52 GA 10967.

53 In September 2000, building upon a decade of major United Nations conferences and summits, world leaders came together at United Nations Headquarters in New York to adopt the United Nations Millennium Declaration, committing their nations to a new global partnership to reduce extreme poverty and setting out a series of time-bound targets - with a deadline of 2015 - that have become known as the Millennium Development Goals; cf. <http://www.un.org/millenniumgoals/bkgd.shtml>, accessed 19 December 2010.

clean drinking water and sanitation were integral to the realisation of all human rights.⁵⁴ Despite some progress, also in light of the 17 Sustainable Development Goals (SDGs) which are at the heart of the 2030 Agenda for Sustainable Development adopted by all United Nations Member States in 2015, SDG 6 aiming to ensure availability and sustainable management of water and sanitation for all is yet to be achieved with 2.2 billion people still lacking safely managed drinking water.⁵⁵

In the judgement of *Matsipane Mosetlhanyane and Others v the Attorney General of Botswana*⁵⁶ the Botswana Court of Appeal overturned a decision of the High Court that prohibited the Kalahari Bushman from sinking boreholes in the Central Kalahari Game Reserve necessary to sustain their livelihood. The ruling interestingly draws a balance between the interests of nature conservation with those of indigenous people's water rights. The court in its judgement *inter alia* made reference "to the United Nations Committee on Economic, Social and Cultural Rights, which on 20 January 2003 submitted a report on what it termed Substantive Issues Arising in the Implementation of the International Covenant on Economic, Social and Cultural Rights. In its introduction it stated the following:

1. Water is a limited natural resource and a public good fundamental for life and health. The human right to water is indispensable for leading a life in human dignity. It is a prerequisite for the realisation of other human rights...

In paragraph 16 (d) of its report the Committee said the following:⁵⁷

16. Whereas the right to water applies to everyone, States Parties should give special attention to those individuals and groups who have traditionally faced difficulties in exercising this right, including women, children, minority groups indigenous peoples, refugees, asylum seekers, internally displaced persons, migrant workers, prisoners and detainees. In particular, States Parties should take steps to ensure that:
 - (d) Indigenous people's access to water resources on their ancestral lands is protected from encroachment and unlawful pollution. States should provide resources for indigenous peoples to design, deliver and control their access to water.

In the 2009 South African case of *Lindiwe Mazibuko and Others v City of Johannesburg and Others*,⁵⁸ the Constitutional Court had to decide over an alleged violation of the right to have access to sufficient water under Section 27 of that country's Constitution. Section 27 stipulates that:

- (1) Everyone has the right to have access to:
 - (a) health care services, including reproductive health care;
 - (b) sufficient food and water; and

54 See <http://www.un.org/News/Press/docs/2010/ga10967.doc.htm>, accessed 12 November 2010.

55 See <https://sdgs.un.org/goals/goal6>, accessed 15 July 2021.

56 Case No. CACLB-074-10, unreported judgment of the Appeal Court of Botswana dated 27 January 2011.

57 Ibid.

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

- (c) social security, including, if they are unable to support themselves and their dependents, appropriate social assistance.
- (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.

Lindiwe Mazibuko and Others v City of Johannesburg and Others was the first case in which the Constitutional Court had considered the obligations imposed by the right to access sufficient water, as set out in Section 27(2) of the South African Constitution. Under the Namibian Constitution, the right to water is not explicitly included in the fundamental rights,⁵⁹ but is an implicit component of existing fundamental human rights. Therefore, water must be available and accessible in sufficient quality and quantity for personal and domestic consumption.⁶⁰ The protection of the right to water is an essential prerequisite to the fulfilment of many other human rights.⁶¹ Without guaranteeing access to a sufficient quantity of safe water, respect for human dignity and other human rights may be jeopardised.⁶² Formal recognition of the right to water means acknowledging the environmental dimension of existing human rights.⁶³

In 2002, Namibia adopted a National Water Policy that states that all Namibians have a right to access sufficient safe water for a healthy and productive life. Moreover, Sections 2 and 3 of the Water Resources Management Act⁶⁴ state that the state has an obligation to ensure that water resources are managed in ways consistent with fundamental principles to warrant equitable access to water by every citizen. Although Parliament approved the Water Resources Management Act, the rather out-dated Water Act⁶⁵ remains in force until the new Water Resources Management Act is promulgated.⁶⁶ The relationship between water quality regulation and human rights jurisprudence is very significant.⁶⁷

3.5 Article 10: Equality and Freedom from Discrimination

As part of the Bill of Rights under Chapter 3 of the Constitution, Article 10 provides for the following:

59 This is also reflected in the recent article by Mungunda (2011) which elaborates on “Access to water: A human right” in Namibia.

60 See Mapaure (2010).

61 Ruppel (2008a:107).

62 Ruppel (2012c).

63 Mapaure (2010). Through a rights-based approach, victims of water pollution and people deprived of essential water to meet their basic needs are provided with access to remedies.

64 No. 24 of 2004.

65 No. 54 of 1956.

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

67 Koonan / Khan (2010:294).

- (1) All persons shall be equal before the law.
- (2) No persons may be discriminated against on the grounds of sex, race, colour, ethnic origin, religion, creed or social or economic status.

The equality clause can be interpreted to strongly support the notion of environmental human rights, thus putting the state under the obligation to protect its people equally and to ensure that benefits are distributed fairly that is to the greatest possible extent.⁶⁸ Human vulnerability also exacerbated by means of global warming and climate change is felt most acutely by those segments of the population who are already in vulnerable situations due to factors such as poverty, gender, age, minority status, and disability.⁶⁹ Vulnerability and impact assessments in the context of climate change largely focus on the economic sector, and tend to not take into account the former factors.⁷⁰

Since Independence, the Government of Namibia has made various efforts in terms of strengthening women's and children's rights, first of all by according gender equality the status of a constitutionally guaranteed fundamental right and by subsequently passing progressive gender-based laws. Moreover, a Ministry of Gender Equality and Child Welfare was established in 2000 with the objective of ensuring the empowerment of women, men and children, and the equality between men and women as prerequisites for full participation in political, legal, social, cultural and economic development.⁷¹

3.6 Article 15: Children's Rights

A study on children's rights has shown that Namibia can be lauded for initiating law reform for the improvement of such rights.⁷² This reflects Namibia's remarkable commitment to protecting children's rights by, amongst other things, incorporating a broad variety of international legal instruments into the domestic system. Namibia is a State Party to the most relevant legal instruments on the protection of children's rights on global, regional and sub-regional level. Thus, the Convention on the Rights of the Child (CRC) explicitly states that the child has a right to "clean drinking water, taking into consideration the dangers and risks of environmental pollution".⁷³ Of course, effective implementation and the entire reporting system, which are imperative for enhancing the situation of children, can only work if States Parties collaborate to improve the situation of children.⁷⁴ In this context there can be no doubt, that the recognition of

68 Bilchitz (2003:1-26).

69 Ruppel (2010a, b, d).

70 Ruppel (2008g).

71 Ruppel (2008b, g; 2009a; 2010b, c, d).

72 Ruppel (2009e, f); Amunda / Mugadza (2009).

73 Article 24(2)(c) CRC.

74 Ruppel (2009e:2-3).

environmental human rights is not only supportive to, but in all means in the best interest of the child. Although the Namibian Constitution does not seem to envisage the concept of the best interest of the child to be of paramount consideration,⁷⁵ international human rights standards must be applied accordingly.⁷⁶

3.7 Articles 18 and 5: Administrative Justice

The Constitution deals with administrative justice in two of its articles, namely Articles 18 and 5. Article 18 requires that administrative bodies act fairly and reasonably, and that they comply with the requirements stipulated in common law and relevant legislation. This article obviously plays an eminent role in the proper implementation of administrative measures, being a means of achieving compliance with environmental laws and thus promoting environmental human rights in Namibia. Article 5 contains the fundamental obligation enshrined in modern constitutionalism according to which the three organs of the state – including the executive – are obliged to uphold and respect the fundamental rights and freedoms set out in Chapter 3 of the Constitution. Thus, Article 5 reaches beyond Article 18: the yardsticks of Article 5 are the fundamental rights and freedoms. Article 5 requires substantial compliance by confronting administrative actions and the law authorising such actions with the comprehensive catalogue of human rights. The placement of Article 5, as an integral part of Chapter 3's fundamental freedoms, expresses – in line with what follows later, namely in Article 21(1) and Article 22 – that the fundamental rights and freedoms are invested with real constitutional and legal weight.⁷⁷

3.8 Article 19: The Right to Culture

With Article 19 the right to culture is guaranteed under the Bill of Rights in the Constitution, as well as in Article 15(1)(a) of the International Covenant on Economic, Social and Cultural Rights (ICESCR). In terms of these two legal obligations, the Government is required to take legislative and administrative action to ensure the fulfilment of these rights. Although Chapter 3 is not primarily aimed at protecting economic, cultural and social rights (such as those of Article 19), it is important to remember that Article 5 makes those listed within Chapter 3 legally enforceable. From this arose the right to profess, maintain and promote a language in the case of *Government*

75 Naldi (1995:79).

76 Ruppel (2009f).

77 Hinz (2009:81-89).

of the Republic of Namibia v Cultura 2000.⁷⁸ Cultural diversity is also closely linked to ecological biodiversity.⁷⁹ The collective knowledge of biodiversity, its use and its management rests in cultural diversity, and can, therefore, also be regarded as an (indigenous) environmental human right.⁸⁰

The right to tradition also falls under Article 19, which seeks to ensure that the traditions and way of life of the different indigenous groups⁸¹ comprising Namibia's society are protected. Article 19 is in line with Article 17(3) of the Banjul Charter, which proclaims that the state has the duty to protect traditional values.⁸² Traditional knowledge, without doubt, is such a value. So far, Namibian courts have been reluctant to consider the right to culture as a means of protecting traditional knowledge. In a case decided by a Magistrate's Court,⁸³ the harvesting of almost 400 kg of hoodia was at issue. *Hoodia gordonii*, a cactus-like plant native to the Namib Desert, is widely believed to be an appetite suppressant, used by some traditional (indigenous) communities.⁸⁴ All hoodia species are protected under the Convention on the Illegal Trade of Endangered Species (CITES), to which Namibia is a signatory. Accordingly, it is listed as a protected plant under Schedule 9 of the Namibian Nature Conservation Ordinance,⁸⁵ as amended after Independence by the Nature Conservation Amendment Act.⁸⁶ Thus, according to Section 73(1) of the Ordinance, no person other than the lawful holder of a permit granted by the Executive Committee is permitted at any time to pick or transport any protected plant. The Magistrate's Court, however, discharged

78 1994 (1) SA 407 (NmS).

79 See in detail Hinz / Ruppel (2008b).

80 Ibid:57.

81 Indigenous groups can be defined as "originating in and characteristic of a particular region or country; native; ... e.g. the indigenous peoples of southern Africa." See <http://dictionary.referencenome.com/browse/indigenous>, accessed 15 July 2021.

82 Naldi (1995:97).

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

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

85 No. 4 of 1975.

86 No. 5 of 1996.

two suspects of the alleged theft of almost 400 kg of hoodia. In its ruling, the court held that it could not be proved that the confiscated plants were of the specific *Hoodia gordonii* species. Taking into consideration that Schedule 9 of the Ordinance lists all *Hoodia* species as protected plants, the reasoning for the ruling in this case is not clear. The Ordinance deals with *in situ* and *ex situ* conservation by providing for the declaration of protected habitats as national parks and reserves, also for the protection of scheduled species. It regulates hunting and harvesting, possession of and trade in listed species for the propagation, protection, study and preservation of wild animal life, wild plant life, and objects of geological, ethnological, archaeological, historical and other scientific interest, and for the benefit and enjoyment of the inhabitants of Namibia and other persons.

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

3.9 Article 25: Enforcement of Fundamental Rights and Freedoms

Article 25(2) of the Constitution provides that

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

Article 25(2) plays an important role in the constitutional framework, as it makes clear reference to the Ombudsman. Chapter 10 of the Constitution deals with the Ombudsman in more detail. In Namibia, ombudsmanship was already introduced in 1986 by the enactment of the Ombudsman of South-West Africa Act.⁸⁷ After Independence in 1990, the Office of the Ombudsman was established as a constitutional Office. The legal foundations of this institution are to be found in Articles 89 to 94 of the Constitution. In addition to the constitutional provisions, the Ombudsman Act⁸⁸ defines and

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

88 No. 7 of 1990.

prescribes the powers, duties and functions of the Ombudsman, and provides for matters incidental thereto. The Office of the Ombudsman is intended to ensure that citizens have an avenue open to them, free of red tape, and free of political interference.⁸⁹ The Ombudsman has a relatively broad mandate and corresponding powers. According to Article 91 of the Namibian Constitution, the mandate of the Ombudsman mainly relates to four broad categories: human rights, administrative practices, and the environment.⁹⁰ The Ombudsman's human rights and environmental mandates are crucial for an effective protection and realisation of environmental human rights in Namibia.

Article 25(3) obliges the state *inter alia* to make all necessary and appropriate orders to respect and uphold fundamental rights and freedoms, including by interdict and injunction. Namibian courts have stated in the past that the Constitution requires a generous interpretation, avoiding the austerity of tabulated legalism, in order to give individuals the full measure of their rights. However, Namibian courts also adhere to the presumption of constitutionality, meaning that the onus is on the applicant to prove that a fundamental right or freedom has been infringed upon and that he/she has *locus standi* as an aggrieved person under Article 25(2). Generally speaking, the common law test for *locus standi* is that the person applying for standing either has a private right or is able to demonstrate that s/he has a special interest in the subject matter of the action before the relevant court.⁹¹ The special interest does not need to involve a legal or pecuniary right but can also be of an intellectual or emotional concern.⁹²

3.10 Article 95(1): The Environmental Principle of State Policy⁹³

Chapter 11 contains principles of state policy that cannot be categorised as constitutional rights in the strictest sense.⁹⁴ Such states Article 101 that the principles of state policy are not legally enforceable, but merely serve as societal goals in making and applying laws to give effect to the fundamental objectives of the different principles. The principles must also be employed in the interpretation of Namibian law and guide

89 Tjitendero (1996:10).

90 With the Namibian Constitution Second Amendment Bill, corruption was removed from the list of the functions of the Ombudsman. The intention behind this amendment was to avoid concurrent overlapping competences between the Office of the Ombudsman and the Anti-Corruption Commission, and to divert all corruption-related complaints to the Commission. The latter was established by the Anti-Corruption Act, 2003 (No. 8 of 2003), and inaugurated in early 2006.

91 Fisher / Kirk (1997:372).

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

93 See Ruppel (2010h:346ff.).

94 Naldi (1995:99).

the state in its decision-making processes.⁹⁵ Article 95(l) compels state organs to be directed by the environmental principle of state policy.⁹⁶ Article 95 stipulates that

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

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

Constitutional principles of state policy serve as a stimulus for new initiatives or endeavours – especially where existing policy, law or programmes seem inadequate to attain the principles’ objectives.⁹⁷ The principles must similarly be employed as direction indicators in setting Government priorities. Also, the judiciary should apply the principles of state policy in constitutional interpretation and use them to fill gaps in the legislative framework when and where necessary. These generic features of constitutional principles of state policy arguably also apply to the environmental principle of state policy in the Constitution of Namibia. The language used in Article 95 indicates that the fulfilment of the principles of state policy requires positive action on the part of Government, i.e. “[t]he State *shall* ... promote and maintain” [emphasis added]. At first sight, this creates the impression that such state principles create enforceable obligations that must be fulfilled.⁹⁸ Although this is not the case in Namibia,⁹⁹ the state is expected to promote and maintain the welfare of the people by adopting policies aimed at maintenance.

3.11 Article 100: Sovereign Ownership of Natural Resources

The land, the water, and the natural resources below and above the land, in the continental shelf and within the territorial waters as well as within the exclusive economic zone of Namibia belong to the state in terms of the Constitution, if not otherwise lawfully owned.¹⁰⁰ To this extent, the Namibian Constitution establishes sovereign state ownership of natural resources not under the control of others.¹⁰¹

95 Watz (2004:186).

96 Hinz (2001:77).

97 Du Plessis (2008:177-179).

98 *Ibid.*

99 Greeff – on the basis of the Caprivi Treason Trial Case *Government of the Republic of Namibia & Others v Mwilima & All Other Accused in the Caprivi Treason Trial* 2002 NR 235 (SC) – attempted to assess whether the Constitution provides an enforceable and pursuable environmental right. The author of the aforementioned article rightfully admits that “the case, in its entirety, is not applicable to the subject matter at hand”. Cf. Greeff (2012:30).

100 See Ruppel (2010h:346ff.).

101 Watz (2004:182-186).

This seems to be in line with Principle 21 of the 1972 Stockholm Declaration on the Human Environment:

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction.

Principle 21 thus applies the principle of state sovereignty to the environmental realm providing the sovereign right of states to exploit and utilise natural resources according to their own national policies, and secondly, the obligation upon states not to cause environmental damage to other states or areas outside their national jurisdiction.

However, extensive natural exploitation of resources does not only bring benefits: it is also deemed to have destructive effects to ecosystems and habitats that support essential living resources. Mining activities therefore need to be monitored with regard to their impacts on human – and, thus, environmental – rights. In regard to the state ownership of natural resources, this entails that the state should accordingly take environmentally related responsibility with a special focus on the principle of sustainability and respect for the rights of present and future generations.¹⁰² This is particularly true in the light of the global economy's growing dependence on natural and exhaustible resources extracted in Africa.¹⁰³

3.12 Article 144: International Law

Namibia is party to various international human rights¹⁰⁴ and environmental covenants, treaties, conventions and protocols and is, therefore, obliged to conform to their objectives and obligations. As to the application of international law, a new approach was formulated after Independence, as embodied in the Namibian Constitution. Article 144 therein provides that

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

Thus, the Constitution explicitly incorporates international law and makes it part of the law of the land. *Ab initio*, public international law is part of the law of Namibia.¹⁰⁵

102 Ruppel (2008a:119).

103 Cf. Ruppel (2012c).

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

105 See Tshosa (2001:79ff.).

No transformation or subsequent legislative act is needed.¹⁰⁶ A treaty will become binding upon Namibia in terms of Article 144 of the Constitution if the relevant international and constitutional requirements have been met.

The 1981 African (Banjul) Charter on Human and Peoples' Rights¹⁰⁷ is a human rights treaty that proclaims environmental rights in broadly qualitative terms. It protects the right of peoples both to the "best attainable state of physical and mental health" (Article 16) and to a "general satisfactory environment favourable to their development" (Article 24). Article 24 of the African Charter establishes a binding human-rights-based approach to environmental protection, linking the right to environment to the right to development.¹⁰⁸

In the *Ogoni* case, for example, the African Commission on Human and Peoples' Rights held, *inter alia*, that Article 24 of the African Charter imposed an obligation on the state to take reasonable measures to "prevent pollution and ecological degradation, to promote conservation, and to secure ecologically sustainable development and use of natural resources".¹⁰⁹ The *Ogoni* case decided by the African Commission on Human and Peoples' Rights in 2001 and communicated to the parties in 2002 is considered to be a landmark decision with regard to the effective protection of economic, social and cultural rights in Africa, particularly the protection of the right of peoples to a satisfactory environment. The *Endorois* case¹¹⁰ is considered to be another landmark decision by the African Commission on Human and Peoples' Rights. This decision delivered in November 2009, deals with the displacement of an indigenous community of approximately 60,000 people in Kenya, the Endorois, from their ancestral lands around the Lake Bogoria without proper prior consultations, adequate and effective compensation for the loss of their property, the disruption of the community's pastoral enterprise and violations of the right to practise their religion and culture, as well as the overall process of development of the Endorois people.

Article 24 of the African Charter should also be viewed together with the Bamako Convention and the first Organisation of African Unity (OAU) treaty on the environment, the Convention on the Conservation of Nature and Natural Resources, which predates the African Charter.¹¹¹ It has to be noted that Namibia is not a signatory to the original Convention. However, Namibia has signed the Revised African Convention

106 Erasmus (1991:94).

107 Hereafter African Charter.

108 Van der Linde / Louw (2003:169).

109 See Communication 155/96 available at <http://www.cesr.org/ESCR/africancommission.htm>, accessed 13 April 2010. For further details see *The Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria* (27 October 2000); Coomans (2003:749-760); Ebeku (2003:149-166).

110 Communication 276/03 *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council Kenya* at http://www.achpr.org/english/Decison_Communication/Kenya/Comm.%20276-03.pdf, accessed 21 January 2022.

111 Viljoen (2007:287ff.).

on the Conservation of Nature and Natural Resources. The latter was adopted by the Second Ordinary Session of the African Union (AU) Assembly of Heads of State and Government in Maputo, Mozambique, in July 2003. It has, however, not yet come into force. The Bamako Convention, which was adopted after the African Charter, was drafted in reaction to the human suffering caused by the dumping of petrochemical waste. It bans the import of waste to the continent.

The Southern African Development Community (SADC) was established in Windhoek in 1992 as the successor to the Southern African Development Coordination Conference (SADCC), which was founded in 1980. SADC's objectives include the achievement of development and economic growth; the alleviation of poverty; the enhancement of the standard and quality of life; support of the socially disadvantaged through regional integration; the evolution of common political values, systems and institutions; the promotion and defence of peace and security; and achieving the sustainable utilisation of natural resources and effective protection of the environment.¹¹²

It might appear that the promotion and protection of human rights is not SADC's top priority as an organisation – one that furthers socio-economic cooperation and integration as well as political and security cooperation among its 15 member states. However, the protection of human rights plays an essential role in economic development as it has an impact on the investment climate, which in turn contributes to growth, productivity and employment creation. Other SADC objectives such as the maintenance of democracy, peace, security and stability refer to human rights, as do the sustainable utilisation of natural resources and the effective protection of the environment. With the 2003 Declaration on Agriculture and Food Security, the SADC community has ascribed substantial importance to some specific objectives laid down in Article 5 of the SADC Treaty.¹¹³ The Declaration is of specific importance for the human right to food, and covers a broad range of human-rights-relevant issues. The SADC Tribunal is the judicial institution within SADC.¹¹⁴

The African Charter, and AU and SADC law automatically form part of Namibian law in so far as the relevant legal instruments have been adopted by the country.¹¹⁵ Despite the absence of a justiciable environmental human right in the Namibian Constitution, Government incurs environmental-rights-based duties in terms of Article 24 of the African Charter.¹¹⁶ Thus, Namibian courts are under the obligation to take

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

113 Namely the promotion of sustainable and equitable economic growth and socio-economic development to ensure poverty alleviation with the ultimate objective of its eradication; the achievement of sustainable utilisation of natural resources and effective protection of the environment; and mainstreaming of gender perspectives in the process of community- and nation-building.

114 For a more detailed review of the SADC Tribunal, see Ruppel (2009a, b, c; 2012a); Ruppel / Bangamwabo (2008).

115 Ruppel (2008a:101ff.).

116 Du Plessis (2008:193).

judicial notice of the aforementioned international instruments as a source of national law.¹¹⁷ In this context, Article 144 is an important constitutional mechanism.¹¹⁸

4 Concluding Remarks

Environmental human rights cannot be seen in isolation from other human rights. They are not only protected under various international conventions but interlinked with many fundamental rights and freedoms in the Namibian Constitution. They are not only relevant under the constitutional principles of state policy but beyond. Human rights must be justiciable, and their protection must be secured through the courts.¹¹⁹ This gives citizens the right to take executive agencies to court, and the judiciary reigns as the authority to adjudicate such matters. The judiciary is most essential in the protection and promotion of environmental human rights. It leads the way in interpreting relevant legislation and settles disputes arising between citizens and/or between citizens and the state. While the inclusion of environmental concerns into human rights jurisdiction is still in its infancy in African jurisprudence, relevant rulings from other courts in the world such as the European Court of Human Rights¹²⁰ and the Indian Supreme Court¹²¹ may be taken as examples when it comes to the link between human rights and environmental concerns and the recognition and judicial enforcement of a human right to environment.

117 Ibid with further references.

118 Ruppel (2008a:108-111).

119 Bukurura (2002:21).

120 *TATAR v Romania* (Application No. 67021/01) Judgment 27 January 2009; *Okay and Others* (Application No. 36220/97) Judgment 12 July 2005. *Fadeyeva v Russia* (Application No. 55723/00) Judgment 9 June 2005; *Oneryildiz v Turkey* (Application No. 48939/99) Judgment 30 November 2004; *Moreno Gómez v Spain* (Application No. 143/02) Judgment 16 November 2004; *Taskin and others v Turkey* (Application No. 46117/99) Judgment 10 November 2004; *Hatton and Others v United Kingdom* (Application No. 36022/97) Judgment 2 October 2001, see Heselhaus / Marauhn (2005:549); *Athanassoglou and Others v Switzerland* (Application No. 27644/95) Judgment 6 April 2000; *Guerra and Others v Italy* (Application No. 14967/89) Judgment 19 February 1998; *Balmer-Schafroth and Others v Switzerland* (Application No. 22110/93) Judgment 26 August 1997, Reports 1997-IV; *López Ostra v Spain* (Application No. 6798/90) Judgment 9 December 1994; *Powell and Rayner v United Kingdom* (Application No. 9310/81) Judgment 21 February 1990.

121 One prominent example of Indian jurisdiction on environmental concerns and fundamental rights is the Delhi vehicular pollution case of *MC Mehta v Union of India* (No. 13029/1985) Judgment 28 July 1998. For further details see Rosencranz / Jackson (2003:228).

