

CHAPTER 3

THEORETICAL EXPOSITION OF THE CONCEPTS ENVIRONMENT AND SUSTAINABLE DEVELOPMENT

3.1 INTRODUCTION

In this chapter focus will be on the theoretical exposition of the concepts of environment and sustainable development. Theories of biocentrics, anthropocentric and social ecologists are important in the whole notion of sustainable development. A brief historical overview of the international human rights law in relation to the environmental rights is provided. This includes international treaties and regional instruments that are relevant to the evolution of the international environmental law. The role of the international human rights law and its relevance in sustainable development is also discussed.

It will also be observed that the general reluctance of states to contemplate the emergence and consolidation of further international legal standards constraining their domestic and foreign policies and national legal systems as an instrument for the achievement of sustainable development goals is well illustrated by their resistance to the explicit recognition of links between international human rights law and sustainable development. The bottom line is that greening process leads to sustainable development and that unsustainable development resulted from environmental degradation. It will be submitted that the pledged cuts in emissions are not only inadequate but will probably not be achieved. Climate change impacts will continue to fall disproportionately on the world's poorest people.

By means of Agenda 21 processes, local governments have established formal partnerships with major groups, ethnic minorities, community-based groups, as well as with international agencies, national governments and other local governments to accelerate sustainability.

The concept of environmental governance is relevant in that it exposes the fragmented nature of the environmental governance in South Africa. Environmental justice calls for redress of the past environmental injustices. The effectiveness of the Environmental Impact Assessment is also evaluated. Various concepts pertaining to gender and environment are also explored to understand the impact of environment on women as a vulnerable stratum. Equally, focus is also made on the youth development and environment. Environmental mainstreaming is important to ensure cohesion and sustainability in the planning circle. The role of the judiciary in interpreting the environment-related cases is also discussed.

3.2 MEANING OF ENVIRONMENT IN RELATION TO SUSTAINABLE DEVELOPMENT

The notion of sustainable development recently emerged in social sciences in the 1970s with the realization that the post-second world war boom had brought devastation upon the environment. It has had a short and tumultuous history ever since, including a departure from economic reductionism by focusing on a multidimensional aspect and addressing the issues of its scope across many disciplines. It embraces the prospect of linking together the social objectives of economic development solidarity between present generations, environmental conditionality of future generations and the viability of economic progress. It stands as both an outcome of technique and a critique of technique. Also, it is a project enabling a rethinking of capitalism based on the concept of a reformed type of capitalism. Along with full employment and the protective state is the idea of environmental objectives and negotiated development between partners – now called stakeholders – that is, mostly the state, corporate managers, workers, and civil society. It is a development “theory” of some kind (Pesqueux 2009: 231).

The notion of sustainable development also grows out of a cross-fertilization of various trends: secular and religious visions, consumerism, movements of civil and human rights protection, ecology, mutual funds, international organizations, and multinational

corporation managers, states and public jurisdictions. The falsely consensual aspect of the notion should be stressed, an aspect that is integral to its "borderline object" status (an object that is common to different fields and whose meaning includes a common aspect as well as differences according to each field) – another argument contributing to the vagueness of the notion. The notion of sustainable development opens up the idea of a consensus on its correlates: solidarity, accountability and equity. It takes on an ethical dimension which is also a political one, given that the idea of consensus bears a collaborationist ideology. Likewise, it adds to the confusion of ethics with politics and that confusion is another aspect of what can be described as an "ethical given" affecting both the philosophical references (sustainable development here) and applied ethics, and business ethics for example (Pesqueux 2009: 233).

Feris (2008:32) distinguishes two main approaches in which 'environment' can be conceptualised. Firstly, there is the instrumental or strongly anthropocentric approach, which holds that the earth should be viewed as a source of (mainly economic) resources that should be conserved with the specific aim of maintaining its usefulness for humans; and secondly, there is a weak anthropocentric position, which does recognise the central locale that humans adopt in nature and the ways in which humans find value in the utility of the earth, but also recognises the value of the environment independent of its usefulness for human purposes. Feris (2008:33) asserts that both biocentrists and social ecologists are calling for a major transformation of people's view and of governmental policies towards environment. In contrast with the more limited perspective of biocentrists, however, biocentrists and social ecologists see the solution to the environmental problems as rooted in sustainable development and social justice. The emphasis is on the human conditions as a basis for transformation, as opposed to the deep ecologists' goal of transforming the world view and reclaiming spiritual connections to earth. According to Shelton (2008: 131) one of the possibilities is to formulate a new human right law to an environment that is not defined in purely anthropocentric terms, an environment that is safe not only for humans, but one that is ecologically-balanced and sustainable in the long term. Some international success has attended the various efforts undertaken in this direction. The notion of a right to

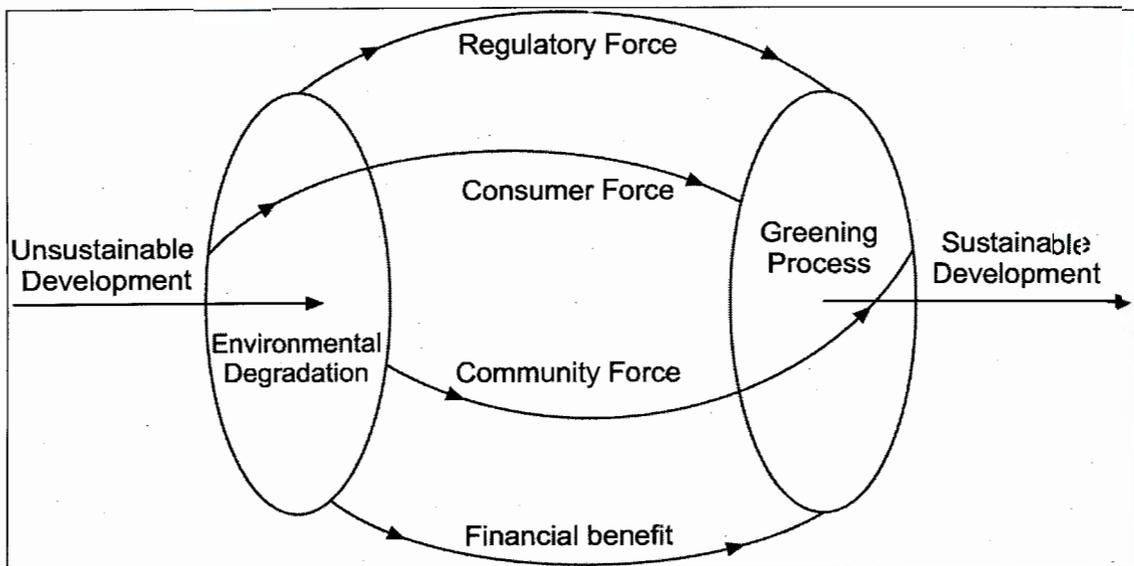
environment has met resistance from revisionists who claim that the concept cannot be given content and who assert that no justiciable standards can be developed to enforce the right, because of the inherent variability of environmental conditions. Shelton (2008: 164) submits that more than 100 constitutions throughout the world guarantee a right to a clean and healthy environment and impose a duty on the state to prevent environmental harm, or mention the protection of the environment or natural resources.

Feris (2008: 40) bases his definition of the concept of sustainable development on a Brundtland Report. Accordingly, the definition of sustainable development not only gives effect to the notion that priority must be given to the needs of the poor, but it also captures the limitations to development imposed by the present state of technology and social organisation on the environment's ability to meet present and future needs. The definition therefore suggests an inherent link between social and environmental needs and the need for technological advancement and development. An imbalance among these elements, where global patterns of development put the environment under pressure, places the earth in crisis. This principle of integration between three pillars, environment protection, economic development, and social needs, is now widely recognised as a core element of sustainable development. Ghandi *et al* (2006: 657) hold a view that the current unsustainable development distorts the original form of the nature. It shows a man-centric effort to conquer nature and ultimately over power it. The economy that is built up by man to protect him and prosper is stressed. The important factors that are responsible for environmental degradation are: industrialization; increase in per capita income and subsequent changes in consumption pattern; population growth; and continuous depletion of non-renewable resources. See figure 3.1 *infra*.

Buckingham and Turner (2008:3) are of a view that sustainable development has emerged as a term which is used increasingly freely, although in reality it is a deeply problematic term which different interest groups use in different ways to serve their own purpose. After all, its very coinage was a compromise between the development imperatives of business, and of countries in the global south heavily reliant on their

natural resources for foreign exchange, with environmental conservation interests in the West. Meszaros (2001:6) submits that the great challenge of sustainable development, which we now must face, cannot be properly addressed without removing the paralyzing constraints of the adversarial character of our social reproduction process. This is why the question of substantial equality cannot be avoided in our time, as it was in the past. For substantiality means being really in control of the vital social, economic, and cultural processes through which human beings not merely survive but can also find fulfilment, in accordance with the designs which they set themselves, instead of being at the mercy of unpredictable natural forces and quasi-natural socio-economic determinations. Our existing social order is built on the structural antagonism between capital and labour, and therefore it requires the exercise of external control over recalcitrant forces.

Figure 3.1 Four Force Model



Source: Ghandi *et al* (2006: 654)

3.3 HISTORY OF THE INTERNATIONAL ENVIRONMENTAL LAW

Kidd (2008: 47) discusses international environmental law as evolved over some distinct periods:

3.3.1 From Early Fisheries Conventions to the Creation of the United Nations in 1945

During this period industrialisation and development on a hitherto unprecedented scale led to concern over the exploitation of natural resources. A number of treaties aimed primarily at conservation of natural resources, particularly wildlife, were adopted, starting with treaties on fishing in the mid-nineteenth century aimed at over-exploitation. These were largely reactive and *ad hoc*.

3.3.2 From the United Nations to the 1972 Stockholm Conference

1945 saw the creation of the United Nations and specialised agencies like Food and Agriculture Organisation (FAO) and the United Nations Educational, Scientific and Cultural Organisation (UNESCO) which began to address environmental issues, even though these were not their aims. Significant developments during this period were as follows:

- The establishment in 1948 of the International Union for the Protection of Nature (IUPN), later the International Union for the Conservation of Nature and Natural Resources (IUCN), to promote the preservation of wildlife and natural environment, public knowledge, education, scientific research and legislation.
- The 1949 United Nations Conference on the Conservation and Utilization of Resources (UNCCUR) was aimed at the exchange of information. Its important contribution was to sow the seeds of the concern with the relationship between conservation and development.
- Various treaties and United Nations resolutions addressed issues of nuclear activity and marine oil pollution, reflecting an advance from concern over wildlife to concern with the products and processes associated with military and industrial activities.
- A number of regional developments in the environmental sphere: the 1959 Antarctic Treaty and the first environmental legislation of the European

Community, for example the Lac Lanoux arbitration and the 1958 Geneva Convention on the Law of the Sea (Kidd 2008:49).

3.3.2.1 The United Nations Conference on the Human Environment (Stockholm) 1972

The Conference produced a Declaration of twenty-six principles, and an Action Plan for 109 recommendations. The report of the Conference was later considered by the UN General Assembly and eleven resolutions were adopted, relating, inter alia, to some of the principles adopted at Stockholm and creating the United Nations Environmental Programme (UNEP). The importance of the Stockholm Conference is that it brought about more co-ordinated approach to international environmental issues and had a great influence on subsequent developments, the most significant achievements being the creation of the UNEP and the adoption of Principle 21 (Kidd 2008: 49). Sands (1995: 264) observes that whereas the 1972 Stockholm Conference did not address the issue of state compliance in any depth, the subject was clearly an important one for the preparations for United Nations Conference on Environment and Development (UNCED) in 1992- yet this task was partially fulfilled. The Rio Declaration identified some of the inadequacies in the institutional and legal arrangements for the maintenance of environmental security.

3.3.3 Stockholm to UNCED (The RIO Conference) 1992

The period after the Stockholm Conference was characterised by much activity in the area of environmental treaties. Several important treaties were established and implemented as a result of the efforts of the UNEP, among these the 1985 Vienna Convention and 1987 Montreal Protocol on ozone depletion; the 1989 Basel Convention addressing international trade in hazardous waste; and the 1992 Biodiversity Convention. Other well known environmental treaties adopted during the period included the 1972 London Convention which addresses dumping at sea: the 1973 MARPOL (marine pollution) Convention and its 1948 Protocol; the 1973 Convention on

the International Trade in Endangered Species of Wild Fauna and Flora; and the 1982 United Nations Convention on the Law of the Sea (Kidd 2008:50).

The integration of environmental considerations into the activities of international economics and financial organisations like World Bank and the General Agreement on Tariffs and Trade (GATT) was important. There were also non-binding instruments which played an important role. These were the 1978 UNEP draft Principles; the 1981 Montevideo Programme for the Development and Periodic Review of Environmental Law; the World Charter for Nature; the 1980 World Conservation Strategy followed by the 1991 Caring for the Earth Strategy; the 1982 Nairobi Declaration; and the 1983 World Commission on Environment and Development and its Brundtland Report (Kidd 2008: 50). Ashley (2003: 463) warns that it is important to avoid the currently fashionable view of Rio as a failed process, full of rhetoric but little practical action—a view developed in some quarters to provide Johannesburg Summit with a contrasting but unnecessary Unique Selling Point. In fact, Rio achieved a great deal—above all, a much higher level of awareness of environmental issues and of the more complex concept of sustainable development.

3.3.3.1 The World Charter of Nature

Adopted by the UN General Assembly in 1982, the World Charter of Nature contains non-binding principles of conservation by which all human conduct affecting nature is to be guided and judged. Its significance is that it has a more ecological focus than earlier anthropocentric instruments, emphasising in the protection of nature as an end in itself. It is widely accepted that the norms contained in the Charter are likely to be reflected in future international law developments through transformation into customary international law (Kidd 2008:50).

3.3.3.2 World Conservation Strategy / Caring for the Earth

The 1980 World Conservation Strategy had three main objectives. Firstly, that essential ecological processes and life-support systems be maintained. Secondly, that genetic diversity be preserved. Thirdly, any use of species or ecosystems must be sustainable. The 1991 Caring for the Earth Strategy supplemented the original strategy with the twin aims of securing a commitment to sustainable living and translating its principles into practice (Kidd 2008: 51).

3.3.3.3 The World Commission on Environment and Development (WCED)

This was established by the UN General Assembly in 1983 and it reported in 1987 (the so-called Brundtland Report). The WCED's broad task was to provide a global agenda for change. More specifically its objectives were re-examine critical environment and development issues and formulate realistic proposals for dealing with them; to propose new forms of international co-operation on these issues that would influence policies and events in the direction of needed changes; and to raise the levels of understanding and commitment to action of individuals, voluntary organisation, businesses, institutes, and government. The core concept of the Brundtland Report was sustainable development, and it focused on issues of population, food security, the loss of species and genetic resources, energy, industry and human settlements. It made several recommendations, *inter alia* on the need for institutional and legal change (Kidd 2008: 51).

3.3.3.4 UNCED and beyond

In December 1987 the UN General Assembly convened United Nations Conference on Environment and development (UNCED), the purpose of which was to elaborate strategies and measures to halt and reverse the effects of environmental degradation to promote sustainable and environmentally sound development in all countries. The Conference was in Rio de Janeiro, Brazil, in June 1992 and was probably the largest international

gathering in the history of the planet. Three non-binding instruments were adopted; the Rio Declaration on Environment and Development, Agenda 21 and the UNCED Forest Principles. In addition, two treaties, the preparation of which had been occurring prior to UNCED, were opened for signature: the Convention on Biological Diversity and the UN Framework Convention on Climate Change (Kidd 2008: 52).

The Rio Declaration is a statement of twenty-seven principles, some of them restatements of the Stockholm principles, setting out the basis upon which states and individuals are to co-operate and further develop international law in the field of sustainable development. Agenda 21 is a massive and complex blueprint and action plan for the whole international community linking development and environmental action for the fulfilment of basic needs, improved living standards for all, better protected and managed ecosystems and a safer, more prosperous future (Kidd 2008: 52).

3.3.3.5 KOTYO Protocol

Now that the Kyoto Protocol has entered into force the next challenge must be to strengthen the environmental efficacy of the Protocol to ensure that neither we, nor our children, have to face the disastrous consequences of climate change. The first step towards strengthening this climate pact must be to recognise its weaknesses. The most serious weakness in the Kyoto Protocol is not just that the target has been set too low, but that there is a reliance on sinks and flexible mechanisms. All of these are merely symptoms of the greater evil, namely that major policy decisions are influenced, first and foremost, by economic considerations rather than the health of the global community (Tladi 2005: 49).

Ashley (2002:461) writes that in the Kyoto Protocol the issue which dared not speak its name at World Summit on Sustainable Development (WSSD), even though it was probably the issue with the highest profile amongst the general public—did force its way back onto the agenda. Paragraph 36 of the Plan of Implementation stated: “states that have ratified the Kyoto Protocol strongly urge states that have not already done so to

ratify the Kyoto Protocol in a timely manner". What was particularly heartening was that China, Russia, Canada and Mexico promptly indicated their intention to sign up, thereby making a reality of the agreement and further isolating the US in its obdurate refusal to play ball.

With the 1997 Kyoto Protocol, these normative commitments were institutionalized in global climate policy. While the world's industrialized nations committed to emissions caps during the 2008–2012 compliance period, developing nations were exempted. The USA refused to ratify Kyoto because of what it perceived as 'unfairness' on the part of developing nations in failing to accept curbs on future emissions. This remains a key issue for countries negotiating a successor framework to Kyoto. The issue of fairness underscores the inability of nations to agree on an effective climate regime, i.e. on how to allocate climate-related costs both among nations (rich and poor) and among generations (current and future). Despite the commitments made by the treaty ratifiers and its primary aim as a first step in the establishment of a long-term institutional framework, Kyoto is a limited and flawed policy framework for dealing with climate change. In particular, the pledged cuts in emissions are not only inadequate but will probably not be achieved. Climate change impacts will continue to fall disproportionately on the world's poorest people (Palmer 2009: 684).

3.3.3.6 World Summit on Sustainable Development

The World Summit on Sustainable Development (WSSD) was held in Johannesburg in September 2002 to mark the 10th anniversary of UNCED. The general focus of the WSSD was development in order to eradicate poverty. The Summit produced the Johannesburg Declaration on Sustainable Development, essentially a short statement of universal commitment to sustainable development, and a Plan of Implementation long on general commitments and aspiration, but short on specific actions to be taken (Kidd 2008: 53). The other key challenge for local government as WSSD loomed closer was how—in partnership with other stakeholders—it could contribute to the main sustainable development agenda at Johannesburg and beyond. Local Agenda 21 is

widely recognised—including, reluctantly and with some irritation, by national governments—as one of the few successful implementation initiatives which flowed from Rio (Ashley 2002: 460).

Ashley (2002: 462) submits that although the opportunities to influence the text of the Plan of Implementation, and especially the Political Declaration, were very limited by the time of the Summit, efforts were made—through the UK national delegation, by lobbying the influential South African hosts and by working closely with the very well-connected and indefatigable Non- governmental Organizations (NGOs) (mainly the Stakeholder Forum)—to hold on to the references to local government inserted at earlier preparatory committees and to ensure that the Declaration acknowledged the role of local authorities. In Chapter 10 of the Plan of Implementation dealing with the institutional framework for sustainable development, local authorities make a very late entry, four paragraphs from the end of the whole document, but with some very positive wording:

States should enhance the role and capacity of local authorities as well as stakeholders in implementing Agenda 21 and the outcomes of the Summit and in strengthening the continuing support for local Agenda 21 programmes and associated initiatives and partnerships, and encourage, in particular, partnerships among and between local authorities and other levels of government and stakeholders to advance sustainable development as called for in, *inter alia*, the Habitat Agenda.

According to Sands (1995: 251) international law is currently concerned with environmental challenges at national, regional and global levels. Whereas, international environmental law was developed to address additional concerns such as the protection of flora and fauna, the conservation of fisheries resources and oil spills- all of which had a somewhat localized interest- the fundamental challenges of the late twentieth century are of a different order. The Rio Declaration and Agenda 21 advocate the integration of environmental considerations into all development activities, thus creating an enormous new agenda for international environmental law. The number of environmental disputes

undoubtedly will rise as the international community seeks to reconcile the conflicting demands of economic growth and environmental protection.

Pallemaerts (2003:2) writes that no treaty making was envisaged as part of the WSSD process. The Johannesburg summit was presented as a 'summit of implementation' not as a norm-setting exercise. Based on the preparatory work of the United Nations Commission on Sustainable Development (CSD), the WSSD was to result in 'action-oriented decisions' for the further implementation of Agenda 21 and renewed political commitment and support for sustainable development. In addition, the Summit was invited to adopt 'a concise and focused document that should emphasise the need for a global partnership to achieve the objectives of the sustainable development' and 'reinvigorate ... the global commitment to a North/South partnership and a higher level of sustainable development. From the outset, the General Assembly had also made it clear that 'Agenda 21 and the Rio Declaration on Environment and Development should not be renegotiated' and that the Summit 'should ensure a balance between economic development and environment protection'.

According to Tladi (2003:197), the three principles relevant in sustainable development discourse are intergenerational equity, intragenerational equity and integration. Intergenerational equity, as an element of sustainable development, requires the present generation to leave the environment in no worse a condition than they found it. Intragenerational equity, in the context of sustainable development, requires equity within a generation. Thus, intragenerational equity, as an element of sustainable development, is concerned with the equitable distribution of environmental costs and benefits from developmental activities. In this sense intragenerational equity attempts to achieve justice between nations. In particular, intragenerational equity attempts to achieve justice between rich and poor nations.

The beauty of intragenerational equity is that it is, in principle, accepted by both developed and developing countries, albeit for different reasons. For developing countries the rich must bear the heavier burden for environmental threats facing the

world due to the industrialization processes and the pressures that their societies continue to place on the earth's natural resources. Thus, for the developing world intragenerational equity places a legal duty on developed nations. Developed nations accept, in principle, the responsibility placed on them by intragenerational obligations because of the "technologies and financial resources they command". For the developed nations these obligations are therefore merely moral (Tladi 2003:203).

The principle of intragenerational equality is an important element in the efforts towards sustainable development. It is based on an understanding of the inextricable link between environmental protection and development. If intergenerational equity asserts environmental sentiments, then these must be integrated with the developmental imperatives asserted by intragenerational equity. The upliftment of the world's poor is indeed a precondition for ensuring that the environmentally destructive development practised by the industrialised countries is not repeated by developing world. Thus it has been asked how impoverished communities can be expected to care about future generations if it cannot care for their own (Tladi 2003: 204).

3.3.3.7 The 2005 UN World Summit

The 2005 United World Summit was the largest gathering of heads of States and governments in history and the most far-reaching attempt to reform the United Nations. Besides addressing development, human rights, peacekeeping and UN institutional reforms, the Summit Outcome Document contains significant sections on sustainable development and environmental protection (Morgera and Duran 2006:11). The EU's environment-related priorities during the discussions on implementation continued to be the same throughout the whole UN Summit process: the pursuit of sustainable development, with particular emphasis on tackling climate change and enhancing global environmental governance. With respect to sustainable development, the EU Council welcomed the unanimous acknowledgement of the MDGs as the international framework for development, together with the Monterrey Consensus and the Johannesburg Plan of Implementation (JPOI) (Morgera and Duran 2006: 19).

3.4 INTERNATIONAL HUMAN RIGHTS LAW AND SUSTAINABLE DEVELOPMENT

According to Pallemmaerts (2003: 4), the general reluctance of States to contemplate the emergence and consolidation of further international legal standards constraining their domestic and foreign policies and national legal systems as an instrument for the achievement of sustainable development goals is well illustrated by their resistance to the explicit recognition of links between international human rights law and sustainable development. It proved impossible, in Johannesburg, to move beyond a general introductory clause affirming that 'respect for human rights and fundamental freedoms, including the right to development, as well as respect for cultural diversity, are essential for achieving sustainable development and ensuring that sustainable development benefits all'. An EU proposal to acknowledge the importance of the interrelationship between human rights promotion and protection and environmental protection for sustainable development was watered down into a clause merely acknowledging the consideration being given to the possible relationship between environment and human rights, including the right to development. Pallemmaerts (2003: 11) noted that although the subordination of international environmental law to international trade law is ostensibly avoided in the Plan of Implementation (PoI), the imbalances in the WSSD's approach to the implementation and development of international law in the field of sustainable development are likely to result in a de facto primacy of international trade law

Most human rights treaties were drafted and adopted before environmental protection became a matter of international concern. As a result, there are few references to environmental matters in international human rights instruments, although the rights to life and to health are certainly included and some formulations of the latter right make reference to environmental issues. The *International Covenant on Economic, Social and Cultural Rights* (16 December 1966), guarantees the right to safe and healthy working conditions and the right of children and young persons to be free from work harmful to their health. The right to health contained in article 12 of the Covenant expressly calls on state parties to take steps for the improvement of all aspects of environmental and

industrial hygiene and the prevention, treatment and control of epidemic, endemic, occupational, and other diseases. The *Convention on the Rights of the Child* (New York, November 20, 1989) refers to aspects of environmental protection in respect to the child's right to health. Article 24 provides that States Parties shall take appropriate measures to combat disease and malnutrition through the provision of adequate nutritious foods and clean drinking water, taking into consideration the dangers and risks of environmental pollution. Information and education is to be provided to all segments of society on hygiene and environmental sanitation. *ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries* (Geneva, June 27, 1989) contains numerous references to the lands, resources, and environment of indigenous peoples. Part II of the Convention addresses land issues, including the rights of the peoples concerned to the natural resources pertaining to their lands. Further, governments are to ensure adequate health services are available or provide resources to indigenous groups so that they may enjoy the highest attainable standard of physical and mental health. Article 30 requires that governments make known to the peoples concerned their rights and duties. Two regional human rights treaties contain specific provisions on the right to environment. The approach of each differs, with the African Charter linking the environment to development, while the American Convention Protocol speaks of a healthy environment (Shelton 2002:6).

Shelton (2008: 130) is of the view that there is a substantial practical reason for emphasizing international human rights law. For those whose well-being suffers due to environmental degradation, human rights law currently provides the only set of international legal procedures that can be invoked to seek redress for harm that is the consequence of an act or omission attributable to a state. The inclusion of inaction is significant because most environmental harm is due to non-state activity. Human rights law makes clear that while its primary objective is to protect individuals from abuse of power by state agents, including legislative representatives of the democratic majority, each state is also obliged to exercise due diligence to ensure that human rights are not violated by non-state actors. Due diligence requires measures to prevent abuses where possible, investigate violations that occur, prosecute the perpetrators as appropriate,

and provide redress for victims. Thus, while no international human rights procedure allows a direct action against private enterprises or individuals who cause environmental harm, a state allowing such harm may be held accountable,

Shelton (2008: 130) asserts that from Stockholm to the present, most advances in developing environmental rights have occurred first, and almost exclusively, at the regional level. Four principal and complementary approaches have emerged to characterize the relationship between human rights and the environment: firstly, International environmental laws incorporate and utilize those human rights guarantees deemed necessary or important to ensuring effective environmental protection; secondly, human rights law re-casts or interprets internationally-guaranteed human rights to include an environmental dimension when environmental degradation prevents full enjoyment of the guaranteed rights; thirdly, International environmental law and international human rights law elaborate a new substantive right to a safe and healthy environment; and fourthly, International environmental law articulates ethical and legal duties of individuals that include environmental protection and human rights.

3.5 ENVIRONMENTAL GOVERNANCE

According to Olowu (2007: 264), even though the concept of environmental governance originated within the purview of the international community's concerted responses to the environmental challenges of the mid-1980s and the decades following, there has been an unmistakable recognition that international responses and initiatives would only thrive when effective normative, institutional and policy frameworks are established at the domestic level. This thinking has even gained added relevance through the prevalent idea that environmental governance holds the potential of promoting the goals of sustainable development.

Public participation is synonymous with stakeholder dialogue. Public participation in environmental decision-making is about linking the citizen to environmental governance and it provides the means through which environmental rights are exercised.

Environmental problems cannot be solved effectively by government alone. Protecting the environment requires the joint effort of governments and the public and is ultimately reliant on good environmental governance (Du Plessis 2008: 25). According to Kotze (2004: 6), it is furthermore argued that there exists a close link between environmental governance and environmental administration and implementation. Environmental governance is a relatively novel term in South African law. The author further suggested the following definition of environmental governance "...the collection of legislative, executive and administrative functions, processes and instruments used by any organ of state to ensure sustainable behaviour by all as far as governance activities, products, services, processes and tools are concerned."

A comprehensive survey of fragmented environmental governance efforts in South Africa suggests that fragmentation manifests in various ways. Firstly, there is vertical and horizontal fragmentation of the environmental governance structure (institutional framework). Vertical fragmentation refers to the three distinctive, interdependent and interrelated spheres of government, namely the national, provincial and local spheres. In each sphere, various independent and autonomous environmental departments, or line functionaries, exist. These line functionaries include, amongst others, the Department of Environmental Affairs and Tourism (DEAT); the Department of Water Affairs and Forestry (DWAF); the Department of Minerals and Energy (DME), the Department of Agriculture, and the South African Heritage Resource Agency. The institutional framework relating to environmental governance is thus fragmented in both a horizontal and vertical sense. Secondly, the framework of environmental legislation in South Africa is fragmented. Fragmentation of legislation may be divided into vertical; horizontal (which is not to be confused with vertical and horizontal fragmentation of the institutional framework); framework/sectoral; and inter-sectoral fragmentation. These manifestations of fragmentation are discussed hereafter (Kotze 2006: 77).

Fragmentation remains one of the main challenges facing the current environmental governance efforts in South Africa. This is mainly because fragmentation may prevent or inhibit sustainable service-delivery by government departments responsible for the

execution of environmental government mandates (Kotze 2007: 442). Kotze and De la Harpe (2008: 6) write that the concept of good governance is coming to the fore as one of the preferred generic governance strategies to ensure proper and sustainable governance, and may be equally useful to address governance inefficiencies relating to World Heritage Site (WHS). Good Governance emphasises, amongst other things, the need for coherence, legal certainty, accountability and a holistic approach to governance. Governance is defined by the United Nations Commission for Global Governance as follows:

Governance is the sum of the many ways individuals and institutions, public and private, manage their common affairs. It is a continuing process through which conflicting or diverse interests may be accommodated and cooperative action may be taken. It includes formal institutions and regimes empowered to enforce compliance, as well as informal arrangements that people and institutions either have agreed to or perceive to be in their interests.

Good administration is seen as part of good governance. According to the European Commission White Paper on Administrative Reform, the key principles thereof are service, independence, responsibility, accountability, efficiency and transparency. The principles of good governance developed by the European Commission in the white paper are openness, participation, accountability, effectiveness and coherence. (Kotze and De la Harpe 2008:30). Kotze and De La Harpe (2008: 42) feel it is not necessary to reinvent the wheel to promote the good and stop the ugly from happening because of bad governance practices. The authors recommend for the utilization of existing tools and optimise our governance performance in terms of these mechanisms. The act, together with supporting legislation, provides the necessary mechanisms – they should merely be used properly.

Beyerlin (2002: 12) evaluates the importance of the civil society in good governance. The author avers that civil society can give a significant impulse to the process of establishing good governance in the field of international environmental protection and

sustainable development. It should play a two-fold role. Firstly, embodying the environmental conscience of the world and advocating the fundamental interests of present and future generations, civil society should develop as a distinct counterpart of the community of States. Secondly, Non-Governmental Organisations (NGOs) representing civil society should become increasingly reliable partners to States in all fields of environmental and developmental co-operation.

The role of local government in good governance is important. Beyerlin (2002:14) remarks that by means of Agenda 21 processes, local governments have established formal partnerships with major groups, ethnic minorities, community-based groups, as well as with international agencies, national governments and other local governments to accelerate sustainability.

3.6 ENVIRONMENTAL JUSTICE

According to Nadal (2008:30), a dominant discourse that influences the framing of environmental justice is that of distributive justice, according to which environmental injustice is the uneven distribution of environmental goods and bads among certain members of society. Notwithstanding a lack of research, particularly in the EU, evidence suggests a strong positive correlation between the suffering of environmental injustice and personal attributes such as race, ethnicity, socio-economic status and, increasingly more pronounced with the onset of climate change, nationality and generation. Such groups also disproportionately suffer from lower standards of living, public health and social exclusion.

Solutions to the environmental crisis will be found by understanding the 'roots' of harm, particularly the social, political, cultural and economic context. This approach is adopted by the eco-human rights perspective, which aims to build a bridge between the objectives of human rights movements, to attain social justice, and the objectives of environmental groups, to attain ecological wellbeing. An understanding of environmental crime, therefore, requires an understanding of the inequitable conditions

of current social and economic systems. The fundamental premise of the eco-human rights approach is that 'the conditions which allow for the long term realisation of human rights are precisely those conditions which allow for long term ecological wellbeing'. The evolution of the informal abalone fishery, therefore, needs to be understood in the context that it emerged as a traditional practice in coastal communities, seen as a legitimate source of income, even if was considered 'illegal' by the state (Hauck 2009: 243

According to Krieg (2009: 114), the outcome of the polluter-industrial complex takeover is the failure to effectively address environmental crises at their political economic core and, consequently, a long history of failed environmental policy rooted in an ideology of free-market environmentalism. At the global level, greater levels of economic integration are increasingly putting power into the hands of private capital and redefining the historical role of the nation-state from acting in the interest of the people to increasingly as acting in the interest of capital. This paradigm shift poses a unique set of challenges for the environmental justice movement.

The term "environmental justice" suggests that the obvious way of achieving environmental justice is through legal means. There are certainly legal mechanisms, both existing and currently mooted, that can assist in the pursuit of environmental justice. This will probably be useful particularly in future situations of actual or threatened environmental injustice. There is, however, clearly a major problem of existing environmental injustice which needs redress and in this regard the law can play at most a limited role. Probably the most important way for dealing with existing environmental injustice in South Africa is through the government's addressing infrastructural deficiencies in areas like access to water, sanitation, electricity and the like- an endeavour in which the law is one of many mechanisms involved (Kidd 2008: 241).

3.7 ENVIRONMENTAL IMPACT ASSESSMENT

The case of Fuel Retailers Association of Southern Africa V Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others 2007(6) SA 4 (CC) ("Fuel Retailers") is the first in which the Constitutional Court considered in detail the nature and scope of the concept sustainable development. More importantly, it elaborates unequivocally on the nature of the legal obligations of environmental authorities under the EIA regulations. The majority judgment goes further than the High Court decisions that have hitherto confirmed that the EIA process is not about environmental protection, but also to the promotion of socio-economic development (Murombo 2006:489).

According to Feris (2008:42), section 24(b) of the Constitution of South Africa mandates the state to apply measures which will prevent pollution and ecological degradation, promote conservation, and secure ecologically-sustainable development and the use of natural resources, while promoting justifiable economic and social development. The Khayalami residents' contentions essentially rested on the argument that the state negated this obligation by not providing for integrated environmental management of the site, including conducting an environment impact assessment as required by environmental legislation. It was, however, never argued as such, or the court simply did not consider sustainable development in this manner.

This anticipatory characteristic of the requirement for environmental authorisation is accordingly inherent in the internationally established system of environmental assessment and is manifested in the most common form of environmental assessment, namely Environmental Impact Assessment (EIA). In South Africa EIA legislation has been in place for well over a decade. But a topical question is whether South African legislation allows for ex post facto environmental authorisation, that is whether an environmental assessment can be carried out after the development is in place or has commenced, or more crucially whether the authorities can simply determine after a development is completed or has commenced that an environmental assessment need

not have been carried out at all. This question has come to the fore as the National Environmental Management Act 107 of 1998 (NEMA) was amended during 2004 to allow for the "rectification of unlawful commencement or continuation of listed activity" (Paschke and Glazewski 2006: 2). A system which permits ex post facto environmental authorisation is highly problematic because, inter alia, it would in effect encourage some persons to undertake listed activities without permission and apply for authorisation only after it is too late to halt the activity in question. By that time, damage to the environment may be irreversible (Paschke and Glazewski 2006: 5).

The model of EIA, which was framed to enable protection of environment, runs into serious argument in developing countries mainly on the issue of poverty. The main point leveled is how protection of environment can gain priority, when a vast section of population is below the poverty line. Hence, sustaining the status quo does not constitute sustainable development as it might in developed economies. Then the changed order of priorities in developing countries becomes: Elevate the vast section of population above the poverty line through economic growth; Ensure that EIA is done to protect the environment to the extent possible without hindering economic growth and Progress towards sustainable development after equity has been achieved in society (Rajaram and Das 2007: 558).

3.8 GENDER AND ENVIRONMENT

As a theoretical construct, gender helps to illuminate, and enables us to analyze, aspects of societies, histories, and environments that might otherwise be taken for granted and reinforced, sometimes with tangible, detrimental effects on particular people, places, and natural entities. Understood in this way, gender analysis includes both women's studies and feminist approaches to research and works in tangent with other forms of critical socio-cultural analysis, such as post-colonial studies. Moreover, because it focuses expressly on the complex interplay of nature and culture, it constitutes an important aspect of interdisciplinary environmental studies (Page 2007:296).

Ecofeminism derives primarily from a feminist analysis that seeks to empower and celebrate the connection between women and nature. Ecofeminists believe that the subjugation of women and nature is a social construction, not a biologically determined fact, and thus can be changed. They promote sociocultural change and argue for a revaluing of people's biological connections with nature. Ecofeminist projects include the creation of new image and stories to replace those of controlling and dominating nature and women. Ecofeminists want to recreate the nurturing image of women and nature as an alternative to the old images of mastery. Some ecofeminists assert that ecofeminist theory represents a "third wave of feminism" because it demonstrates the need for an environmental perspective of feminism and a feminist perspective of environment (Benton and Short 1999: 141).

Benton and Short (1999:143) are of the view that radical feminist idea, in particular, has generated much debate within feminist circles. The radical ecofeminist discourse holds that the primary dynamic behind the domination of women and nature is patriarchy and that this is the only way to comprehend every other expression of patriarchal culture- from hierarchies, to industries, to technologies. This position is criticised by those who are wary of attributing a single root cause to multiple problems. Benson and Short (1999:144) critique ecofeminist and feminist perspectives. According to the authors many ecofeminist and feminist perspectives struggling to articulate a new environmental discourse unsatisfactorily address class, ethnicity, and age- not as independent agencies/structures but as a "subcontractors" of patriarchy. Feminist arguments relying on a single agency (patriarchy) as the lynchpin in the whole system of environmental degradation are problematic. The authors further counter that human attempts to control nature can be traced back to such technological inventions as fire, the wheel, tools- all of which predate patriarchal societies.

Marika and Joekes (1997:5) are of the view that a more philosophical stream of women, environment and development (WED) sees women's position as essentially closer than men's to nature because their work has always entailed a close relationship with nature.

Women are depicted as naturally privileged managers of environmental resources. An economic line of a WED emphasises women's work: the sexual division of labour that has led to women's particular role in managing natural resources.

Feminist critiques have pointed out that WED conceptualisations are flawed on three main reasons. First, environmentally-friendly management practices by women can be explained in terms of rational short-term interests. For instance, women may only collect dry wood for fuel because it is lighter and easier to carry, and certain trees may be protected more by custom or religious than by women's motivation to conserve resource. Second, relations of women to the environment cannot be understood outside the context of gender relations in resource management and use. Women's relation to the natural resources reflects social-structural forces, within the framework of gender relations which systematically differentiate men and women in processes of production and reproduction. These forces relegate/confine women to environmentally-based activities by limiting their access to other types of livelihood. Third, like the WID (women in development) approach, the WED perspective completely focuses women at the exclusion of men, and pays little attention to the differences among men (Marika and Joeke 1997:5).

Selman (1996: 7) observes that the environmental agenda is in practice almost limitless and includes, at least tangentially, most of the major issues currently facing humanity. The adoption of the notion of sustainable development has in particular broadened the basis of concern by extending it to include issues such as war, poverty, gender, education, animal welfare, trade and health as well as purely ecological issues. However, in order to take a manageable perspective on the subject, it is useful to identify the core issues which local sustainability programmes commonly address. Quan-Baffour (2008: 57) recommends that women in rural areas must be part of mainstream decision making on environmental issues. This paradigm shift implies that rural women farmers take control of and responsibility for natural resources such as water, land, soil and forest to ensure their sustainable use. This, however, can be realised only when rural women have been taught the relevant knowledge and skills,

and offered the opportunities to be involved in making decisions relating to the environment. Quan-Baffour (2008: 60) remarks that although the survival activities of rural women may cause minimal environmental destruction, they bear the brunt of natural resource destruction because their life and livelihood depend on it. It is therefore fair that women should be equipped with the knowledge and skills to manage natural resources to ensure sustainability. Because of their responsibilities to provide food, to gather fuel and waste, and to care for the sick and elderly, rural women often have valuable knowledge and experience of their environment. This knowledge is often overlooked or ignored by development agencies and some governments, because women are so rarely consulted about their expertise.

3.9 ENVIRONMENT AND YOUTH DEVELOPMENT

According to Ausyouth (2003: 6), adopting and promoting practices that are healthy and safe as well as positive, engaging, empowering and enterprising, will promote increased confidence in young people, parents and the community, and are more likely to match expectations. A positive, healthy and safe environment is equally important in ensuring youth development programs and activities are able to offer adults, communities and young people opportunities to work together with shared purpose and in collaborative enterprise. To achieve these diverse and sometimes competing goals, young people and provider organisations needs more than an understanding of potential hazards in the youth development environment. Achieving these goals calls for resourcefulness and a commitment to implementing the overarching and underpinning principles for good practice in youth development.

Ioan (2006: 1134) encourages the youth to learn more about environmental issues. The author submits that learning, alongside with adaptation, represent the two major modalities of acquiring a balance with the complex external environment and consists of accumulation in terms of social and individual experience. Ecological learning and the "expertise" that must be acquired over and over again in each life stage (age) involves the ability of looking, listening to, smelling and adjusting the environment. The pleasure

of enjoying nature must also be learned. The fusion of sensory perceptions, of physical experiences, of reflections and of direct intervention actions can trigger learning events with long-term effect. Ecological learning cultures not only contain nature experiencing and nature sciences, but also the relationship man-nature technology as a component of ecology. Ecological learning envisages the sensitivity of perception, rationality, esthetical competency, the capability of enjoying the environment and a specific attitude and perspective of observation as well.

While some of the principles of youth engagement applied to certain types of initiatives, they were found to not be entirely applicable to the scenario of young people taking action on climate change on campuses. A possible reason for this is that, unlike many other social issues, the impacts of climate change are not clearly visible in a campus setting, and are not as personal. While the impacts are felt more harshly by certain demographics of people, this is less obvious on a campus than, for example, discrimination against women or people of color. Even without the "identity" principle, however, youth approaches to creating change on campus were found to have some of the unique features, thereby reinforcing the need to uniquely consider the engagement of this demographic (Helferty and Clarke 2009: 298).

Heferty and Clarke (2009: 298) observe that whether in an awareness-raising campaign or the development of an on-campus policy, students are key stakeholders on campuses and have a unique perspective to contribute to any dialogue around campus climate solutions. They also have the potential to create their own initiatives to educate peers on behavioral change or implement mechanisms to reduce greenhouse gas (GHG) emissions. Implementation of many of the campus-wide initiatives is dependent on student buy-in, and there are many opportunities for students to develop leadership skills within the campus setting as a result of a high level of involvement in creating solutions to climate change. In addition, most of the initiatives outlined here can be replicated elsewhere, thereby providing a starting point for students wanting to begin an initiative or providing ideas for other campus stakeholders wanting to engage students in initiatives. In both the short- and long-term, the transition to a low-carbon society will

benefit if students are given the opportunity and space to engage in climate change initiatives on campuses, and are supported in their efforts to navigate the complex university system and institutionalize solutions in relatively short windows of time.

3.10 MAINSTREAMING ENVIRONMENTAL SUSTAINABILITY

Sustainability assessment has the potential to enhance the sustainable decision-making processes of local, regional, national or international authorities or private organisations. Despite this, sustainability assessment, as a formalised process, is not currently practised in South Africa and may not even be adopted or promoted. However, through this initial conceptualisation of sustainability assessment, there appears to be remarkable similarities between what is proposed in the tool and how SEA (Strategic Environmental Assessment) has been conceptualised and promoted in South Africa (Govender et al 2006: 323).

Chapter 5 of the National Environmental Management Act (NEMA) provides for the development of procedures for the assessment of the impact of policies, plans and programmes. SEA-specific legislation does not exist. However, Department of Environment and Tourism (DEAT) prepared these guidelines in the absence of formal legal requirements in response to the need for informed planning and decision-making. Not only did the limitations of project EIA become widely recognised but planning legislation identified principles of community empowerment and concern for the environment, however, did not prescribe methods by which environmental issues can be accounted for early in the planning process (Govender et al 2006: 324).

Sowman and Brown (2006: 701) remark that following the democratic elections in 1994, environmental concerns in South Africa have been addressed in broad frameworks, sectoral policies and laws. Principles of equality, social and environmental justice, participation, ecological limits, stewardship, good governance and capacity building in environmental management have been espoused as, for example, in the South African Constitution (1996) "... everyone has the right to an environment that is not harmful to

their health or well-being". Part (b) of this clause gives government the responsibility to take reasonable measures to ensure that environment is protected for the benefit of present and future generations, and to take reasonable legislative and other measures that prevent pollution and ecological degradation; promote conservation; and secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development. Govender et al (2006: 325) note that sustainability assessment is increasingly being viewed as an important tool to aid the shift towards sustainable development. The understanding of sustainable development has led to different approaches towards environmental assessment processes of which most are sustainability-based, a truly integrative sustainability-based assessment framework is yet to be established out of these experiences.

The environmental management specialist needs to fully understand how the Integrated Development Planning (IDP) processes function. The environmental management specialist needs to understand the language, the tools and the thought processes that are used by the IDP planner and manager. The environmental management specialist must be able to assist the IDP manager to develop (and test) different scenarios that may reduce environmental impact and push development in more sustainable directions. Environmental management and sustainability issues and techniques should not impede the processes used by the IDP manager (Sowman and Brown 2006: 706).

In her persuasive argument, Bolton (2008: 50) submits that even though in South Africa environmental considerations are generally not incorporated into government procurement procedures, this does not mean that there is no scope within the existing legal framework for doing so. The wording of section 217(2) of the Constitution, section 2(1)(d) of the procurement act and regulation 17 of the procurement regulations, in particular, allows for an interpretation that includes the use of procurement as a tool of environmental policy. There are different ways in which environmental considerations could be incorporated throughout the procurement process. As a rule, the planning stage of the procurement process is the best time to incorporate environmental considerations into procurement decisions since unlike the other stages in the

procurement process this stage is not as heavily regulated. The environment can further play a significant role in the drawing up of specifications. Organs of state could stipulate that they will only consider green goods or services. The environment can also play a role when determining the responsibility of contractors. Contractors could be excluded from consideration if they have been found guilty of contravening environmental laws, or if they simply do not have the necessary environmental competence to render performance under a contract that specifically requires this. The former ground for exclusion would, however, require a legislative amendment. Environmental criteria can also, in addition to the usual criteria such as price and technical capability, be applied during the award stage of the procurement process. It is important, however, that green award criteria: (i) do not confer an unrestricted freedom of choice on an organ of state, meaning award criteria must be specific and objectively quantifiable; (ii) are expressly mentioned in the tender documentation; and (iii) generally comply with the principles in section 217(1) of the Constitution, *ie* fairness, equity, transparency, competitiveness and cost-effectiveness. Insofar as the actual contract is concerned, organs of state could ensure that contracts contain specific clauses aimed at the protection of the environment. In the case of construction contracts, for example, the contract could expressly restrict the use of certain vehicles or types of equipment in the performance of the contract. Contractors could also be contractually obliged to implement an environmental policy for the duration of the contract.

Tladi (2004: 176) writes that environmental assessments of projects proposed for bank financing must be 'environmentally sound and sustainable'. Under the operational policy, the bank must undertake an environmental screening of each proposed project in order to classify the project. The project may be classified as a category A project if 'it is likely to have significant adverse environmental impacts that are sensitive, diverse or unprecedented', or category B 'if its potential adverse environmental impacts on human populations or environmentally important sites ... are less adverse' than the impacts in Category A. A project will be classified as category C if it is likely to have minimal or no adverse environmental impact. Needless to say, Category A projects require a more intense impact assessment, while the scope is narrower for Category B. Category C

projects need no environmental assessment beyond screening to determine the category.

According to Du Plessis and Britz (2007: 275), there is no indication in legislation or the National Environmental Management Act regulations how environmental, socio-economic and cultural impacts should be considered in relation to one another. Legislation sometimes refers to socio-economic considerations and often the social and economic issues are regarded as separate issues. The courts and officials give different interpretations to these considerations depending on the issue before them. However, the four considerations – environmental, economic, social and cultural – are not separate issues, but are inter-related and interdependent. These considerations should be regarded in a balanced manner and always in relation to environmental issues. Purely social or purely economic issues should not sway a decision in a particular direction – the same could be said of purely environmental issues. Social and economic issues should be linked as socio-economic issues in order to ensure that the correct issues are addressed regarding a project. Sustainability rests on four pillars: the environmental, socio-economic, cultural and governance pillars. If one of the pillars is not taken into account, sustainability may not be achieved. If governance and decision-making are skewed, sustainability will never be achieved. Decisions should not be taken in isolation. The DEAT should, therefore, not exclude other government departments in its decision-making or try to usurp the functions of another department. In the case of filling stations, the DME plays a major role with regard to competition and market-related issues, while the DEAT should consider a combination of environmental, socio-economic and cultural impacts. Planning authorities, for example, take economic considerations into account during zoning applications. Where the decision-making authority of the two or more departments overlaps, the principles of cooperative governance should apply and no decisions should be taken without input from the other department. Just as the DME should not issue retail and wholesale licences without environmental authorisations, the DEAT should not act as the competent authority to make decisions with regard to competition issues. If economic considerations, therefore, are already considered by another department, whether a local government department

or the DME, the DEAT could focus on the other pillars of sustainability in its decision-making.

Du Plessis and Britz (2007: 276) recommend that guidelines could be provided to assist government departments to make decisions to achieve sustainability. The National Environmental Management Act or the National Environmental Management Act's regulations may be amended to state clearly what is meant by environmental, socio-economic and cultural impact. The example of the National Water Act could be followed to state the context of socio-economic considerations. Social and economic considerations should not be considered separately, but as interlinked issues. The guidelines should give a clear indication as to what is understood by under socio-economic considerations. Listing a number of factors, as in the Gauteng Guidelines, does not offer a solution if the context in which these factors should be considered is not defined. However, in the end the ultimate goal of an environmental impact assessment should be the achievement of sustainability and not the regulation of competition and the market

3.11 THE JUDICIAL INTERPRETATION OF THE ENVIRONMENTAL RIGHTS

According to Pieterse (2004: 389), debates about the justiciability of socio-economic rights typically focus in the first place on their legitimacy (ie whether their nature and content is suitable for constitutionalisation) and secondly on whether courts are institutionally competent to enforce them. Legitimacy-based objections to the constitutionalisation of socio-economic rights typically relate to broader ideological concerns on redistribution of wealth and state intervention in market economies. It has, for instance, been claimed that socio-economic rights are 'choice-sensitive' issues that are better left to political, rather than legal, deliberation. Added to these are arguments relating to the nature of socio-economic rights and the degree to which they are said to differ from civil and political rights. It has for instance been contended that socio-economic rights are ill suited to judicial deliberation because they are 'positive' in nature (their fulfillment requires state action), ideologically loaded, vague and indeterminate,

expensive to realise and achievable only progressively. Civil and political rights are conversely depicted as requiring merely state restraint (therefore 'negative' in nature), and as ideologically neutral, precise in content and obligation, cheap to enforce and immediately realisable. These notional distinctions between civil and socio-economic rights, and specifically the argument that they render socio-economic rights incapable of judicial enforcement, have been widely discredited. For instance, it has been shown that resource implications also flow from vindicating civil and political rights, that it is possible to award more precise content to socio-economic rights and that both 'categories' of rights have 'positive' as well as 'negative' dimensions that are achievable either immediately or progressively.

According to Pieterse (2004:406), the South African judiciary is unconditionally obliged to give content to socio-economic rights and the duties they impose through the process of constitutional interpretation. This interpretative role is uncontroversial and there can be few qualms about the judiciary's competence in this regard. Interpreting legal texts is what courts do best, and many decades of civil rights interpretation by foreign courts has shown that they are similarly adept at giving meaningful content to rights. The Constitution awards courts significant scope for interpretative innovation and creativity that may be used to further its transformative aims, and judges are in principle free to use this (textually derived) leeway accordingly, without fear of overstepping the boundaries of separation of powers. That said, the fact that courts have the last word on the meaning of constitutional rights requires that the interpretative function is exercised responsibly. Especially when giving content to obligations, courts must guard against imposing unrealistic or overly onerous duties on the state. While nothing but the constitutional text should in principle constrain courts in this respect, interpretative fora should remain sensitive to the remedial context of their decisions. Ideally, the interpretative task should be viewed as courts assisting other branches of government to establish the precise content of their obligations rather than as an antagonistic mandate from the judiciary to the legislature and executive. In this manner, interpretation can 'build a pragmatic notion of inter institutional cooperative interaction

while at the same time not losing sight of the courts' duty to promote "Human dignity, equality and freedom" through rights adjudication'.

In the case of *BP Southern Africa (Pty) Ltd v MEC for Agriculture, Conservation, Environment and Land Affairs* 2003 All SA 201 (W) it was held that pure economic principles will no longer determine in an unbridled fashion whether a development is acceptable. Development, which may be regarded as economically and financially sound, will in future be balanced by its environmental impact, sustainable development and socio-economic concerns. By elevating the environment to a fundamental justiciable human right, South Africa has irreversibly embarked on a road, which will lead to the goal of attaining a protected environment by an integrated approach, which takes into consideration inter alia socio-economic concerns and principles.

Kidd (2006: 2) posits that in *Minister of Public Works and Others V Khayalami Ridge Environmental Association and Another* 2001 (3) SA 1151 ("Kyalami"), the Constitutional Court, in probably the first significant case in which the *National Environmental Management Act (NEMA)* required consideration, got it plain wrong. First, the court suggests that *NEMA* revolves around the environmental implementation and management plans, ignoring the fact that these are one of many components of the Act which are not any more important than the other components, which the court describes as 'various other provisions'. The court goes on to find that the environmental management principles in section 2 are not directed at "controlling the manner in which organs of state use their property". The author further argues that the principles *are* directed at the manner in which organs of state use their property and, indeed, do anything that could affect the environment, could not be clearer from the wording of section 2(1). According, further flawed interpretation by the court of section 2 of *NEMA* includes the failure to find that the principles can be applied in a dispute –between members of the public and the government concerning activities that are not regulated by environmental implementation plans or other provisions formulated under [*NEMA*]... – and the finding that section 2 applies to activities that 'will' significantly affect the environment, rather than those that *may* do so, which is a critical difference.

In the Merebank Environmental Action Committee V Executive Member of Kwazulu-Natal Council for for Agricultural Affairs (Case No. 2691/01 (D) ("Merebank case"), the court completely ignored section 32 of *NEMA* insofar as it applied to both the applicant's *locus standi* and the award of costs. Bearing in mind that *NEMA* has been in force since 1 January 1999, this is also inexcusable. There is, of course, the possibility that the relevant section was not brought to the court's attention by counsel. More recently, several judgments have begun to claw back the gains made by Safe the Vaal Environment (SAVE) that were subsequently pegged back in Kyalami and Merebank. Kidd (2006:3) cited the Supreme Court of Appeal in MEC for Agriculture, Conservation, Environment and Land Affairs v Sasol Oil (Pty) Ltd and Another where the court emphasised that of particular importance is *NEMA*'s injunction that the interpretation of any law concerned with the protection and management of the environment must be guided by its principles. At the heart of these is the principle of 'sustainable development' which requires organs of state to evaluate the 'social, economic and environmental impacts of activities' (Kidd 2006: 3).

If the courts are to make a decent fist of deciding such matters, judges will have to appreciate the many, and often complex, scientific aspects of these decisions. They are not being asked to do so yet, because almost inevitably, there is a ground of review other than reasonableness or rationality present. Environmentally sound decisions, based on appreciation of the scientific merits, will require judges to 'graduate' to the next level of the game, where the further challenge will be to augment their legal skills with the skills necessary to grasp the essence of the relevant science (Kidd 2006: 12).

3.12 CONCLUSION

It is important to note that both biocentrists and social ecologists are calling for a major transformation of people's view and of governmental policies towards environment. The notion of a right to environment has met resistance from those who claim that the concept cannot be given content and who assert that no justiciable standards can be developed to enforce the right, because of the inherent variability of environmental

conditions. The notion of a right to environment has met resistance from those who claim that the concept cannot be given content and who assert that no justiciable standards can be developed to enforce the right, because of the inherent variability of environmental conditions.

The definition of sustainable development therefore suggests an inherent link between social and environmental needs and the need for technological advancement and development. An imbalance among these elements, where global patterns of development put the environment under pressure, places the earth in crisis. Most human rights treaties were drafted and adopted before environmental protection became a matter of international concern. By means of Agenda 21 processes, local governments have established formal partnerships with major groups, ethnic minorities, community-based groups, as well as with international agencies, national governments and other local governments to accelerate sustainability. The most important way for dealing with existing environmental injustice in South Africa is through the government's addressing infrastructural deficiencies in areas like access to water, sanitation and electricity. The next Chapter will focus on the concepts of Intergovernmental Relations and Co-operative Governance.