11 Challenges of human rights protection in the sustainable development of natural resources in South Africa

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1. Introduction

When the rights and interests of different stakeholders in the development of natural resources conflict, the state must balance the competing interests, which regrettably, could compromise one right against another.[1] Balancing economic interests against environmental degradation and the possibility of abuse of human rights in the process of the development of natural resources is bound to be a challenge for any state. However, "human development and human rights are close enough in motivation and concern to be compatible and congruous, and they are different enough in strategy and design to supplement each other fruitfully."[2] It is essential, therefore, that human rights standards be applied to assess the effectiveness of development to ensure that potential inequalities and discriminatory practices that frustrate effective development are eliminated. A rights-based approach is a panacea to the challenges of inequalities and discrimination created by resource development.

The necessity to protect stakeholders' rights is premised on a requirement that development must be sustainable by satisfying the needs of all stakeholders. Accordingly, it is expected that the development of natural resources should incorporate a balance of the interests of all stakeholders that integrates socioeconomic benefits derivable therefrom with the least impact on the environment facilitated by appropriate policy and regulation.

The objective of this chapter is to examine the challenges associated with the protection of human rights in the context of sustainable development of natural resources, using South Africa as a point of reference. Part 1 is the introduction. Part 2 examines the nexus between the protection of the environment and human rights. Part 3 considers the need for the development of natural resources in the context of sustainable development. Part 4 discusses the challenges of safeguarding human rights in the process of sustainable

1 W Twining and D Miers, *How to Do Things with Rules* (5th edn, CUP 2010) 150.

2 "2000 UNDP Human Development Report" 19 <www.hdr.undp.org/reports/view_reports.cfm?2000> accessed December 6, 2022.

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development of natural resources, *vis-à-vis* the constitutional obligation in South Africa to protect the environment sustainably. The objective underlying discussion throughout the chapter is to identify any gap in the law relevant to the subject, hence, part 5 presents a conclusion and recommendations to assuage any deficiency identified.

2. Environmental protection and human rights

Environmental factors may affect human rights in three different ways. First, the effect may be direct as in when toxic discharges or pollution arising from development adversely affect people's health. Secondly, adverse environmental factors may necessitate the enforcement of certain procedural rights like the right to be informed and the right to a remedy for infractions relating to other substantive human rights caused by environmental degradation. Finally, the need to protect the environment may justify some interference with specific human rights, as may be reasonable and justifiable for the benefit or the protection of the larger society.[3] Regrettably, a rigid classification of environmental rights in the absoluteness that characterises civil and political rights may exacerbate the challenge of the resolution of the modern-day conflict between development and human rights.

While there is some understanding regarding the existence of a substantive right to environmental rights, there is no generally accepted standard to measure the success or efficacy of the attendant values of terms like "decent environment," "environment adequate for their health and well-being" accompanying the right, thereby cloaking environmental rights with the toga of ambiguity and lack of credibility.[4] A countermeasure by activists and scholars is to work towards finding an alternative but effective means of environmental protection,[5] resulting in the emergence of the application of procedural rights like the rights to information, participation, just administrative action, and access to courts as veritable tools to be applied to forestall environmental harm.[6]

In these situations, procedural rights may balance the competing rights,[7] making it possible to employ other substantive rights impacted by environmental degradation as the basis of a claim for remedies. For example, where

3 Council of Europe, *Manual on Human Rights and the Environment* (3rd edn) 8 <https://rm.coe.int/manual-environment-3rd-edition/1680a56197> accessed August 25, 2022.

4 JL Sax, "The Search for Environmental Rights" (1990) Journal of Land Use and Environmental Law 96.

5 DL Shelton, "Human Rights and the Environment: What Specific Environmental Rights Have Been Recognized?" (2006) Denver Journal of International Law and Policy 132.

6 S Kravchenko, "Environmental Rights in International Law: Explicitly Recognized or Creatively Interpreted" [2012] Florida A & M University Law Review 164.

7 N Vlavianos, "The Intersection of Human Rights Law and Environmental Law" (A symposium on Environment in the Courtroom: Key Environmental Concepts and the Unique Nature of Environmental Damage, Canada Institute of Resources Law University of Calgary 2012) 6.

the effect of environmental damage is direct, as in when toxic discharges or pollution adversely affect the health of people, it may be necessary to demand the enforcement of certain procedural rights like the right to be informed and the right to remedy for infractions on other human rights caused by environmental degradation. The fact that damage to the environment can impair and undermine other human rights, for instance, the right to life underscores the fact that though there may be no substantive right to a healthy environment, recourse may be made to procedural rights like the right to just administrative action to prove that action taken was administratively unfair and/or that there is need for appropriate reasons to be provided for the offending action.

Furthermore, procedural rights facilitate democratic decision-making in the regulation of the environment. People must have access to the centres of power to allow them to express competing views on the exercise of power fairly and equitably.[8] Moral duty on the part of the administrative authority demands that it engages the people through public participation, given that the authority works for the public.[9] The fact that the existence of divergent values influences the development of environmental law underscores the role of the state in resolving environmental problems and addressing the issues emanating from politics in the discourse on the environment.[10] It is therefore reasonable that those who are affected or may be affected by a decision should have a right to be involved in the process of arriving at that decision.[11] A participatory process allows stakeholders to be involved in environmental policy formulation, thereby creating a consensus on the part of those whose rights may be violated and those who must act.[12]

The promotion of coordinated participation of individuals, including children,[13] non-governmental organisations, and other sectors of society in

8 C Ramaphosa, "The Main Elements of Democracy: A South African Experience" in *Democracy: Its Principles and Achievement* (Inter-Parliamentary Union Geneva 1998) 73.

9 Department of the Environment, Transport and the Regions (UK), "Public Participation in Making Local Environmental Decisions" (2000) 11 <www.unece.org/env/pp> accessed August 12, 2022.

10 E Fisher and others, *Environmental Law: Text, Cases and Materials* (OUP 2013) 54.

11 M Dellinger, "Ten Years of the Aarhus Convention: How Procedural Democracy Is Paving the Way for Substantive Change in National and International Environmental Law" [2012] Colorado Journal of International Environmental Law and Policy 313.

12 For the advantages and disadvantages of participation in environmental decision-making, see – D Shelton, "Rights-Based Approach to Public Participation and Local Management of Natural Resources" <www.pub.iges.or.jp/modules/envirolib/upload/1503/attach/3ws-26-dinah.pdf> accessed 12 August 2022; NAF Popovic, "The Right to Participate in Decisions That Affect the Environment" [1993] Pace Environmental Law Review 683, M Mason "Information Disclosure and Environmental Rights: The Aarhus Convention" [2010] Global Environment Politics 10; Ministry of Environment Poland, "Handbook on Public Participation in Environmental Impact Assessment Procedures in Poland" (2002) <www.mos.gov.pl/aarhus> accessed August 12, 2022.

13 The interest of every segment of the population is relevant in matters of public participation. Article 12 of the *UN Convention on the Rights of the Child* 1989 provides for the right of a

the effort to improve the environment generally enhances the quality of life in the long run.[14] If there is congruence in the interests of the government and the community regarding environmental decision-making facilitated through public participation, it is possible to expect individuals and the community to monitor compliance and identify violations which could be missed by an understaffed public agency, thereby filling gaps in government enforcement caused by resource constraints.[15]

At the regional international level, the *African Charter on Human and Peoples' Rights* 1981 (hereafter the *Banjul Charter*) took the bold step of creating a substantive right "to a general satisfactory environment favourable to their development."[16] Indeed, the *Banjul Charter* is the first legally binding regional instrument to make a clear provision for the right to a clean environment and a right to development.[17] Article 21 of the *Banjul Charter* affirms the right of the states to freely dispose of their wealth and natural resources in the exclusive interest of the people, while article 24 creates a substantive "right to a general satisfactory environment" suitable to people's development. However, article 24 of the *Banjul Charter*, the possibility of deriving a right to a healthy environment from the custom and principles of international law is doubtful even in the African region because various African constitutional provisions on the environment vary in form and substance, and many can be classified as mere declarations of value, rather than creating binding legal obligations.[18]

Meanwhile, to be effective, laws protecting the environment require effective implementation because they are not self-executing. It is necessary to create appropriate administrative capacities and regulations, coupled with a commitment on the part of the government and the active participation of civil society in the decision-making process.[19] The capacities and the regulations so

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child to be listened to and taken seriously, and "be heard in any judicial and administrative proceedings affecting the child." This is a substantive right, which is coupled with a procedural right enabling the child to seek redress, and it should of necessity be extended to environmental matters.

14 See The Organisation of American States *1991 Inter-American Program of Action for Environmental Protection* (AG/RES 1114 (XXI-0/91 of June 8, 1991).

15 Casey-Lefkowitz and others, *Proceedings of the 4th International Conference on Environmental Compliance and Enforcement* (at Chiang Mai, Thailand 1996) <www.inece.org/4thvol1/futrell.pdf> accessed August 12, 2022.

16 See article 24 of the Banjul Charter.

17 S Atapattu, "The Right to a Healthy Life or the Right to Die Polluted? The Emergence of a Human Right to a Healthy Environment Under International Law" 2002] Tulane Environmental Law Journal 79. See also articles 21 and 24 of the Banjul Charter.

18 See OW Pedersen, "European Environmental Human Rights and Environmental Rights: A Long Time Coming?" [2008] Georgetown Environmental Law Review 82.

19 J Razzaque, "Implementing International Procedural Rights and Obligations: Serving the Environment and Poor Communities" in T Bigg and D Satherthwaite (eds), *How to Make Poverty History* (International Institute for Environment and Development 2005). See also

created, and their enforcement has the potential to enhance the sustainable development of natural resources, thereby ensuring that environmental and human rights are protected.

3. Sustainability and the development of natural resources

Sustainable development is defined as development "that meets the needs of the present without compromising the ability of future generations to meet their own needs."[20] Uncontrolled consumption of a finite natural resource without taking cognisance of sustainable development may result in the diminution of that resource, thereby depriving future generations of the benefits accruing therefrom.[21] It is therefore important to ensure that the development of natural resources is guided by policies and regulations addressing both socioeconomic and environmental considerations, mindful of the interest of present and future generations. Sustainable development affects the interrelationship between mankind and the environment to ensure their continued existence. Although earlier models of the principle addressed the subject only from the perspective of economic and industrial growth, the rapid expansion of global economies post-Second World War brought with it enormous environmental challenges, which necessitated a reconsideration of a sustainable environment from the perspective of the protection of nature and natural resources.[22]

Unfortunately, the possibility of remediating environmental harm after occurrence by way of compensation may not always be effective, as the *ex post facto* remedy may not effectively ameliorate irreversible damages. It is, therefore, necessary to evaluate prospective development before implementation to ensure that it is "transparent and accessible, holistic and comprehensive, scientifically rigorous, adaptive and robust, and inclusive and collaborative."[23] This is likely to balance the competing socioeconomic interests of stakeholders against the anticipated impact on the environment to ensure that the project meets the needs of the present generation without compromising the interests of future generations.

'How to Make Poverty History – The Central Role of Local Organisations in Meeting the MDGs' <www.pubs.iied.org/pdfs/G00466.pdf> accessed September 2, 2022.

20 1987 World Commission on Environment and Development, "Our Common Future" UN Doc A/42/427 (the Brundtland Report) Annex <www.un-documents.net/our-common-future.pdf> accessed July 22, 2022.

21 S Bice, *Responsible Mining: Key Principles for Industry Integrity* (Routledge 2016) 1.

22 H Veinla, "Sustainable Development as the Fundamental Principle of Europe's ius Commune" [2005] Juridica International 117.

23 Canadian Water Network, *Water and Hydraulic Fracturing Report Water and Hydraulic Fracturing Report: Where Knowledge Can Best Support Decisions in Canada* (Canadian Water Network 2015) 40.

Sustainable development is a decision-making framework, and the public must be informed and be involved in the decision-making process relating thereto. Although discussions relating to environmental justice continue to illustrate the inequitable share of the ills of environmental degradation that the poor communities bear, which typically mirrors the inequities in the socio-economic and cultural statuses,[24] the discussion ought to include recognition, participation, and empowerment of all the stakeholders in decision-making on matters affecting the environment. In this regard, certain procedural rights, namely, the rights of access to information, just administrative action, and access to justice as pillars of decision-making are critical and necessary to facilitate the appreciation of the varying environmental, economic, and social perspectives of different segments of the population.[25]

The challenges posed by sustainable development have been addressed both under international and domestic law. Principle 2 of the *Declaration of the United Nations on the Human Environment* 1972 ("the *Stockholm Declaration*") recognised the link between the environment and development, asserting the need to protect the environment "for the benefit of present and future generations through careful planning or management." The objective underlying sustainable development gained international prominence in the *Report of the World Commission on Environment and Development: Our Common Future* 1987 ("the *Brundtland Report*),[26] a document that initiated discussion on the need for a strategic framework for sustainable development across nations.[27] That discussion was eventually encapsulated into the principle of sustainable development, which has entered contemporary legal discourse since its inclusion in the *Rio Declaration* 1992.[28] The *Rio Declaration* proclaimed that environmental protection constitutes an integral part of the development process,[29] and enjoins states to "reduce and eliminate unsustainable patterns of production and consumption, and promote appropriate demographic policies."[30] The *Rio Declaration*, therefore, constitutes a build-up on the earlier foundation, and severally enumerates the key elements essential for sustainable development including the requirement for the dissemination of information to all stakeholders and to facilitate their

24 A Szaz and M Meuser, "Environmental Inequalities: Literature Review and Proposals for New Directions in Theory and Research" [1997] Current Sociology 99.

25 See the Report of the World Commission on Environment and Development: Our Common Future <https://sustainabledevelopment.un.org/content/documents/5987our-common-future.pdf> accessed July 11, 2022.

26 1987 World Commission on Environment and Development "Our Common Future" UN Doc A/42/427 (the Brundtland Report).

27 E Fisher and others, *Environmental Law: Text, Cases, and Materials* (OUP 2013) 407.

28 J Verschuuren, "Sustainable Development and the Nature of Environmental Legal Principles" (2006) 9(1) Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad 209.

29 Principle 4 of *Rio Declaration* 1992.

30 Principle 8 of *Rio Declaration* 1992.

participation in decision-making,[31] the precautionary principle,[32] the polluter pays principle,[33] and the requirement of an environmental impact assessment for projects likely to adversely impact the environment.[34]

While environmental protection and development may appear incompatible, focus on sustainable development is likely to force stakeholders to pay attention to integrated decision-making and policies which incorporate the social, economic, and environmental impacts of development, thereby redirecting the motivation for development to benefits that may accrue to mankind, present and future.[35] While the state's obligation to permit the development of natural resources to facilitate economic growth and social development is acknowledged, there is a need to ensure that the operations will not compromise the environment and that the environment will be protected for the benefit of present and future generations.[36] Given that development of natural resources has the potential to adversely impact water, human health, sustainable development, and public trust, paying attention to sustainable development and public trust requirement can mitigate the effect of the impact.

The succeeding part of this chapter engages in a critical discussion of the sustainable development of resources in the context of environmental protection and human rights in South Africa, to make recommendations for improvement where there are flaws.

4. The challenges of human rights protection in the sustainable development of natural resources in South Africa

South Africa has a robust bill of rights in the *Constitution of the Federal Republic of South Africa* 1996 (hereafter the Constitution), with provisions for the three categories of rights, namely the blue rights (the civil and political rights), the red rights (social, economic, and cultural rights), and the green rights (peoples or solidarity, including environmental rights).[37] South Africa is also a signatory to the *Banjul Charter*, article 24 of which gives all peoples "the right to a general satisfactory environment favourable to their development"; and which by article 21 protects the right of all peoples to freely dispose of their wealth and natural resources with the obligation to exercise that right in

31 Principle 10 of *Rio Declaration* 1992.
32 Principle 15 of *Rio Declaration* 1992.
33 Principle 16 of *Rio Declaration* 1992.
34 Principle 17 of *Rio Declaration* 1992.
35 JC Dernbach and JR May, *Shale Gas and the Future of Energy: Law and Policy for Sustainability* (Edward Elgar 2016) 24.
36 M Barnard, "The Role of International Sustainable Development Law Principles in Enabling Effective Renewable Energy Policy: A South African Perspective" [2012] Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad 212.
37 M Kidd, *Environmental Law* (Juta 2011) 19.

the exclusive interest of the people. These provisions could only be effective if South Africa is willing to put structures in place to enforce them.

The relevance of international instruments alongside constitutional and legislative instruments to the promotion of sustainability in the development and protection of the environment in South Africa received judicial imprimatur in *Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others.*[38] In that case, the Constitutional Court held that it is apparent from section 24 of the Constitution that there is an explicit recognition of the obligation to promote sustainable economic and social development as it is vital to the well-being of human beings, observing that the "promotion of development requires the protection of the environment."[39] The Court cited with approval, several international instruments and reports dealing with sustainable development, including the *Declaration on the Right to Development*,[40] the *Report of the World Commission on Environment and Development*,[41] and the *Rio Declaration*,[42] as well as the opinion of the International Court of Justice in the *Gabcikovo-Nagymaros Project case (Hungary/Slovakia)*,[43] all to the effect that economic development should be engaged in, contemporaneously with sustainable development. The instruments and cases underscore the importance of sustainable development from a legal point of view in South Africa. In the *Fuel Retailers* case,[44] the Constitutional Court pointed out that-

> development cannot subsist upon a deteriorating environmental base. Unlimited development is detrimental to the environment and the destruction of the environment is detrimental to development. Yet the environment cannot be protected if development does not pay attention to the costs of environmental destruction. The environment and development are inexorably linked.[45]

Accordingly, section 24 of the Constitution protects, *inter alia*, the right of everyone "to an environment that is not harmful to their health or well-being; and to have the environment protected, for the benefit of present and future generations." Although the term "well-being" is rather wide, open-ended, and might be incapable of a precise definition, it expresses the objective of the right protected in section 24, namely, to protect the environment for the

38 2007 ZACC 13.
39 At para 44.
40 *Ibid*.
41 Commonly referred to as the *Brundtland Report*, at para 47.
42 At para 49.
43 1998 ILM 162, at para 54.
44 2007 (6) SA 4 (CC) 44, 7.
45 2007 (6) SA 4 (CC) 44, 7 at para 44.

benefit of people living today and generations yet unborn. The state's obligation flowing from section 24 motivates the exercise of its authority to ensure that all stakeholders take care to forestall environmental degradation.[46] However, while acknowledging the duty of the state to permit the development of natural resources to facilitate economic growth and social development, there is a need to ensure that the processes adopted will protect the environment and effectively harmonise and manage natural resources sustainably with future generations in mind.[47]

The legislative authority also gives a footing for the constitutional requirement to secure ecologically sustainable development and use of natural resources in the *National Environmental Management Act 1998* (the NEMA)[48] and the *Mineral and Petroleum Resources Development Act* 2002 (the MPRDA).[49] For instance, section 2 of the NEMA provides for the *National Environmental Management Principles* which incorporates internationally recognised principles of environmental law including sustainable development and enumerated the relevant factors to be considered in the determination of whether or not development is sustainable.[50] Furthermore, under section 2(4)(a)(vii) of the NEMA, it is required "that a risk-averse and cautious approach is applied in development which takes into account the limits of current knowledge about the consequences of decisions and actions."

The courts have at different times upheld the constitutional and statutory provisions relating to sustainable development. For instance, in *BP Southern Africa (Pty) Limited v MEC for Agriculture, Conservation, Environment & Land Affairs*,[51] the court held that legislation dealing with matters such as town and country planning, conservation of natural resources, and prevention of pollution, bear eloquent testimony of the existence of this more civilised and enlightened attitude that resources are held in trust for future generations. The court further held that the concept of sustainable development is the fundamental building block around which environmental legal norms have been fashioned, both internationally and in South Africa, and is reflected in section 24(b)(iii) of the Constitution.[52]

Concomitantly, the combined effect of sections 24 and 8(2) of the Constitution is to, *inter alia*, impose a responsibility on private entities as custodians of natural resources albeit in a moderate capacity, compared to the all-encompassing duty of the state, thus creating a shared responsibility between

46 E Fisher and others, *Environmental Law: Text, Cases and Materials* (OUP 2013) 54.
47 Barnard (n 36) 212.
48 Act No. 107, 1998.
49 Act No. 28, 2002.
50 See section 2(4) NEMA.
51 2004 ZAGPHC 18.
52 *Ibid* 25. See also HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism and others 2006 ZAGPHC 132 at 18; see also *HTF Developers v Minister of Environmental Affairs and Tourism and Others* [2007] 4 All SA 1108 (SCA).

public and private actors to manage natural resources in the interest of the public and future generations.[53] In any event, a private entity that has been granted rights over natural resources that is *res communis* is not permitted to exploit the resources to the detriment of the citizens. This explains why the government must protect the environment and natural resources for the benefit of all people. The consequence of not doing so can adversely impact the continued availability of natural resources in the long run and possibly compromise the constitutional right to a healthy environment, which should dictate the protection of the environment for the benefit of present and future generations.

Although there is a substantive environmental right in the Constitution, there is no generally accepted standard to measure the success or efficacy of the "well-being" requirement in section 24, thereby cloaking environmental rights with a toga of ambiguity in enforcement.[54] The quest for finding an alternative but effective means of enforcement of environmental rights has resulted in the emergence of the application of procedural rights like the rights to information, just administrative action, and access to courts as veritable tools to be applied to forestall environmental harm.[55]

Procedural environmental rights will assist in protecting environmental interests by democratising environmental decision-making and providing a mechanism for the recognition and enforcement of substantive rights. Furthermore, accountability in the administration of environmental affairs and the implementation of sustainable development will be facilitated. All these would make it possible to challenge the activities of people, organisations, and regulators involved in resource development that may have a bearing on the environment, secure the enforcement of substantive rights, and rectify identified errors.

The risks associated with resource development require all-round monitoring[56] and enforcement of environmental rights. Procedural rights manifest in the Constitution, among others, protect human rights. The relevance and effectiveness of the application of procedural rights, namely, the right of access to information,[57] the right to just administrative action,[58] and the right of access to courts[59] to protect human rights and enhance the sustainable development of natural resources in South Africa are discussed below.

53 L Feris, "The Public Trust Doctrine and Liability for Historic Water Pollution in South Africa" 2012] Law Environment and Development Journal 17.

54 JL Sax, "The Search for Environmental Rights" 1990] Journal of Land Use & Environmental Law 96.

55 Kravchenko (n 6) 164.

56 W Du Plessis, "Regulation of Hydraulic Fracturing in South Africa: A Project Life-Cycle Approach?" [2015] Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad 1445.

57 Section 32.

58 Section 33.

59 Section 34.

4.1 Access to information

The enforcement of an environmental right will be challenging if public authorities and development entities refuse to share information with affected stakeholders.[60] The lack of information may prejudice people's interests, whether in understanding the rationale for a policy or being in the dark as to what is required in the event of having to establish a claim to enforce the substantive right. Section 32 of the Constitution provides for the right of access to information, and the recognition of that right as a principle "that may significantly affect the environment"[61] is acknowledged by the NEMA, which requires that "decisions must be taken in an open and transparent manner, and that access to information must be provided in accordance with the law."[62] The details of the procedure for the enforcement of access to information rights are hardly found in constitutions, hence, appropriate legislation for that purpose had to be enacted. This is in line with the requirement in section 32(2) of the Constitution imposing an obligation on the legislature to enact an appropriate law.[63] That legislation is the *Promotion of Access to Information Act*[64] 2000 (hereafter the PAIA).

Section 32 of the Constitution distinguishes between two classes of bodies that may hold information, namely information held by the state and information held by another person, though, in respect of the latter, the right of access is qualified by the proviso that the access sought must be for the exercise or protection of any rights. It is, therefore, not a surprise that the PAIA also adopts this classification, providing access to the records of public bodies in part 2 and to the records of private bodies in part 3. Accordingly, if the request of the applicants is to be resolved by invoking the PAIA, there is a necessity to establish whether the information required belongs to private bodies or public bodies in terms of the Act.[65]

A decision reached without prior information given to those affected could not have addressed "the interests, needs and values of all interested and affected parties."[66] Accordingly, to ensure that access to information is not restricted, the courts have held that there is a presumption that any information in possession of the state is subject to access. For instance, in *Centre for*

60 A Du Plessis, "Public Participation, Good Environmental Governance and Fulfilment of Environmental Rights" [2008] Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad 182.

61 Section 2(1) NEMA.

62 Section 2(4)(k) NEMA.

63 Certification of the Constitution of the Republic of South Africa (1996–1997) (2) SA 97 (CC) at para 86.

64 Act 2 of 2000.

65 See *The Institute of Democracy in South Africa and Others v The African National Congress and Others* Case (2005) (5) SA 39 (C).

66 Section 2(4)(g) NEMA.

Social Accountability v The Secretary of Parliament and Others,[67] the court held that the right of access to information held by the state and its agencies is unqualified, while the right to information held by private bodies is qualified by the condition that the information must be required for the exercise or the protection of a right. Therefore, the grant of access to state information is the rule, and the refusal is the exception.[68] Furthermore, although compliance with the required procedure is important, it would appear that the courts are disposed to rule that the exercise of the discretionary power to refuse access should be carried out in a manner that favours disclosure, which is the underlying substance of the PAIA.[69] Thus, the fact that the requisite forms were not filled out correctly should not prejudice applicants and deprive them of standing[70] to request information, as the defect is purely a technical one.[71]

Access to information engenders public participation, especially in any new development where the potential risks are yet to be conclusively grasped. The value of public participation is emphasised in *Petro Props (Pty) Limited v Barlow*.[72] In that case, the respondents opposed the construction of a service station, alleging that the site was an ecologically sensitive wetland, which would be degraded by the construction contrary to the applicant's contention that the respondents' campaign was unlawful. The applicant sought to end the campaign through an interdict, arguing that it was damaging to their interests. The court refused to grant the interdict, observing that initiatives like that undertaken by the respondents should be commended because it "earns the support of our Constitution" and

> in this context, it should be borne in mind that the Constitution does not only afford a shield but also to be resorted to passively and defensively. It also provides a sword, which groups like the association can and should draw to empower their initiatives and interests.[73]

67 (2011) (5) SA 279 (ECG).

68 It would however appear that there are challenges facing public bodies in complying with the requirements relating to disclosure of information. See for example, Centre for Environmental Rights, "Shadow Report 2016: Access to Information Network" <https://cer.org.za/wp-content/uploads/2017/02/CER-Shadow-Report-Final.pdf> accessed August 12, 2022. See also Centre for Environmental Rights, "Full Disclosure – The Truth About Mining Rehabilitation in South Africa" <https://fulldisclosure.cer.org.za> accessed August 12, 2022.

69 *See M & G Media and Others v 2010 FIFA World Cup Committee South Africa Ltd v Another* 2011 (5) SA 163 (GSJ) at para 397.

70 Section 18(1) of PAIA requires that "a request for access must be made in the prescribed form to the information officer of the public body concerned at his or her address or fax number or electronic mail address."

71 *See M & G Media and Others v 2010 FIFA World Cup Committee South Africa Ltd v Another* (2011) (5) SA 163 (GSJ) at para 30.

72 (2006) ZAGPHC 46.

73 *Ibid* para 55.

The right of access to information creates a structural framework for the realisation of environmental rights, in that information held by the state (or by private bodies affecting public and individual interests) must be made available to people according to the requirements of parts 2 and 3 of the PAIA to enable them to take effective decisions and to facilitate the enforcement of their rights when necessary. Consequently, the right of access to information makes the right to participate feasibly, and when it is applied to the protection of the environment and environmental rights, obligations are imposed on states' authorities to engage people in decision-making which could affect the environment and adversely affect them. Making the necessary relevant information available to stakeholders will ensure that those affected by any development can comprehend the rationale and enjoy the benefits thereof while being put in a position to challenge any action that violates their rights.

4.2 Administrative justice

The Constitution contains appropriate mechanisms to ensure that the exercise of governmental power consistently reflects the values on which the democratic state is founded, including the objective of ensuring "accountability, responsiveness and openness."[74] Section 33(1) and (2) of the Constitution enumerates four requirements of the right to just administration, namely lawfulness, reasonableness, procedural fairness, and the provision of reasons,[75] while section 33(3) of the Constitution envisages that legislation to be enacted will facilitate the practical implementation of the right, and provide the procedures and the statutory mechanisms to make the realisation of the right a reality.[76] The *Promotion of Administrative Justice Act* 2000 (the PAJA)[77] is the legislation envisaged, and as clearly stated in its explanatory note, it is

> to give effect to the right to administrative action that is lawful, reasonable and procedurally fair and the right to written reasons for administrative action as contemplated in section 33 of the Constitution . . . and to provide for matters incidental thereto.

The PAJA is general administrative law in that it prescribes how public powers conferred on administrators by law are to be exercised and controlled. It creates a two-step process to facilitate the realisation of the right to just administrative action, first creating the necessity to determine whether or not the act under consideration falls within the scope of the application of the right

74 Section 1(d) of the Constitution.
75 *Minister of Health v New Clicks South Africa (Pty) Ltd and Others* (2006) (2) SA 311 (CC) at para 143.
76 H Corder, "Administrative Justice in the South African Constitution" 1998] Admin Review 7.
77 Act No. 53 of 2002.

created by the Constitution in section 33, that is an administrative action, and secondly, to determine the content of the rights as to lawfulness, reasonableness, and procedural fairness.[78] The PAJA is intended to be a codification of the rights relating to administrative action contained in the Constitution, thereby creating only one system of law from which the powers of the court flow.[79] Accordingly, a litigant cannot go behind the PAJA and seek to rely on the common law or the Constitution except to "inform the meaning of the constitutional rights and the Act."[80] Public officers and regulatory authorities are to carry out administrative actions in the course of the regulation of the development of natural resources under constitutional and legislative provisions.[81]

About the development of mineral and petroleum resources, for instance, section 2 of the Mineral and Petroleum Resources Development Act 2002[82] (hereafter the MPRDA) gives effect to section 24 of the Constitution by imposing obligations on the regulator and operators to ensure "that the nation's mineral and petroleum resources are developed in an orderly and ecologically sustainable manner while promoting justifiable social and economic development." In the same vein, section 37 of the MPRDA requires permits and rights holders under it to give effect to the principles enumerated in section 2 of the NEMA, which are to serve as guidelines for the interpretation, administration, and implementation of the MPRDA. Furthermore, section 6 of MPRDA clearly states that any administrative action or decision taken should comply with the principles of lawfulness, reasonableness, and procedural fairness and that written reasons must accompany decisions when requested. These are principles of administrative justice recognised and protected by section 33 of the Constitution. Furthermore, the PAJA, the legislation envisaged in section 33(3) of the Constitution, addresses the control of the exercise of public power with provisions to ensure that the exercise of power and decision-making that is fair, rational, and lawful highlights the underlying protection of the right to just administrative action.

The complexity of certain resource development demands that efforts be made to ensure that regulations sufficiently address the public's concerns and provide an opportunity to challenge the actions of administrative authorities where necessary. Accordingly, a developer of natural resources is subject to administrative decision-making procedures notwithstanding the prospective

78 I Currie and J De Waal, *The Bill of Rights Handbook* (6th edn, Juta 2013) 653.

79 See *Fedsure Life Assurance Ltd and Others v Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) at para 32.

80 *Minister of Health v New Clicks South Africa (Pty) Ltd and Others* 2006 (2) SA 311 (CC) at paras 95–96.

81 See C Glinz, "The Right to Be Given Reasons as Part of a Fair Administrative Procedure: A Comparative Study of Namibian, South African and German Law" [2009] Namibian Law Journal 21.

82 Mineral and Petroleum Resources Development Act, No. 28 of 2002.

beneficial outcome of the undertaking.[83] For instance, in *Earthlife Africa Johannesburg v The Minister of Environmental Affairs and Others*,[84] the court held that the lack of express statutory or regulatory provisions requiring a climate change assessment before building a 1200MW coal-fired station does not imply that there is no legal duty to conduct one.

To strengthen constitutional democracy, independent state institutions are created and made subject only to the Constitution and the law, required to be impartial, and to "exercise their powers and perform their functions without fear, favour or prejudice."[85] The existence of legislation facilitating the enforcement of the right to just administrative action confirms the robustness of South African law in this regard. Administrative action and administrative proceedings have a far greater impact on individual rights than regular judicial proceedings because the former is concerned with the everyday practice of administrative justice.[86] However, poor and vulnerable persons face major challenges, including access to legal knowledge and/or financial capacity required to enforce rights, which may scuttle their ability to seek administrative justice. Recourse to the courts may be their only panacea.

4.3 Access to courts

Access to courts is more than the capacity to approach a court by initiating court processes. Litigants before a court, including those involved in civil proceedings, must be effectively heard.[87] Section 34 of the Constitution provides that "everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum." This includes disputes relating to the protection of the environment, and violation of rights caused by environmental abuse.

The right of access to courts protected by section 34 requires that a dispute is to be resolved by the application of law and decided in a fair public hearing. Fairness and lack of impartiality in a judicial hearing refer to the "quality of

83 LJ Kotzé, "The Application of the Just Administrative Action in the South African Environmental Governance Sphere: An Analysis of Some Contemporary Thoughts and Recent Jurisprudence" (2004) Potchefstroom Electronic Law Journal/Potchefstroomse Elektroniese Regsblad 10.

84 2017 (2) All SA 519 (GP).

85 Section 181(1)(d) of the Constitution.

86 L Sossin, "Access to Administrative Justice and Other Worries" in CM Flood and L Sossin (eds), *Administrative Law in Context* (Emond Montgomery Publications 2013) 26.

87 J Dugard, "Courts and the Poor in South Africa: A Critique of Systemic Judicial Failures to Advance Transformative Justice" (2008) South African Journal on Human Rights 216. Currie and De Waal also contend that constitutional access to courts has four constitutive elements, namely access to everyone, to the courts or other independent and impartial forum, in respect of any dispute capable of resolution by application of law, in a fair public hearing. See Currie and De Waal (n 78) 711.

open-minded readiness to persuasion – without unfitting adherence to either party or to the judge's predilections, preconceptions and personal views – that is the keystone of a civilized system of adjudication."[88]

For the right of access to courts to be effective, the focus must not be limited to the mere existence of functioning institutions but also on the prospective users of the justice system.[89] The case of *Johan de Cock v Minister of Water Affairs and Forestry and Others*[90] highlights the challenge that without an appropriate procedural framework, the right to an environment that is not harmful to health or well-being cannot be effectively realised.

Meanwhile, concerning standing, the wide ambit of the NEMA provisions reinforces the fact that a strict approach to standing could be a serious threat to public interest environmental litigation.[91] The provisions of section 32 of the NEMA are more or less a copy of section 38 of the Constitution which permits an action to protect any right in the Bill of Rights, including the right to an environment not harmful to health and well-being and lists the categories of persons who may approach the court for appropriate relief. Furthermore, according to section 38 of the Constitution, the courts have generally recognised that NGOs have an interest in ensuring compliance with the Constitution and the rule of law, underscoring their objective of litigating in the public interest.[92]

Legal activism, particularly in the protection of the environment has its benefits in that "some of the worst failures of the state and private sector have been corrected by the courts through public interest litigation," thereby making public interest legal services an effective tool for social change.[93] There cannot be a good reason for adopting a narrow interpretation of standing in cases having a bearing on the protection of environmental rights.

Considering that it is usually the poor and vulnerable persons and communities who bear the brunt of environmental degradation,[94] the extension of legal aid to indigent persons in civil cases are necessary because cases relating to the development of natural resources are likely to be complex. In South Africa, the state is probably reticent to fund civil legal aid due to a lack of constitutional or statutory provisions. Regrettably, it would appear that Legal

88 See *South African Commercial Catering and Allied Workers Union and Another v Irvin and Johnson Ltd Seafoods Division Fish Processing* 2000 (3) SA 705 at para 14.

89 M Nyenti, "Access to Justice in South African Social Security System: Towards a Conceptual Approach" [2013] De Jure 902.

90 2005 ZACC 12.

91 See section 32(1) of the NEMA. See also T Murombo, "Law Environment and Development Journal" [2010] Lead Journal 175.

92 *Democratic Alliance and Others v The Acting National Director of Public Prosecutions* 2012 ZASCA 15 at para 42.

93 Socio-Economic Rights Institute of South Africa *Public Interest Legal Services in South Africa* 8.

94 See T Hart, "Socio-Political Factors" in MA Rabie and RF Fuggle (eds), *Environmental Management in South Africa* (Juta 2005) 54.

Aid South Africa considers its mandate as one derived from the provision of section 35(2)(c) and (3)(g) of the Constitution, which limit legal aid to the accused in criminal trials only. The enforcement of environmental rights is equally as important, hence, indigent persons seeking to enforce their rights ought also to have the benefit of legal aid.

5. Conclusion

The foregoing constitutional and statutory provisions, as well as judicial authorities on the importance of procedural rights, indicate that it is important that a project for the development of resources in South Africa should not just be presented as simply beneficial or sustainable. It should be manifestly perceived as such by the public, especially the communities likely to be affected by the development.

Procedural rights can facilitate the means for making duty bearers liable for their actions or omissions, guaranteeing accountability and making administrative action relating to the environment more accessible and effective. In the same vein, procedural rights make it possible for people to have recourse to the courts for redress regarding environmental degradation causing harm.

The following recommendations regarding the procedural rights considered above can facilitate effective protection of human rights and enhance sustainable development when the development of natural resources has adverse consequences on the environment and human beings.

The right of access to information can be applied as a leverage right to make the realisation of other rights possible in that it could be applied by people whose rights may be infringed in one way by activities associated with the development of natural resources. Effective information management involving different strategies targeted at different segments of the population is likely to culminate in increased awareness. This will enhance the capacity of all stakeholders to participate in pro-environmental behaviour, thereby creating useful indicators of compliance with the requirements of sustainable development.

Ordinarily, the application of rules in administrative proceedings may alienate vulnerable persons who may have been victims of public authorities' maladministration or victims of harm caused by complex resource development activities. However, the legal framework and the relevance of the right to just administrative action in South Africa considered above have the potential to facilitate the enforcement of the right to administrative justice about the anomalies in the regulation of the development of natural resources, and the activities of operators. The scope of the PAJA covers the exercise of power by a private body (whether a natural or juristic person) when the exercise of power affects the rights of any person. In this regard, the presentation of regulations and their enforcement concerning the development of natural resources should be conducted in a manner that the ordinary person can understand.

The right to access to courts is very important. When individuals and communities face challenges arising from the adverse impacts of the complex development of natural resources, one of the most viable solutions is for the victims to approach the court to seek remedies. The courts are duty-bound to deliver justice without partiality and ensure that due process is followed. However, as indicated above, it is difficult for poor and vulnerable persons to access the courts for relief when their rights are violated. This is due largely to financial constraints, sometimes coupled with a lack of knowledge regarding violations and the complex process of judicial proceedings. An effective right of access to courts is that which creates equal opportunities for all persons, regardless of economic or educational status, to seek redress for wrongs committed against them.

Cases arising from activities associated with the development of natural resources are likely to be complex. The technicalities of the rules of procedure will confound poor and vulnerable persons who may seek the enforcement of rights violated by operators of the development of natural resources. Although the seeming lack of commitment on the part of the state to fund civil legal aid may be due to a lack of constitutional or statutory provision more than a lack of funding, it is recommended that an obligation be imposed on the state to permit the extension of legal aid in civil cases, including the enforcement of environmental rights to indigent persons.

By their nature, human rights play a pivotal role in guiding the government and the courts towards the consideration of the values and material realities of society in the interpretation of those rights. The ability to enforce rights, which may be violated by activities of resource development operators, has the potential to enhance sustainable development.