

PUSHING THE FRONTIERS OF EQUITY AS A MEANS FOR ENVIRONMENTAL JUSTICE IN AFRICA*

Abstract

Inter-generational equity which focuses on the rights of future generations is one of the key principles of international law relating to sustainable development. Whilst the usage of this principle to achieve environmental justice in other jurisdictions has been popularized, the reason for poor implementation of the principle in an African context is exacerbated by the placement of same constitutional environmental provision. The South African jurisdiction exemplifies a means to achieve environmental justice by approaching the courts to enforce an environmental right because the principle of inter-generational equity is an inherent part of its constitutional environmental provision. The paper puts forward the South African jurisdiction due to the willingness of its judiciary to recognize the principle as a means to achieve environmental justice for present and future generations.

Key words: *inter-generational equity, sustainable development, constitution, environmental justice, implementation.*

1. Introduction

For the first time we must be concerned as members of the human species with the condition of the natural and cultural heritage of our planet that we pass to future generations and with our own ability to enjoy the legacy from past generations...¹

The concept of development aims at enlarging the opportunities people have in their lives and can be regarded as a process of individual freedom.² Similarly, the concept of sustainable development is the recognition that human society is intrinsically related to wider ecological process and the Earth's natural resources.³ It is a realisation that environmental issues cannot be considered in isolation from other global concerns.⁴ Berke and Conroy described it as a dynamic process in which communities anticipate and accommodate the needs of current and future generations in ways that reproduce and balance local social, economic, and ecological systems, and link local actions to global concerns.⁵ Consequently, the last twenty-six years has witnessed the emergence of sustainable development as an important concept in global efforts to balance economic, social and environmental policies and laws.

In 1987, the World Commission on Environment and Development (WCED) (also referred to as the 'Brundtland Report) popularized the concept of sustainable development in international discourses.⁶ It defined sustainable development as 'development that meets the needs of the

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¹ Edith Brown Weiss, 'Intergenerational Equity in International Law' (1987) 81 *Am. Soc'y Int'l L. Proc.* 126 – 131 at 127.

² Koen de Feyter, *World Development Law: Sharing Responsibility for Development* (UK: Intersentia, 2001) pp. 32 and 33; Amartya Sen *Development as Freedom* 3 (1999) in John C. Dernbach 'Creating the Law of Environmentally Sustainable Development' (2011) 28 (3) *Pace Envtl. L. Rev.* 614- 649 at 619.

³ Duncan French *International Law and Policy of Sustainable Development* (UK: Manchester University Press, 2005) p. 10.

⁴ *Ibid.*

⁵ Philip R. Berke and Maria Manta Conroy 'Are We Planning for Sustainable Development?' (2000) 66 (1) *Journal of American Planning Association* 21-33 at 22.

⁶ Marie-Claire Cordonier Segger and Ashfaq Khalfan *Sustainable Development Law – Principles, Practices and Prospects* (UK: Oxford University Press, 2004) p. 18.

present without compromising the ability of future generations to meet their own needs.’ This recognition of present and future generations is central to the goal and ethical principle of sustainable development and is referred to as equity, particularly intergenerational equity.⁷ The exceptionality of this principle is such that it has found expression in various multilateral environmental agreements in the past three decades and has been the subject of discourse in domestic jurisdictions and constitutions.

At the 2002 World Summit on Sustainable Development (WSSD), there were calls for more debates on the ethics and theory of sustainable development.⁸ Among others, issues have been raised on how relations between generations impinge upon environmental ethics, not only in the sense of relations between overlapping generations of contemporaries of different ages, but, more particularly, in the sense of relations between generations living at different times, including future generations.⁹ What the issues raised have brought to light is the need to properly analyze the content of equity as relevant to the discourse on sustainable development, and how same can effectively be mainstreamed into policy and law in order for it to achieve its goals.

In carrying out this analysis, this article will first outline the core of what is meant by “equity”, and the context of both intra-generational and inter-generational equity. It will go on to discuss how the principle has developed over the years, and then examine the position of same in South Africa with respect to implementation. In this regard, the paper argues that South Africa is one of many developing countries in Africa which has embraced the principle of sustainable development and encapsulated same into her domestic legislation. To buttress this point, the paper examines the status of the principle of intergenerational equity under South African national law as one which is intertwined with discussions of sustainable development, emphasizing the need for implementation of same in achieving environmental justice at the national level. The paper concludes by re-stating the importance of the inter-generational equity principle in the development of environmental law and policy, and a means for the achievement of environmental justice, particularly in Africa.

2. The Idea of Equity

In the real sense of the word, equity is about fairness.¹⁰ It derives from a concept of social justice and represents a belief that there are some things which people should have, that there are basic needs that should be fulfilled, that burdens and rewards should not be spread too divergently across the community, and that policy should be directed with impartiality, fairness and justice towards these ends.¹¹ One of these needs, albeit, a right, which should be fulfilled,

⁷ See Sharon Beder, ‘Costing the Earth: Equity, Sustainable Development and Environmental Economics’ (2000) at p. 2. <<http://ro.uow.edu.au/cgi/viewcontent.cgi?article=1030&context=artspapers>> accessed 11 July 2012.

⁸ See Karl Bosselmann ‘The Concept of Sustainable Development’ in Bosselmann & Grinlinton (eds.) *Environmental Law for Sustainable Development* (2002); Gillespie *International Environmental Law, Policy and Ethics* (1997). See also Pallemarts ‘International environmental law from Stockholm to Rio: Back to the Future?’ in Philippe Sands (ed.) *Greening International Law* (1994) cited in Dire Tladi, ‘Intragenerational Equity: A New Name for Environmental Justice’ (2003) 9 *Fundamina* 197 – 204 at 197.

⁹ Robin Attfield ‘Intergenerational Equity and Environmental Ethics’ (2010) *Inquiry; An Interdisciplinary Journal of Philosophy* 207 – 222 at 207.

¹⁰ T. Franck, *Fairness in International Law and Institutions* (Oxford: Clarendon Press, 1995) pp. 7 – 9.

¹¹ See Falk, Jim, Hampton, Greg, Hodgkinson, Ann, Parker, Kevin and Rorris, Arthur, 1993, *Social Equity and the Urban Environment*, Report to the Commonwealth Environment Protection Agency, AGPS, Canberra, p.2 in Sharon Beder (note 7) at 16.

is the right to a healthy environment¹² for the benefit of present and future generations. The question that arises is: what distinguishes the present generation from future generations?

While ‘present generations’ refers to the group of individuals/children existing in a global context, ‘future generations’ includes children conceived in the coming months and born next year. The latter sometimes foreseeably overlap with contemporary generations; but they also include all the others who will or could inherit our environmental heritage and problems in the coming centuries.¹³ Likewise, Edith Brown Weiss approaches future generations as one general group whose place in time is not defined as no generation knows beforehand when it will be the living generation, how many members it will have, or even how many generations there will ultimately be.¹⁴ A corollary to this definition is further expressed by the author in her postulation that sustainability requires that we look at the earth and its resources not only as an investment opportunity, but as a trust passed to us by our ancestors for our benefit, but also to be passed on to our descendants for their use.¹⁵ Consequently, a system can be regarded as being sustainable if the legacy left for the next generation is of equal value to that inherited by the present generation, even if some of the endowment of natural resource is consumed.¹⁶ This attempt to provide an insight into ‘present and future generations’ is premised on the issue of how to protect the future which is central to sustainable development, plus a recognition of the fact that some ‘duty’ is owed to future generations not to ‘mess up’ the planet.¹⁷ This need to provide some degree of fairness among individuals and States in environmental protection culminates in the principles of intra-generational and inter-generational equity.

2.1. Intra-generational Equity

The principle of intra-generational equity is one that posits the application of equity across communities in one generation. It finds equilibrium in the fact that as a key principle of sustainable development, inequities are a cause of environmental degradation.¹⁸ Poverty deprives people of the choice as to whether or not to be environmentally sound in their activities.¹⁹ Therefore, at a basic level, intra-generational equity can be interpreted to mean that

¹² This is a third generation right. Third generation rights or people’s rights are vested in groups rather than on individuals. In recent times, six areas of rights have been suggested to fall within the encapsulation of the term “third generation rights;” These include: right to peace, right to the environment, common heritage of mankind, communication and humanitarian assistance and the right to development. See Colleen Theron ‘Environmental Rights: An Overview of Interpretations’ (1997) 4 *SAJELP* 23 at 34.

¹³ Robin Atfield (note 9) at 207.

¹⁴ E. Brown Weiss ‘Intergenerational Equity: A Legal Framework for Global Environmental Change’ in E. Brown Weiss (ed.) *Environmental Change and International Law: New Challenges and Dimensions* (Tokyo: United Nations University Press, 1992) p. 385, at 397. See also Malgosia Fitzmaurice *Contemporary Issues in International Environmental Law* (UK: Edward Elgar, 2009) p. 113.

¹⁵ E. Brown Weiss ‘In Fairness to Future Generations and Sustainable Development’ (1992 -1993) 8 *Am. U. J. Int’l. L. & Pol’y* 19 – 26 at 20.

¹⁶ Irving Minter and David Michel ‘Climate Change, rights of future generations and intergenerational equity; an in-expert exploration of a dark and cloudy path’ (2001) 1 (2) *Int. J. Global Environmental Studies* 203 – 221 at 212.

¹⁷ Lynda M. Warren ‘Legislating for Tomorrow’s Problems Today –Dealing with Intergenerational Equity’ (2005) 7 *Envtl. L. Rev.* 165 – 172 at 165.

¹⁸ Sharon Beder (note 7) at 4.

¹⁹ The Brundtland Report 1987 also recognizes this fact when it states that “those who are poor and hungry will often destroy their immediate environment in order to survive: they will cut down forests; their livestock will overgraze grasslands; they will overuse marginal land; and in growing numbers they will crowd into congested cities. The cumulative effect of these changes is so far-reaching as to make poverty itself a major global scourge. See Report of the World Commission on Environment and Development, *Our Common Future* United Nations (1987) at 27 <http://conspect.nl/pdf/Our_Common_Future-Brundtland_Report_1987.pdf> accessed 18 June 2015. See also Sharon Beder (note 7) at 4.

everyone is entitled to the necessities of life: food, shelter, health care, education and the essential infrastructure for social organization.²⁰ It is the obligation to ensure a just allocation of the utilization of resources among human members of the present generation both at the domestic and global levels.²¹ In the environmental sense, intra-generational equity means equity between the inhabitants on earth within a single generation and required fairness in the use of environmental resources by and within this generation.²² This interpretation of intra-generational equity is referred to in modern international environmental law as 'environmental justice.'²³

It has been argued that the reliance on intra-generational equity which can be applied within this present generation consists of two camps: the developed world which is pro-environmental protection and the developing world which is anti-environmental protection.²⁴ Dire Tladi refutes this position and states that rather, the role of intra-generational equity is to bridge this gap as it attempts to distribute costs of environmental protection and benefits of development equitably to ensure participation of states that would otherwise not participate.²⁵ He argues that the beauty of intra-generational equity is that it is, in principle, accepted by both developed and developing nations, albeit for different reasons.²⁶ For developing countries, the rich (developed) countries must bear the heavier burden for environmental costs as they are responsible for the major 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.²⁷ Thus, for the developing world, intra-generational equity places a legal duty on the developed nations. For the developed nations, on the other hand, they accept in principle, the responsibility placed on them by intra-generational obligations because of the technologies and financial resources they command. Consequently, for the developed nations, the obligation to bear environmental costs is therefore merely moral.²⁸

The principle of intra-generational equity found expression since 1892 in the *Bering Fur Seal* arbitrations between the United States and Great Britain.²⁹ In its pleadings before the arbitration tribunal, the United States government raised issues of equity in utilization of the seals at both the domestic and international levels, contending that that it was wrong as against the laws of civilization and nature to 'exterminat[e]...a race of animals, a race that have... their own right

²⁰ O. Schachter *Sharing the World's Resources* (1977) Bangalore, Allied Press at 11-12.

²¹ M. Cordonier Segger and A. Khalfan *Sustainable Development Law: Principles, Practices and Prospects* (Oxford: Oxford University Press, 2004) at 125. See also G F Maggio 'Inter/intragenerational Equity: Current Applications under International Law for Promoting the Sustainable Development of Natural Resources' (1996 - 1997) 4 *Buff. J. Envtl. L.* 162 - 223 at 193.

²² Laura Horn 'Emerging Trends in Sustainable Development - the International Initiatives' (2002) *Austl. Intl. L. J.* 24 - 56 at 35.

²³ Environmental justice has become common parlance in the United States of America.

²⁴ See Karin Mickelson 'South, North, International Environmental Law and International Environmental Lawyers' (2000) *Yearbook of International Environmental Law* 54.

²⁵ See also Dire Tladi (note 8) at 202 -203.

²⁶ Dire Tladi (note 8) at 203.

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ *Award between the United States and the United Kingdom relating to the rights of jurisdiction of United States in the Bering's sea and the Preservation of Fur Seals - Decision of 15 August 1893* <http://www.untreaty.un.org/cod/riaa/cases/vol_xxviii/263-276.pdf> accessed on 12 June 2012.

to live as long as they can live harmlessly.³⁰ This represented the first time intra-generational interests were raised in a modern international resource management agreement.³¹

The Rio Declaration 1992 does not expressly refer to intra-generational equity but is implied by the provisions of Principle 6, which requires that special priority be given to the special situation and needs of developed countries, particularly the least developed and most environmentally vulnerable.³² The Convention on Biological Diversity also makes reference to intra-generational equity in its Article 16 when it refers to “fair and equitable sharing of benefits.” However, one of the most express references to intra-generational equity in a multi-lateral environmental treaty is found in the Article 16 of the 1994 United Nations Desertification Convention. It directs Parties to the Convention to exchange information on local and traditional knowledge, ensuring adequate protection for it and providing appropriate return from the benefits derived from it on an *equitable basis* and on mutually agreed terms, to the local populations concerned, subject to existing national legislation and policies of the Parties.³³

This recognition of multilateral environmental agreements in the 1990s shows that the principle of intra-generational equity was gaining prominence at the international level. However, its associated principle, inter-generational equity has been the most recognized and advocated because of its direct reference and emphasis on the ‘future generations,’ a term which as will be seen below, has led to various arguments in environmental law discourse.

2.2. Inter-Generational Equity

The concept of inter-generational equity was brought into common parlance with the publication by John Rawls in 1971.³⁴ He noted that generations exist in a ‘veil of ignorance’ somewhere in the spectrum, but do not know where it will be located.³⁵ He introduced the so-called ‘difference principle’ which is, *inter alia*, based on a premise that individuals would find a fair and equal society if the assignment of benefits would result in just distribution and the eradication of economic inequities, in particular in relation to the least advantaged members of society.³⁶ This theory has been viewed in a broader sense to encompass environmental justice and just outcomes which are based on economic inequality envisaged by Rawls; therefore, it was suggested that the Rawlsian theory be transformed onto an international level in environmental matters.³⁷

At the international level, the concept of inter-generational equity was popularized by the reference to ‘future generations.’ Hence, inter-generational equity is a value-concept which

³⁰ The US argued that its management of the Bering Fur Seal was for the common interests of mankind and for the benefit of the world. See *Fur-seal Arbitration: Oral Argument of Edward J. Phelps on behalf of the United States at Paris, June 22 – July 8 1893* at p. 37 <<http://www.archive.org/details/cu31924017136684>> accessed on 13 July 2012. See also G. Maggio (note 22) at 196.

³¹ G. Maggio (note 22) at 195.

³² See Text of the Rio Declaration in *Selected Texts of Legal Instruments in international Environmental Law* (2005) at 86. See also the United Nations Framework Convention on Climate Change 1992, Para. 21 of the Preamble and Article 4.

³³ See text of the United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, particularly in Africa in (note 33) at 336.

³⁴ See John Rawls, *A Theory of Justice* (1971). See also Armin Rosencranz ‘The Origin and Emergence of International Environmental Norms’ (2002-2003) 26 *Hastings Int’l Com. L. Rev.* 309 – 320 at 313.

³⁵ E. Brown Weiss (note 16) at 21.

³⁶ John Rawls (note 35) at 61 and 83. See also Malgozia Fitzmaurice (note 15) at p. 115.

³⁷ See M. Drumbl ‘Poverty, Wealth and Obligation in International Environmental Law’ (2002)76 *Tulane Law Review* 843 at 903 – 905.

focuses on the rights of future generations and it is implicit in the concept of sustainable development.³⁸ It is based on the premise that each generation has a right to inherit the same diversity in natural and cultural resources enjoyed by previous generations. The present generation is therefore regarded as a custodian of the planet for future generations, extending the concept of social justice into the future.³⁹ In defining inter-generational equity, it is trite to view the human community as a partnership among all generations.⁴⁰ Edith Brown Weiss is of the opinion that in this partnership, no generation knows beforehand when it will be the living generation, how many members it will have or how many generations there will ultimately be. She sees the Rawlsian theory of a generation that is placed somewhere along the spectrum of time, but does not know in advance where it will be located, as a very useful one.⁴¹ On this premise, Weiss states that inter-generational equity calls for equality between generations i.e. each generation is both a custodian or trustee of the planet for future generations and a beneficiary of its fruits; thus, each generation is entitled to inherit a planet which is at least as good as that of the previous generation (generational justice).⁴² According to her:

The proposed theory of intergenerational equity postulates that all countries have an intergenerational obligation to future generations as a class, regardless of nationality. This is necessary because the condition of the planet will have a profound impact on the welfare of our descendants. There is increasing recognition that while we may be able to maximize the welfare of a few immediate successors, we will be able to do so only at the expense of our more remote descendants, who will inherit a despoiled natural and cultural environment. Our planet is finite, and we are becoming increasingly interdependent in using it. Thus our concern for our own country must, as we extend our concerns into longer time horizons and broader geographic scales, focus on protecting the planetary quality of our natural and cultural environment. This means that in order to protect our own future nationals, we must cooperate in the conservation of natural and cultural resources for all future generations.⁴³

Weiss identifies three components of intergenerational equity: conservation of options, conservation of quality and conservation of access. Conservation of options means consciousness and obligation of the present generation to conserve the diversity of the natural and cultural resource base, so that each generation does not unduly restrict the options available to future generations in solving their problems and satisfying their own values.⁴⁴ Conservation of quality means that the present generation must act to maintain the quality of the planet,

³⁸Rajendra Ramologan *Sustainable Development: Towards a Judicial Interpretation* (Vol. 9, Netherlands: Martinus Nijhoff Publishers, 2011) p. 212.

³⁹ Rajendra (note 39) at 212.

⁴⁰ Edmund Burke observes that 'as the ends of such a partnership cannot be obtained in many generations, it becomes a partnership not only between those who are living but between those who are living, those who dead and those who are to be born.' See E. Burke, 'Reflections on the Revolution in France' (1790) 139 -40 (1790) in Edith Brown Weiss (note 16) at 21.

⁴¹ Edith Brown Weiss 'Agora: What Obligation Does Our Generation Owe to the Next? An Approach to Global Environmental Responsibility: Our Rights and Obligations to Future Generations for the Environment' (1990) 84 *American Journal of International Law* at 200.

⁴² See Edith Brown Weiss (note 1) at 128. See also E. Brown Weiss (note 16) at 21; E. Brown Weiss (note 42) at 200.

⁴³ E. Brown Weiss (note 1) at 129.

⁴⁴ E. Brown Weiss (note 16) at 22.

leaving it in no worse condition for future generations.⁴⁵ Conservation of access addresses the issue of each generation providing its members with equitable rights of access to the legacy from past generations i.e. preservation of legacy.⁴⁶ These principles satisfy the basic criteria of balance, flexibility, cultural acceptability and clarity.⁴⁷

The argument by Weiss that future generations have rights and that present generations are obligated to maintain the quality of the planet for future ones has been questioned by various authors. Some argue that the principle of intergenerational equity posed by Weiss is 'far from clear' and that this duty of each generation to pass on an environment in no worse off a condition than it received it is 'impossibly demanding.'⁴⁸ They further argue that Weiss's insistence of rights of future generations could lead to a critique of ancestors for failing to facilitate the association of foreseeable vital interests.⁴⁹ Others contend that Weiss's doctrine of intergenerational equity inappropriately underemphasizes the moral importance of the past, and in particular, the colonization and marginalization of the developing world by the developed.⁵⁰

Arguably, Weiss never claimed that her theories on intergenerational equity were perfect; she merely set out her perception of what the principle envisages. She stressed the need for the present generation to have options and quality to satisfy their own needs,⁵¹ hence the laudable clarification of the three components of intergenerational equity. International environmental concepts are constantly evolving and one can say the same for the principle of intergenerational equity. Therefore, Weiss is therefore right when she stresses that the three components of intergenerational equity can serve as the foundation for an international framework protecting the rights of future generations from present day rapacity.⁵²

3. Intergenerational Equity in Multilateral Environmental Instruments

The principle of intergenerational equity has found expression in various multi-lateral instruments⁵³ dealing with the environment and development. Though the term 'intergenerational equity' is not expressly stated in these instruments, reference to 'present and future generations' is proof that the principle is envisaged and deliberate.

⁴⁵ Shorge Shato 'Sustainable Development and the Selfish Gene: A Rational Paradigm for Achieving Intergenerational Equity' (2002-2003)11 *N. Y. U. Envtl. L. J.* 503 – 530 at 509. See also Rajendra Ramlogan (note 15) at 213.

⁴⁶ Edith Brown Weiss (note 1) at 130.

⁴⁷ One criterion is to balance the needs of future generations with those of the present, neither licensing the present generation to consume without attention to the interests of the future generations or requiring it to sacrifice unreasonably to meet indeterminate future needs. See Edith Brown Weiss 'Climate Change, Intergenerational Equity and International Law (2007 – 2008) 9 *Vt. J. Envtl. L.* 615 - 627 at 616 -617.

⁴⁸ See J Alder & D Wilkinson *Environmental Law and Ethics* (London: Macmillan Press Ltd, 1999) p. 21 and 55. See also Lynda Warren (note 18) at 169. See also Kenneth Arrow, Intergenerational Equity and the Rate of Discount in Long Term Social Investment 2 (Stan. Univ., Dep't of Econ., Working Papers Series No. 97005, 1995) in Shorge Shato (note 46) fn. 38 p. 510.

⁴⁹ Robin Attfield (note 9) at pp. 208-209.

⁵⁰ Mayeda also asserts that intergenerational equity "undermines the importance of human dignity and the equal worth of all" because it treats the present generation as a mere means to the end of future generations' happiness. See Graham Mayeda, 'Where Should Johannesburg Take Us? Ethical and Legal Approaches to Sustainable Development in the Context of International Environmental Law' (2004) 15 *Colo. J. Int'l Envtl. L. & Pol'y* 45, 54- 56, 61.

⁵¹ E. Brown Weiss (note 48) at 617.

⁵² Shorge Shato (note 46) at 509. See also Jeffrey M. Gaba 'Environmental Ethics and our Moral Relationship to Future Generations: Future Rights and Present Virtue' (1999) 24 *Colum. J. Envtl. L.* 249 - 288.

⁵³ Maggio opines that 'intergenerational equity has been accorded little more than lip service in the preamble of instruments dealing with environmental protection and development.' See G. Maggio (note 22) at 186.

3.1. Soft Law Instruments

The Stockholm Declaration, a document of 26 principles arising from the United Nations Conference on the Human Environment (UNCHE) 1972 is equivocal in the right and ‘solemn responsibility’ of man to: ...protect and improve the environment for present and future generations.⁵⁴ The World Commission on Environment and Development 1987 published its Brundtland Report (“Our Common Future”) with an influential definition of the concept of sustainable development encompassing the intergenerational principle: “Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs”.⁵⁵ In 1992, the United Nations Conference on Environment and Development (UNCED or “Earth Summit) produced the Rio Declaration, a document of 27 principles which made reference to the intergenerational principle thus: “The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.”⁵⁶ Similarly, the 1994 Draft Principles on Human Rights and the Environment provides that: “All persons have the right to an environment adequate to meet equitably the needs of present generations and that does not impair the rights of future generations to meet equitably their needs.”⁵⁷ The 1995 Draft IUCN Covenant on Environment and Development is not left out in its attempt to give voice to the principle of intergenerational equity. It provides that: “The freedom of action of each generation in regard to the environment is qualified by the needs of future generations.”⁵⁸ Most importantly, the adoption by the United Nations Economic, Social and Cultural Organization (UNESCO) of a Declaration on the Responsibilities of the Present Generation towards Future Generations 1997 is worthy of mention. It recognizes the need for present generations to ‘strive to ensure the maintenance and perpetuation of humankind with due respect for the dignity of the human person’ and that as ‘present generations have the responsibility to bequeath to future generations an Earth which will not one day be irreversibly damaged by human activity, each generation inheriting the Earth temporarily should take care to use natural resources reasonably and ensure that life is not prejudiced by harmful modifications of the ecosystems.’⁵⁹

3.2. Hard Law

The recognition of the principle of intergenerational equity by the persuasive provisions of the soft law instruments above influenced the credible inclusion of the principle of intergenerational equity in the Preambles to various environmental treaties which have binding obligations on the Parties.⁶⁰ The United Nations Framework Convention on Climate Change (UNFCCC) and the United Nations Convention on Biological Diversity (CBD) were the two global treaties adopted at the UNCED 1992. They also contain some reference to intergenerational equity thus:

⁵⁴ Principle 1 of the 1972 Stockholm Declaration.

⁵⁵ See *Our Common Future* (note 20) at p. 37.

⁵⁶ Principle 3 of the Rio Declaration 1992.

⁵⁷ Principle 4 of the 1994 Draft Principles available at the University of Minnesota Human Rights Library <<http://www1.umn.edu/humanrts/instree/1994-dec.htm>> accessed 15 July 2012.

⁵⁸ See Article 5 of the IUCN Draft Covenant on Environment and Development in IUCN Draft Covenant on Environment and Development, Third Edition Updated Text, (2004) 31 (2) *Environmental Policy and Law Paper* at 3. <http://www.iucn.org/dbtw-wpd/edocs/EPLP-031_rev2.pdf> accessed on 15 July 2012.

⁵⁹ See Articles 3 and 4 of the UNESCO Declaration 1997 <<http://www.unesco.org/cpp/uk/declarations/generations.pdf>> accessed on 15 February 2012.

⁶⁰ See for example, the Preambles to the 1946 International Whaling Convention for the Regulation of Whaling – ‘recognizing the interest of the nations of the world in safeguarding for future generations the great natural resources represented by the whale stocks’; 1973 Convention on International Trade in Endangered Species of Wild Flora and Fauna – ‘recognizing that wild fauna and flora in their many beautiful and varied forms are an irreplaceable part of the natural system of the earth and must be protected for this and the generations to come.’

Determined to conserve and sustainably use biological diversity for the benefit of present and future generations.⁶¹

In their actions to achieve the objective of the Convention and to implement its provisions, the Parties shall be guided, *inter alia*, by the following:

The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities.⁶²

Worthy of mention is the 1997 International Energy Agency's Joint Convention on the Safety and Management of Spent Fuel Management and on the Safety of Radioactive Management which cautions Parties to: "...strive to avoid actions that impose reasonably predictable impacts on future generations greater than those permitted for the current generation, [and]...aim to avoid imposing undue burdens on future generations".⁶³ Regional Conventions like the African Conservation of Nature and Natural Resources also make implied references to intergenerational equity thus:⁶⁴ "The Parties shall adopt and implement all measures necessary to achieve the objectives of this Convention, in particular through preventive measures and the application of the precautionary principle, and with due regard to ethical and traditional values as well as scientific knowledge in the interest of present and future generations".

The inclusion of implied provisions of the principle of intergenerational equity evidences it as a trend setter in environmental and developmental issues. Maggio is critical of the inclusion of these provisions in environmental treaties due to the fact that they 'offer no assistance in determining how Parties should behave to protect the interests of future generations in any manner differently from those of present humankind.'⁶⁵ He notes that apart from the UNFCCC, no other legally binding international instrument suggests how the interests of future generations should be considered, or how the interests of future generations may differ from those of present generations with regard to the access and utilization of resources.⁶⁶ Therefore, it appears that the recognition of the principle of intergenerational equity in the soft and hard law instruments is proof enough of the fact that Parties are to take conservation and resource use seriously in order that present and future generations may enjoy it. The need to differentiate between the present and future generation is dispensed with by virtue of this inclusion and also, by virtue of the fact that in each and other environmental Conventions, there is always an inclusion in the provisions of the national obligations of Parties in implementing the provisions of the Convention. This means that the protection of the environment for present and future generations goes beyond the international perspective, but includes national obligations.

4. Implementation and Enforcement of Intergenerational Equity

Implementation and enforcement of inter-generational equity requires a concerted effort by national governments to recognize this principle as an inherent part of the environmental provisions in their national Constitutions. The inclusion of this principle, preferable under the aegis of an environmental right, rather than a mere environmental provision that is non-justiciable, affords a litigant the option of bringing an environmental claim under the auspices of enforcing his/her environmental right using the principle of intergenerational equity. It should also be noted that this paper's allusion to the principle of inter-generational equity is

⁶¹ Last Paragraph of the Preamble to the CBD 1992.

⁶² Article 3(1) of the UNFCCC 1992.

⁶³ Article 4 (vi) and (vii) of the 1997 IAEA Convention.

⁶⁴ Article IV of the 2003 Revised Version of the Convention.

⁶⁵ Maggio (n. 22) p. 186.

⁶⁶ Maggio (n. 22) p. 187

deliberate because the former refers to the right and benefit of future generations, whilst the latter is geared towards the equity of the present generation. It is only trite that the environmental future of generations yet unborn be protected and legislation/policy to that effect be adopted, with modalities for adequate enforcement of same.

Having encapsulated the principle of intergenerational equity in the terms above, Weiss sets forth ways in which intergenerational rights and obligations can be implemented – through broad strategies and specific actions.⁶⁷ She advocates, *inter alia*, for the representation of the interests of future generations in administrative decision-making⁶⁸ and judicial decision-making and advocated for the promulgation of an International Declaration of Planetary Obligations and Rights codifying the key elements of the doctrine of intergenerational equity.⁶⁹ Though it may be objected that there are no rights-holders present to correspond with the obligations imposed,⁷⁰ she argues that enforcement of these intergenerational rights is appropriately done by a guardian or representative of future generations as a group, not of future individuals who are indeterminate.⁷¹

In 1995, the International Court of Justice (ICJ) was privileged to address the issue of intergenerational equity. Though it failed to endorse the principle explicitly in its judicial deliberations, it offered some hope for future consideration of intergenerational equity as a principle to assist in judicial determination of international disputes by the ICJ.⁷² Justice Weeramanthy has been a staunch advocate of the principle of intergenerational equity as is evidenced by his dissenting opinions in the cases below. In the 1993 case of *Denmark v Norway*,⁷³ regarding maritime delimitation between Greenland and Jan Mayen, Justice Weeramanthy noted that diverse legal traditions around the world have recognized principles of intergenerational equity.⁷⁴ In the *Nuclear Test II case*,⁷⁵ Justice Weeramanthy also opined that:

...the case before the Court raises, as no case before the court has done, the principle of intergenerational equity....an important and rapidly

⁶⁷ It should be noted that the World Commission on Environment and Development 1987 had discussed and recommended the appointment of an international ombudsman or other neutral auspices to oversee protection of the interests of for future generations. See Maggio (note 22) fn. 107 at 188; and Weiss (n. 16) p. 25.

⁶⁸ In administrative decision making, she envisages an option of appointing and publicly financing an office responsible for identifying and ensuring that interests of future generations are considered, and also ensuring that laws relating to the environment and natural resources are observed, for investigating complaints, or for providing warnings of pending problems. See Weiss (n. 16) p. 25.

⁶⁹She also recognized that such an instrument would constitute "soft law" but observed that it could lead to the conclusion of binding agreements, and/or the formation of customary international law. See Weiss (ed.) (n.15) at 105.

⁷⁰ Dinah Shelton 'Equity' in Daniel Bodansky, Jutta Brunnee and Ellen Hey (eds.) *The Oxford Handbook of Environmental Law* (Oxford: Oxford University Press, 2007) p. 644. See also Wilfred Beckerman & Joanna Pasek, *Justice, Posterity, and the Environment* (Oxford: Oxford University Press, 2001) at 21.

⁷¹ Weiss (n. 42) p. 205.

⁷² Rajendra Ramlogan (n. 39) p. 215.

⁷³ Case Concerning Maritime Delimitation in the Area between Greenland and Jan Mayen (*Denmark v. Norway*), [1993] I.C.J. Rep. 38. <<http://www.icj-cij.org/docket/index.php?sum=401&code=gjm&p1=3&p2=3&case=78&k=e0&p3=5>> accessed on 17 July 2012.

⁷⁴ Lynda M. Collins 'Revisiting the Doctrine of Intergenerational Equity in Global Environmental Governance' (2007) 30 *Dalhousie L. J.* 79-140 at 127.

⁷⁵ *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v France) Case*, Order of 22 September 1995 (Dissenting Opinion of Judge Weeramanthy) [1995] ICJ Rep. 317 at 317 – 62 <<http://www.icj-cij.org/docket/files/97/7567.pdf>> accessed on 17 July 2012.

developing principle of contemporary international law...it raises in pointed form, the possibility of damage to generations yet unborn..... [the Court] must regard itself as a trustee of those (intergenerational rights) in the sense that a domestic court is a trustee of the interests of an infant to speak for itself. If this Court is charged with administering international law, or has already done so, this principle is one which must inevitably be a concern of this Court.⁷⁶

In the ICJ Advisory Opinion on the Threat or Use of Nuclear Weapons 1996, Justice Weeramantry stated that:

The effects upon the ecosystem extend...beyond the limits of all foreseeable historical time...at any level of discourse, it would be safe to pronounce that no generation is entitled...to inflict...damage on succeeding generations. The Court as the principal organ of the United Nations...must, in its jurisprudence, pay due recognition to the rights of future generations.⁷⁷

This acknowledgement of the intergenerational right at the international judiciary is apt especially in view of the fact that it has undeniably influenced international perspective of intergenerational rights. However, the most controversial authority on intergenerational rights encapsulating Weiss advocacy and argument put forth in 1989 and 1990 above for generational rights to be enforced in a representative capacity was seen in 1994 in the *Minors Oposa* case. In *Minors Oposa v Secretary of the Department of Environment and Natural Resources (DENR)*,⁷⁸ the case was filed by minors from all over the Philippines, compelling the Secretary of the DENR to cancel all existing Timber Licensing Agreements (TLA's) and to cease issuing new ones.⁷⁹ They claimed to have standing to 'represent' their generation and unborn generations. They also relied on the provisions of Philippine Constitution which guaranteed a balanced and healthful ecology.⁸⁰ The Philippine Supreme Court held, acknowledging that the minor has *standi* to file a class suit on behalf of their generation and succeeding generations thus:

Their personality to sue on behalf of the succeeding generations can only be based on the concept of intergenerational responsibility in so far as the right to a balanced and healthful ecology is concerned...Each generation has a responsibility to the next to preserve that rhythm and harmony for the full enjoyment of a balanced and healthful ecology...the minor's assertion of their right to a sound environment constitutes, at the same time, the performance of their obligation to ensure the protection of that right for generations to come.⁸¹

⁷⁶ Ibid at 341 and 342. See also Ramlogan (n. 39) p. 216 and Fitzmaurice (n. 15) p. 142.

⁷⁷ *Legality of the Threat or Use of Nuclear Weapons – Dissenting Opinion of Justice Weeramantry* at 455 -456. <<http://www.icj-cij.org/docket/files/95/7521.pdf>> accessed on 20 July 2012.

⁷⁸ 33 ILM (1994) 73. Text of the *Minors Oposa* judgment <<http://www1.umn.edu/humanrts/research/Philippines/Oposa%20v%20Factoran,%20GR%20No.%20101083,%20July%2030,%201993,%20on%20the%20State%27s%20Responsibility%20To%20Protect%20the%20Right%20To%20Live%20in%20a%20Healthy%20Environment.pdf>> accessed on 22 July 2012.

⁷⁹ Ibid. See also Dante B. Gatmaytan 'The Illusion of Intergenerational Equity: *Oposa v Factoran* as Pyrrhic Victory' (2002-2003) 15 *Geo. Intl. L. Review* 457 – 485 at p 468; Trevor R. Updegraff 'Morals on Stilts: Assessing the Value of Intergenerational Environmental Ethics' (2008 -2009) 20 *Colo. J. Intl. Env. L. & Pol'y* 367 – 389 at 377.

⁸⁰ Ibid.

⁸¹ See *Minors Oposa* case (n. 79) at 8. See also Fitzmaurice (note 15) at 137; and Updegraff (n. 80) p. 367.

This case has been described as ‘significant and innovative and likely to become something of a landmark in the jurisprudence of international sustainable development.’⁸² It announced a powerful and influential exposition of intergenerational rights in the context of environmental protection.⁸³ However, despite the various accolades accruing to this case and its recognition of intergenerational equity, it has been subject to various criticisms. Dante Gatmaytan argues that while many point to the case as one that recognizes standing to sue for future generations, the Court’s statement to that effect is obiter dictum therefore, not binding as precedent.⁸⁴ He puts forward the argument that the use of intergenerational equity - invoking the rights of future generations - while intellectually titillating, is ultimately useless in the resolution of the case. He argues that the Philippine Supreme Court would have decided *Oposa* exactly the same way had the children filed the case solely on their own behalf because in cases involving the protection of the environment, the distinction between present and future generations is inconsequential - we cannot protect the rights of future generations without protecting the rights of the present.⁸⁵

Paul Baressi views the case from a broader angle and argues that the language of the Philippine Supreme Court sought to pair group rights with individual duties which is not what was envisaged by Weiss as a proponent of intergenerational equity.⁸⁶ He argues that the court offered no rationale for this peculiar juxtaposition and that nevertheless, the rights and duties envisaged by the court do not enjoy sufficient support in the right quarters to serve as a solid foundation for an effective legal regimen intended to achieve intergenerational equity in environmental matters.⁸⁷ He therefore suggests that we look elsewhere for the theoretical building blocks with which to construct that foundation if our primary interest is to ensure that the legal regimen on which intergenerational equity will rest will be effective.⁸⁸ Likewise, Trevor Updegraff focuses on the issue of intergenerational standing and states that ‘it is an insufficient vehicle for achieving environmental protection.’⁸⁹

Constructive though these criticisms may be, it cannot be disputed that rights and interests of future generations are being treated as a legal issue in some national jurisdictions, including

⁸² Ben Boer, ‘The Rise of Environmental Law in the Asian Region’ (1999) 32 *U. Rich. L. Rev.* 1503, 1534-37.

⁸³ See Neil A.E Popovic ‘In Pursuit of Environmental Human Rights: Commentary on the Draft Declaration of Principles on Human Rights and the Environment’ (1996) 27 *Colum. Hum. Rts. L. Rev.* 487, 513. See also the words of Antonio Oposa, Jr, the Counsel for the Petitioners in the case: ‘...this case has been the subject of extensive citation, analysis, and comment in international law circles. Perhaps, because it is the first case decided by the highest court of a country which discussed and implement what had heretofore been a rhetorical call for responsibility to future generations for the world’s natural resources. Furthermore, it brings to the fore – in the personal voice of our children – the imminent likelihood that our generation’s wanton use of the earth’s resources will inevitably adversely impact our children’s generation and generations yet unborn.

See Antonio A. Oposa, Jr., ‘The Power to Protect the Environment’ (excerpts of a paper presented before the LAWASIA Conference in Manila) in Gatmaytan (n. 80) p. 459.

⁸⁴ He recognizes the protection of the rights of future generations was already enshrined in Philippines law and jurisprudence and that only a few people like Richard Desgangne and David Wirth correctly view the case as a worthy cause for environmental protection. See Gatmaytan (n. 80) p 459. See also Richard Desgangne, ‘Integrating Environmental Values into the European Convention on Human Rights’ (1995) 89 *Am. J. Int’l. L.* 263, 263, n.7; and David A. Wirth, ‘The Rio Declaration on Environment and Development: Two Steps Forward and One Back, or Vice Versa?’ (1995) 29 *Ga. L. Rev.* 599, 652, n.51.

⁸⁵ Gatmaytan (n. 80) p. 460.

⁸⁶ Paul A. Baressi ‘Advocacy, Frame and the Intergenerational Imperative: A Reply to Professor Weiss in ‘Beyond Fairness for Future Generations’ (1997 -1998) 11 *Tul. Envtl. L. J.* at 435.

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*

⁸⁹ Updegraff (n 80) p. 380.

developing countries.⁹⁰ Therefore, there is no longer any inherent reason why national courts should not permit the representative proceedings on behalf of the unborn/future generations⁹¹ especially if the Constitution of that particular jurisdiction encapsulates an environmental right. However, much will depend on the procedural rules and the context in each legal system and no generalizations with regard to generational rights in national law are possible.⁹²

5. Intergenerational Equity as Customary International Law?

The inclusion of the principle of intergenerational equity in an implied manner in various soft and hard law instruments have led to the confusion as to whether intergenerational equity can be regarded as customary international law due to its rapid recognition and acceptance in various global treaties. Though this fact is undisputable, critics have the principle as an ethical, rather than a legal one and that it is doubtful that a duty towards future generations would be universally recognized even as a principle of customary international law.⁹³ In the cases before the ICJ discussed above, the principle of intergenerational equity was alluded to as a 'legal norm.' The phrasing of intra- and inter- generational expressions in various international instruments are also phrased in 'normative' terms with the idea of it gaining acceptance in the hope that perhaps, the ICJ may be confronted with addressing directly the normative status of intergenerational equity.⁹⁴

The reality is that the presence principle of intergenerational equity in international environmental agreements and international legal instruments on sustainable development suggest that the international community has come to recognize the use of natural resources in an inter-temporal context.⁹⁵ These references also indicate that generational equity has become integral to international law dealing with environmental protection, resource utilization and socio-economic development.⁹⁶ In both its intra- and inter- generational dimensions, equity constitutes a bridge for recognized mutual interests between environmental protection, socio-economic development and human rights law.⁹⁷ This evolving complementarity is a new phenomenon as suggested by proponents of environmental justice in general⁹⁸ and indigenous peoples' rights in particular.⁹⁹ In addition, the ever present relationship between sustainability and equity cannot be over-emphasized. The concept of sustainable development raises the issue as to whether present life-styles are acceptable and whether there is any reason to pass them on to the next generation. Because intergenerational equity must go hand in hand with intra-

⁹⁰ The Constitution of the Republic of Vanuatu 2006 has an innovative approach to intergenerational rights as it provides in its Section 7 (d) that 'every person has the following fundamental duties to himself and his descendants and to others....to.... safeguard the national resources and environment in the interests of the present generation and future generations.' Constitution of the Republic of Vanuatu 2006 (Consolidated Edition) <<http://www.parliament.gov.vu/Constitution/Constitution%20Of%20The%20Republic%20of%20Vanuatu.pdf>> accessed 16 July 2012. See also the 2008 Constitution of Ecuador.

⁹¹ P Birnie and A Boyle, *International Law and the Environment* (2ed, Oxford: Oxford University Press, 2002) p. 91

⁹² See *Faroque v Government of Bangladesh* (1997) 49 DLR (AD) where the court held that the plaintiffs, relying on *Minors Oposa case*, had no standii to bring the suit on behalf of present and future generations as the environmental right was not part of the provisions of the Bangladesh Constitution. See Birnie and Boyle, *ibid*.

⁹³ Warren (n 18) p. 168.

⁹⁴ Maggio (n 15) p. 191.

⁹⁵ *Ibid* at 162. See also Segger and Khalfan (n 22) p. 130.

⁹⁶ *Ibid* at 163.

⁹⁷ Segger and Khalfan (n 22) p. 130.

⁹⁸ D. A. Sarokin and J. Schulkin, 'Environmental Justice: Coevolution of Environmental Concern and Social Justice' (1994) 4 *The Environmentalist* 141.

⁹⁹ See R. K Hitchcock 'International Human Rights, the Environment and Indigenous Peoples' (1994) 5 *Colo. J. Int'l Env'tl. L. & Pol'y* 1.

generational equity, a major restructuring of the world's income and consumption patterns may be a necessary precondition for any viable strategy of sustainable development.¹⁰⁰

Therefore, the principles of intra- and intergenerational equity cannot be regarded as customary international law presently. This is due partly to the fact that the needs of future generations and the ways in which future generations can enjoy the planet/environment are not clearly spelt out in any internationally binding legal document. There is also the lack of consensus between States on the obligation to ensure distributional justice between States.¹⁰¹ At best, it will be proper to refer to the principle as an international one which guides the development and application of the concept of sustainable development, and one which has garnered State commitment and recognition due to its allusion in various global multi-lateral treaties and international court.

In view of this general overview of the principle of intergenerational equity, the question of its application in a developing South Africa arises. South Africa is a developing country with laudable environmental laws which are constantly being amended to comply with its obligations under multilateral environmental treaties. Developing countries like South Africa also have a role to play in ensuring the protection and conservation of the environment for the benefit of present and future generational rights. Therefore, specific South African legislation is examined below with a view to determining whether the principle of intergenerational equity stands a chance in the jurisdictional context.

6. The Ambit of Intergenerational Equity in South Africa: A Beacon for Africa

South Africa is one of the larger and more diversified economies in Africa.¹⁰² The 1996 South African Constitution has provisions on intra- and intergenerational equity and environmental rights enshrined.¹⁰³ Section 24 of the Constitution clearly states that:

Everyone has the right:

- (a) to an environment that is not harmful to their health or well-being;
- (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that:
 - (i) prevent pollution and ecological degradation;
 - (ii) promote conservation; and

¹⁰⁰ See UNDP Human Development Report 1994. See also Jonathan M. Harris 'Basic Principles of Sustainable Development' (2000) Global Development and Environment Institute, Working Paper 00-04 at 17. <https://notendur.hi.is/bdavidis/UAU101/Readings/Harris_2000_Sustainable_development.pdf> accessed on 17 August 2012.

¹⁰¹ Segger and Khalfan (n. 22) p. 132.

¹⁰² See W. Du Plessis and AA Du Plessis 'Striking the sustainability balance in South Africa' in Michael Faure & Willemien du Plessis (eds) *The balancing of interests in environmental law in Africa* (Pretoria: Pretoria University Law Press, 2011) at 414.

¹⁰³ Chapter Six, Article 27 of the Constitution of Ecuador 2008 states that the right to live in a healthy environment that is ecologically balanced, pollution-free and in harmony with nature are recognized and hereby guaranteed. Chapter Two, Article 395 also recognizes the duty of the State to guarantee a sustainable model of development, one that is environmentally balanced and respectful of cultural diversity, conserves biodiversity and the natural regeneration capacity of ecosystems, and ensures meeting the needs of present and future generations. Text of the Constitution <http://www.mmrree.gob.ec/pol_exterior/constit_eng.pdf> accessed on 15 July 2012. See also the Constitutions of the Republic of Vanuatu, Eritrea, Brazil, Namibia, Malawi, Uganda and Qatar.

- (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.¹⁰⁴

The constitutional environmental right and the intergenerational principle is anthropologically construed in such a manner that environmental, social and economic aspects must be factored into the way in which the environment is protected and this must be done in a balanced way to ensure sustainable development beyond the lifespan of the current generation.¹⁰⁵ This constitutional right is therefore justiciable and enforceable. The National Environmental Management Act 107 of 1998¹⁰⁶ is the overarching environmental framework legislation of South Africa.¹⁰⁷ Section 1 of the Act alludes to intergenerational equity in the definition of ‘sustainable development as ‘the integration of social, economic and environmental factors into planning, implementation and decision-making so as to ensure that development serves present and future generations.’¹⁰⁸ This express recognition by the South African constitution of intergenerational rights is evidence that the South African government recognizes the inextricable need for environmental protection and the individual capacity to enforce environmental rights to achieve environmental justice. While critics posit that South Africa has been slow to embrace the correlative doctrine of intergenerational justice by implementing and enforcing a pragmatic legal framework in the country,¹⁰⁹ the South African government should also be commended for adopting a sustainable development agenda to ensure development that meets the needs of present and future generations.¹¹⁰

In recent times, the enforcement of intergenerational rights as a centerpiece of sustainable development has been addressed by South African courts.¹¹¹ Soft law interpretation of intergenerational equity and sustainable development was relied on by the court in the case of *Director Mineral Development, Gauteng Region and another v. Save the Vaal Environment and Others*.¹¹² Justice Olivier stated that:

¹⁰⁴ See the Constitution of the Republic of South Africa, Act 108 of 1996.

¹⁰⁵ Du Plessis (n. 103) p. 428.

¹⁰⁶ (as amended by Act 62 of 2008). It was assented to on 5 January 2009 and came into effect on 1 May 2009. Full text of the Act <[http://www.capegateway.gov.za/Text/2009/2/national_environmental_management_amendment_act_\(62_of_2008\)_9jan2009.pdf](http://www.capegateway.gov.za/Text/2009/2/national_environmental_management_amendment_act_(62_of_2008)_9jan2009.pdf)> accessed 21 September 2012.

¹⁰⁷ J Nel & W du Plessis ‘An evaluation of NEMA based on a generic framework for environmental framework legislation’ (2001) *South African Journal of Environmental Law and Policy*, 1-37.

¹⁰⁸ Section 37 (2) of the Mineral and Petroleum Resources Development Act 2002 also provides that ‘any prospecting or mining operation must be conducted in accordance with generally accepted principles of sustainable development by integrating, social, economic and environmental factors into the planning and implementation of prospecting and mining projects in order to ensure that exploitation of mineral resources serves present and future generations.’ See the MPRDA 2002 <http://www.dme.gov.za/pdfs/minerals/MPRDA_ACT_28_of_2002_pdf> accessed on 21 September 2012.

¹⁰⁹ Various proponents sought for and got the South African government to recognize that environmental degradation is now a violation of human rights. See Collins, L. ‘Environmental rights for the future? Intergenerational equity in the EU’ (2007) 13 *RECIEL* 321-331.

¹¹⁰ W Scholtz ‘The anthropocentric approach to sustainable development in the Environmental Management Act and Constitution of South Africa’ (2005) *S. Afr. L. J.* 65 – 89 at 85. See also B. Hewitt ‘Carbon Pollution Reductions’ (2004) 64 *Climate Change* 289-315.

¹¹¹ See *Republic of South Africa v Grootboom Case*, CCT/11/2000 (11) BCLR 1169, Constitutional Court of South Africa, 4 October 2000. This judgment merely sought to determine the existing human rights of existing individuals and not future generations. See J. Fitzpatrick and R C Slye, ‘International Decisions’ (2003) 97 *AJIL* at 669 -673.

¹¹² (1999) Case No. 133/98 CC. <<http://www.saflii.org/za/cases/ZASCA/1999/9.pdf>> accessed 20 September 2012.

...what has to be ensured when application is made for the issuing of a mining license is that development which meets present needs will take place without compromising the ability of future generations to meet their own needs (the criterion proposed in the Brundtland Report: World Commission on Environment and Development, *Our Common Future*, Oxford University Press 1987). Our Constitution, by including environmental rights as fundamental, justiciable human rights, by necessary implication requires that environmental considerations be accorded appropriate recognition and respect in the administrative processes in our country. Together with the change in the ideological climate must also come a change in our legal and administrative approach to environmental concerns¹¹³

In the 2004 case of *BP Southern Africa (Pty) Ltd*¹¹⁴ the applicant, BP Southern Africa sought an order on review setting aside the decision of the Gauteng Provincial Department of Agriculture, Conservation, Environment and Land. The Department had refused to authorise an environmental assessment application under section 22 of the Environment Conservation Act 73 of 1998, regarding the development of a new filling station on one of its properties.¹¹⁵ In handing down judgment, the Court made the following pertinent comments on the notion of sustainable development and the environmental right:

The concept of ‘sustainable development’ is the fundamental building block around which environmental legal norms have been fashioned, both in South Africa, and is reflected in s 24(b)(iii) of the Constitution...Development, which may be regarded as economically and financially sound, will, in future, be balanced by its environmental impact, taking coherent cognizance of the principle of intergenerational equity and sustainable use of resources in order to arrive at an integrated management of the environment 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.¹¹⁶

Arguably, no environmental case similar to the *Minors Oposa* case has been brought before the South African Constitutional Court for interpretation of the right of the ‘future generations.’ However, it appears that any such case would be well-suited if filed under the auspices of enforcing an environmental right within the concept of sustainable development within the framework of s. 24 of the 1996 Constitution. Thus, it has been argued, in the context of acid mine drainage, that *government is neglecting its intergenerational responsibilities and abrogating Constitutional purpose, a situation which is exacerbated by multiple understandings in different sectors of society of the significance of intergenerational equity and how it is best implemented.*¹¹⁷ *Though this view is particular in context, this paper sheds*

¹¹³ Ibid at p. 14 -15.

¹¹⁴ (2004) Case No. 03/16337 HC <<http://www.saflii.org/za/cases/ZAGPHC/2004/18.pdf>> accessed 20 September 2012.

¹¹⁵ Kola O. Odeku ‘Climate Change and Intergenerational Justice: Perspective from South Africa’ (2012) 39 (3) *Journal of Human Ecology* 183 – 194 at 189.

¹¹⁶ See BP Case (note 117) 1-51 part. at p. 24 -25. See also Justice Claasen’s reference to Philippe Sands and ‘future generations’ p. 24 of the judgment.

¹¹⁷ ‘Principle of Intergenerational Equity likely to fail in Africa’ <<http://blog.dhec.co.za/2012/10/principle-of-intergenerational-equity-likely-to-fail-in-south-africa/>> accessed on 15 July 2012.

light on the willingness of the judiciary to utilize the principle of inter-generational equity to achieve environmental justice. Although the South Africa Constitution expressly provides for the actionable rights of present and future generations in a national court, this may be hard to achieve in a typical African context if the suit is not brought under the auspices of enforcing an environmental right. Accordingly, there is the need for the judiciary in other African Countries to take the lead in ensuring that this principle is allowed a pride of place in the protection of the environment.

7. Conclusion

The principle of equity in both forms (intra- and intergenerational) is intertwined with the concept of sustainable development. The Brundtland Report 1987 and other international environmental law instruments have made it an imperative of States to implement the social, environmental and social objectives of sustainable development if present and future generations are to live in an ideal world. The above discourse on the international and national emergence of the principle is evidence of its destiny to become a force to be reckoned with in the international law parlance. Though the vagueness of the concept lies in the inability of the international community to reach a mutually agreed definition of the concept, its greatest achievement lies in the fact that internationally and nationally, there is increased awareness of an obligation not to act ‘wastefully or wantonly’ even when we cannot calculate how such acts would make any present or future persons worse off.¹¹⁸ Additionally, while various African jurisdictions have included the principle of inter-generational equity in various environmental legislation, only a few like South Africa have environmental right provisions in their Constitutions. However, the inclusion of the principle in the South African Constitution is proof of how the concept of equity as one of the principles of international law relating to sustainable development has permeated a developing Africa, and has further increased awareness of the need to protect the environment by any means possible for generations yet unborn. Whilst it can be estimated that over 60 percent of the world’s population is currently aware of the need to safeguard the rights of present and future generations, the principle remains an inextricable part of environmental law in general, and a subset of sustainable development in particular.

¹¹⁸ Anthony D’Amato in (n. 42) p. 198.