



Sustainable Development and the Rule of Law for Nature: A Constitutional Reading

Louis J. Kotzé

Louis.Kotze@nwu.ac.za

- Paper available at:

- Christina Voigt (ed) *Rule of Law for Nature: New Dimensions and Ideas in Environmental Law* (Cambridge University Press, 2013)

Background

- **Hypothesis:**

- Reality is that, in practice, weak (as opposed to strong) sustainability will probably prevail for the near future

- **Purpose:**

- Whether SD as a feature of environmental constitutionalism could contribute to upholding the rule of law for nature in South

Rule of Law?

- Act in accordance with pre-announced, clear and general rules that are enforced by impartial courts in accordance with fair procedures
- Prohibits government from exercising any power unless that power is mandated by law
- Law must be publicly promulgated, prospective in effect, understandable, consistent, non-contradictory, and relatively stable
 - Mostly procedural in nature
 - Do not relate to the *substance* of the law, but rather provide “procedural guidelines” for conducting legislative and administrative processes in a country

Rule of Law?

- But also important substantive aspects
 - What makes the **“new-order”** rule of law different from the apartheid era rule of law, is that the Constitution and its provisions collectively seek to break from a past political and legal dispensation that was in every way directly opposed to constitutionalism
 - Rule of law is more than a constitutional principle; it is considered a **constitutional value** along with other values upon which South Africa is founded, including human dignity, the achievement of equality and the advancement of human rights and freedoms, non-racialism and non-sexism, and constitutional supremacy



Extending the Rule of Law to Nature

- **Procedural:**
 - US: rule of law litigation
 - Better administrative decision-making and compliance
 - Rule of law raises governance capacity, which directly improves environmental policies
- **Substantive:**
 - Extent to which it could be used to create, maintain, improve and/or protect the substantive “goodness” of environmental laws and thus environmental interests/outcomes
 - Part of environmental constitutionalism

Environmental constitutionalism?

- Legitimize, dignify and improve a legal order
- Reform environmental governance and laws
- Prioritizes environmental care by equating it at higher constitutional level to fundamental rights, ethics and universal moral values
- Legitimate foundation and means for creating and enforcing environmental rights, values and other sources of ecological obligation
- Provides means to dictate content of laws
- Establishes moral and ethical obligations
 - L Kotzé, 'Arguing Global Environmental Constitutionalism', 1 *Transnational Environmental Law* (2012), 199-233

SD and Rule of Law for Nature

- In SA, SD is not a constitutional value or explicit constitutional principle as is the case with the rule of law
- BUT it is a **constitutional issue** that is constitutionally entrenched
 - Indirectly implied by other rights such as human dignity, equality and life
 - It is an **objective** of environmental right

Conclusion

- SD characterised as constitutional objective which in tandem with the loftier ideals of constitutionalism and the rule of law, should strive to fulfil objectives of environmental right and environmental protection more generally
- Development must be approached by government in terms of its three-pillared manifestation

Conclusion

- “Sustainable development does not require the cessation of socio-economic development but seeks to regulate the manner in which it takes place. It recognises that socio-economic development invariably brings risk of environmental damage as it puts pressure on environmental resources. It envisages that decision-makers guided by the concept of sustainable development will ensure that socio-economic developments remain firmly attached to their ecological roots and that these roots are protected and nurtured so that they may support future socio-economic developments.” [p. 26].

Conclusion

- If the rule of law for nature also means protecting environmental interests AND socio-economic interests, then sustainable development has played a meaningful role in providing balancing measure to the court in its efforts to uphold the rule of law for nature
 - “The very idea of sustainability implies continuity. It reflects a concern for social and developmental equity between generations, a concern that must logically be extended to equity within each generation. This concern is reflected in the principles of inter-generational and intra-generational equity which are embodied in both s 24 of the Constitution.” [p 32].

Conclusion

- Courts are guardians of the rule of law for nature through:
 - “The role of the courts is especially important in the context of the protection of the environment and giving effect to the principle of sustainable development. **The importance of the protection of the environment cannot be gainsaid. Its protection is vital to the enjoyment of the other rights contained in the Bill of Rights; indeed, it is vital to life itself.** It must therefore be protected for the benefit of the present and future generations. The present generation holds the earth in trust for the next generation. This trusteeship position carries with it the responsibility to look after the environment. **It is the duty of the Court to ensure that this responsibility is carried out**”. [p.39]