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Carola Glinski

**Environmental Justice
and the South African Legal System**

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M.A. Programme Development Policy with
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Universität Bremen, FB 8
Postfach 330440
28334 Bremen
Germany

Bremer Informationszentrum für Menschenrechte und Entwicklung (biz)
Bremen Information Centre for Human Rights and Development
Bahnhofsplatz 13
28195 Bremen
Germany
Homepage: [http:// www.bizme.de](http://www.bizme.de)
E-mail: info@bizme.de

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Editorial

The *enro + biz studies* series is intended to elaborate on positions in development policies. It aims at supplying backgrounds on development issues to a critical and committed public. Most of the papers published in this series are theses of students in *Development Policy with Focus on Non-Governmental Organisations* (*enro/dengo*). All of the authors have been working in NGOs and, in addition to the examination in a previous study of a broad spectrum of disciplines, they have passed the final exam in the post-graduate programme of *enro*. The publications focus on the juncture of practice and theory of development policy. They are meant to provide ideas and theory-guided assistance in arguing for organisations and institutions in the area of development.

As a theme in constitutional law the environment is rather young, if not nascent. Until recently, the problem of environmental deterioration was not considered compelling enough to be explicitly addressed at constitutional level. Whatever legal issues obtained in relation to it were dealt with only as part of those in subjects like administrative law, property law and torts.

The situation has significantly changed in recent years. The issue of the environment started to come forth especially as part of the discourse on sustainable development. That peoples are entitled to healthy and clean environment came to be increasingly acknowledged. Around the beginning of the 1990s the issue claimed a focussed attention in and with respect to Africa. This focus culminated in the accommodation of the environment issue in the constitutions of some countries in the continent. Several factors account for this development.

- The Rio Summit of 1992 provided the recommendation that states should concretise the ideas on sustainability of development in their policies. Accordingly, several states that subsequently either drafted or amended their constitutions made it a point to include in them provisions on the rights and responsibilities of the citizens and communities as regards the environment.

- With the wave of democratisation and economic reforms that started in the end of the 1980s, the continent seemed to be experiencing a reawakening or a renaissance. Environmental degradation was perceived as a problem linked to the political crises the African states were in. The hypothesis obtained that the governments could not deal with this problem in part because they had lost whatever legitimacy they might have had. Thus it was virtually as an aspect of the dialogue on reform and renewal that the issue of the environment came to the fore at the beginning of the 1990s. It was highlighted to such an extent that several African constitutions, including those of South Africa, Namibia, and Malawi addressed it in connection with state policy and the rights and duties of the peoples and communities concerned.

By now, one dare say, the issue of the environment is recognised, in one or another form, in many of Africa's constitutions (as much as it is in international

law). However, in themselves constitutional clauses or guarantees are not enough for the effective and sustainable management of the environment. Hence, important questions are being raised: under what conditions can the constitutional clauses translate into actual and effective policies? How can the necessary "political will" for the application of stated policies be cultivated and developed? Who has or who should have the *locus standi* - i.e. the capacity or the right to act so as to make the state and the institutions concerned answerable in respect of environmental rights? What exactly is the nexus between governance, development and management of ecological resources? What can be done to strengthen the juridical position of environmental rights? What are the tasks at the regional and global levels? What ought to change in the character of North-South relations? How can the extra-legal values that affirm the sanctity of the ecosystem be resuscitated, advanced and strengthened? Is there such a thing as *environmental ethics*? Do non-human living things have environmental rights too? If so, in what sense, and how should the rights be enforced?

Works dealing with the environment as a problem related to the injustice of apartheid and as a challenge integral to the endeavor for the socio-economic transformation of the country are not that plentiful. This essay by Carola Glinski is a very important contribution in this area. It is a study on the challenges of the environmental problems in the new South Africa and the legal measures undertaken to address them. It examines the problem in all its dimensions and proffers ideas on what remains to be done - especially in the legal field - to realize *environmental justice* in this country. A stimulating and, though medium-sized, really profound study, this work is timely and very important to those engaged in the law and politics of the environment in South Africa. It is also a valuable companion to those pursuing the cause of *environmental justice* elsewhere in the developing world, especially in sub-Saharan Africa.

Bremen, May 2003

Tesfatsion Medhanie

German summary

Der Aufbau eines demokratischen Rechtsstaats in Südafrika nach dem Ende der Apartheid ist mit der Wiedergutmachung vergangenen Unrechts verknüpft. Dies wirkt sich immer noch in Form von krassen Unterschieden der Lebens- und Umweltbedingungen aus. Ein erheblicher Teil der Bevölkerung hat mangelhaften Zugang zu Ressourcen wie sauberem Wasser oder Land oder ist starker Umweltverschmutzung ausgesetzt. Als Reaktion hierauf haben sich Zivilgesellschaft, Politik und Gesetzgebung *environmental justice* (Umweltgerechtigkeit) zum Ziel gesetzt.

Carola Glinski analysiert in ihrer Studie die Ursachen von Umweltungerechtigkeit und stellt die südafrikanische *environmental justice*-Bewegung mit ihren Forderungen vor. Auf dieser Grundlage lotet sie das Potenzial des neuen südafrikanischen Rechts im Hinblick auf zukünftige gerechte Umweltentscheidungen und Wiedergutmachung vergangenen Unrechts aus.

Insbesondere die Verfassung von 1996 mit ihrem Katalog sozialer Grundrechte und weitreichender Verfahrensgarantien verleiht Einzelnen und NGOs weitgehende Rechte und Möglichkeiten. Allerdings ist die Umsetzung dieser Rechte insbesondere im Bereich des materiellen Umweltrechts noch lückenhaft. Teilweise ist diese zögerliche Umsetzung jedoch der sehr partizipativen Vorbereitung von Entscheidungen und Gesetzen geschuldet, andererseits mangelnden finanziellen Mitteln.

Die Studie illustriert am Beispiel der vielversprechenden Entwicklung Südafrikas im Bereich *environmental justice* die Bedeutung rechtlicher Rahmenbedingungen für zivilgesellschaftliches Engagement.

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