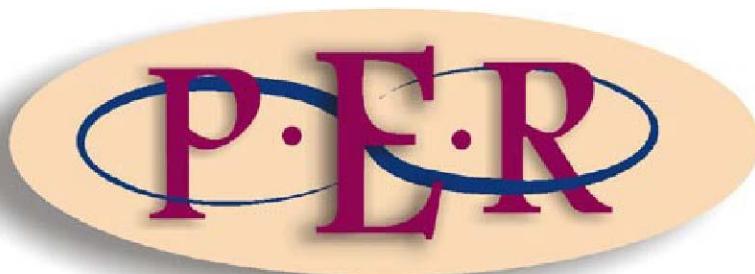


Author: AA du Plessis

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CONSTITUTIONAL DUTIES OF LOCAL GOVERNMENT IN SOUTH  
AFRICA: A CONCEPTUAL INTRODUCTION**

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# THE "BROWN" ENVIRONMENTAL AGENDA AND THE CONSTITUTIONAL DUTIES OF LOCAL GOVERNMENT IN SOUTH AFRICA: A CONCEPTUAL INTRODUCTION

**AA Du Plessis\***

Cities are the locus of critical social, economic and environmental problems, as well as comprising unique opportunities for a more sustainable future.<sup>1</sup>

## 1 Introduction

Scholarly interest in the position and role of cities and local governments in environmental governance is growing.<sup>2</sup> The climate change discourse of recent years seems to have deepened this curiosity.<sup>3</sup> International attention to local environmental governance can, however, be traced back to the 1990s when the United Nations (UN) adopted *Agenda 21*<sup>4</sup> and the International Council for Local Environmental Initiatives (ICLEI)<sup>5</sup> launched a number of flagship local government initiatives.<sup>6</sup> During the same period the 1992 *Rio Declaration on Environment and Development (Rio Declaration)*<sup>7</sup> and especially *Agenda 21* came to change our understanding of environmental governance to the extent that these instruments conceive ecological and *other*

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\* Anél du Plessis. BA, LLB, LLM, LLD. Professor of Law, Faculty of Law, North-West University (Potchefstroom Campus), South Africa. Email: anel.duplessis@nwu.ac.za. This note draws in part upon a paper that was delivered at the International Institute for Sociology of Law Workshop on *Human Rights and the Environment: In Search of a New Relationship*, Onati, Spain, June 2012. The author wishes to thank the workshop organisers and the Alexander von Humboldt Foundation for its financial support towards this research.

<sup>1</sup> Allen 2002 <http://rec.brookes.ac.uk/research/relp/network/resources/GreenVBrownAgenda.doc> 1.

<sup>2</sup> Recent international publications include Bouteligier *Cities, Networks and Global Environmental Governance*; Rosenbloom 2015 *BYU L Rev*; and Martine *et al* *New Global Frontier*. Some recent scholarly publications in South Africa include Du Plessis 2010 *Stell LR*; Fuo 2013 *Obiter*; Freedman 2014 *PELJ*; Du Plessis 2009 *SA Public Law*; and Du Plessis *Local Government and Environmental Law*.

<sup>3</sup> For discussions on the role and importance of local government in responding to climate change, see Richardson *Local Climate Change Law*; Bulkeley and Merill Betsill *Cities and Climate Change*; Sánchez-Rodíquez "Urban Sustainability" 151; Fünfgeld 2015 *Curr Opin Env Sust* 67; and Du Plessis and Kotzé 2014 *J Afr L* 145.

<sup>4</sup> Adopted in 1992 at the United Nations Conference on Environment and Development in Rio de Janeiro.

<sup>5</sup> ICLEI has since been renamed as "Local Governments for Sustainability".

<sup>6</sup> For historical and more recent programmes and initiatives see ICLEI 2014 <http://www.iclei.org/our-activities.html>.

<sup>7</sup> Adopted in 1992 at the United Nations Conference on Environment and Development in Rio de Janeiro.

developmental pressures to be closely interlinked.<sup>8</sup> The *Rio Declaration* links ecological degradation and poverty,<sup>9</sup> for example, while *Agenda 21* advances the idea of different development interdependencies in the pursuit of sustainability.<sup>10</sup> The notion that local authorities have a significant function in the world's transition to an inclusively perceived sustainable future culminated in the development of *Local Agenda 21*.<sup>11</sup> Still, twenty odd years down the line domestic law and policy as well as decision-makers themselves continue to grapple with the details of the role of local authorities in this pursuit.<sup>12</sup>

For state governments, the optimal allocation and actual execution of sustainability mandates by government institutions are often challenging. This challenge intensifies under certain conditions, for example, when there is a lack of political will, when organs of state compete with each other for resources or when a country's national constitution provides for a substantive constitutional environmental right to be realized for the present and future generations by an institutionally divided government, in the collective.<sup>13</sup>

Using the interconnectedness of ecological and other developmental pressures in the pursuit of sustainability as the conceptual departure point, this note explores the interrelationship between ecologically sustainable development (the green environmental agenda) and pro-poor urban development and environmental health (the brown environmental agenda). The latter's relevance for *local* government in

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<sup>8</sup> Connelly *et al* *Politics and the Environment* 270.

<sup>9</sup> See Principle 5 of the *Rio Declaration*, for example.

<sup>10</sup> Chapter 1 of *Agenda 21*.

<sup>11</sup> Chapter 28 of *Agenda 21* is titled "Local authorities' initiatives in support of Agenda 21" and serves as the basis of what has become known as Local Agenda 21 programmes and projects in many parts of the world. The basis for local action is described in ch 28.1: "Because so many of the problems and solutions being addressed by Agenda 21 have their roots in local activities, the participation and cooperation of local authorities will be a determining factor in fulfilling its objectives. Local authorities construct, operate and maintain economic, social and environmental infrastructure, oversee planning processes, establish local environmental policies and regulations, and assist in implementing national and subnational environmental policies. As the level of governance closest to the people, they play a vital role in educating, mobilizing and responding to the public to promote sustainable development."

<sup>12</sup> See, for example, Stanton *Democratic Sustainability* focusing on the United Kingdom.

<sup>13</sup> Velverde *Everyday Law on the Street* 139 describes the rights of people in general as mechanisms in municipal governance.

South Africa is discussed<sup>14</sup> as part of the argument that the brown agenda features in South Africa's constitutional environmental right with meaningful implications for the interpretation and enforcement of the service delivery mandate of municipalities. It is in this context most relevant that section 24 of the *Constitution of the Republic of South Africa, 1996* (the *Constitution*), protects human health and well-being as well as the natural resource base. This research is thus devoted to an introductory conceptual framing of South Africa's environmental right that goes beyond the green environmental agenda to the concomitant constitutional promise for communities and the interpretation and execution of the duties of local government.

Part 2 focuses on the meaning and relevance of the so-called brown and green environmental agenda, in general. Part 3 attends to the interplay between the two agenda and local government in the South African context. Part 4 focuses on the brown agenda in relation to section 24 of the *Constitution* and on the "environmental" relevance of the seemingly "non-environmental" constitutional duties of local government. Part 5 offers a response to what the conceptual framing of South Africa's constitutional environmental right beyond the green agenda promises for communities and implies for local government.<sup>15</sup>

## **2 The "green" and "brown" environmental agenda**

The literature in the domain of environmental management and governance often describes "environmental" issues (objectives, complexities, strategies etc) with reference to the allegorical brown and green agenda and the synergies between the two.<sup>16</sup> The green environmental agenda typically concerns ecosystem protection,

<sup>14</sup> Cock 2004 <http://ccs.ukzn.ac.za/files/Cock%20Connecting%20the%20red,%20brown%20and%20green%20The%20environmental%20justice%20movement%20in%20South%20Africa.pdf> 2 refers to Harvey when she explains that the term "environmental issues" has generated a diversity of mutually exclusive and sometimes antagonistic claims – a "confusing multiplicity of discourse". Connolly *et al* *Politics and the Environment* 7 explains that inherent to the notion of "sustainable development" is the idea that social and economic practices are inseparable from the natural environment and require the integration of economic development and environmental protection.

<sup>15</sup> This note extends the thinking in an earlier research project in which I have argued in general that s 24 of the *Constitution of the Republic of South Africa, 1996* 1) aims to secure for all members of society a basic quality of life and to afford entitlements to the material conditions for human welfare and 2) establishes entitlements that are included in but also transcend what is necessary for biological survival. See Du Plessis 2011 *SAJHR* 297. See also Du Plessis 2015 *SAJHR* 284.

<sup>16</sup> Bolnick *et al* 2006 <http://pubs.iied.org/pdfs/10533IIED.pdf> 2.

mitigation of loss or the deterioration of natural life-support systems, and the prevention of the degradation of natural resources such as water, forests, soil and biodiversity.<sup>17</sup> This agenda focuses on the delayed, dispersed and ecological effects of human activity at different scales and is directed at inter-generational equity, environmental justice<sup>18</sup> and the protection of the environmental rights of future generations.<sup>19</sup> The green agenda recognises people and human activity in the long-term protection<sup>20</sup> of the natural resource base, while it covers issues such as the restitution of land,<sup>21</sup> access to and the sustainable use of biodiversity,<sup>22</sup> the management of phenomena such as natural hazards,<sup>23</sup> ecosystem health, the "tragedy of the commons" and "limits to growth".<sup>24</sup> Nel and Kotzé explain that the green agenda attends to the biotic (living) and abiotic (non-living) elements of the earth system and that, in addition to those already mentioned, it covers specific issues such as the protection of threatened species, ecosystems, vulnerable habitats and biodiversity, the eradication of alien, invasive species and the maintenance of ecosystem services.<sup>25</sup>

The brown environmental agenda focuses on the now and hinges on the understanding that social issues ("brown capital") cannot be separated from the environment - human beings are an integral and indivisible part of the earth system.<sup>26</sup> The relevant social issues include "imbalances in patterns of production and consumption resulting in unequal access to opportunities, resources and services; and the challenges presented to individuals and groups by poverty, disease, unemployment, crime and environmental injustice".<sup>27</sup> The brown agenda further focuses on the vulnerabilities of the urban poor,<sup>28</sup> human livelihoods in urban areas,

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<sup>17</sup> Bolnick et al 2006 <http://pubs.iied.org/pdfs/10533IIED.pdf> 2.

<sup>18</sup> DANIDA 2000 <http://web.mit.edu/urbanupgrading/urbanenvironment/issues/green-agenda.html>.

<sup>19</sup> Khan 2014 *Policy Brief 1*.

<sup>20</sup> Khan 2014 *Policy Brief 3*.

<sup>21</sup> Cock 2004 <http://ccs.ukzn.ac.za/files/Cock%20Connecting%20the%20red,%20brown%20and%20green%20The%20environmental%20justice%20movement%20in%20South%20Africa.pdf> 3.

<sup>22</sup> Cock 2004 <http://ccs.ukzn.ac.za/files/Cock%20Connecting%20the%20red,%20brown%20and%20green%20The%20environmental%20justice%20movement%20in%20South%20Africa.pdf> 3.

<sup>23</sup> Khan 2014 *Policy Brief 3*.

<sup>24</sup> See Connolly et al *Politics and the Environment* 2-4.

<sup>25</sup> Nel and Kotzé "Environmental Management" 2-3.

<sup>26</sup> Nel and Kotzé "Environmental Management" 3.

<sup>27</sup> Nel and Kotzé "Environmental Management" 3.

<sup>28</sup> Khan 2014 *Policy Brief 3*.

prevention, management and recovery from disasters or setbacks,<sup>29</sup> and the fulfillment of basic human needs such as food, housing, medical facilities, sanitation infrastructure, waste management, intra-generational equity, and quality of life.<sup>30</sup> Notably, the brown agenda concerns the immediate, localised and health-related effects of human activity that often have particular bearing on low-income groups.<sup>31</sup>

It follows that the green and brown agenda continue to symbolise the prevailing environment-versus-development discourse of the 1990s.<sup>32</sup> Allen submits that currently the green and brown agenda converge in highlighting worldwide all of the environmental impacts of human activity and that our response to climate change links both agendas.<sup>33</sup> Bolnick *et al* holds a contrary view, namely that international environmental concerns tend to emphasise the green but that the brown agenda remains the obvious priority for most deprived communities – such as those of urban Africa.<sup>34</sup> The green agenda is by no means off the charts but the brown agenda however seems to remain the immediate and first concern in the African context.<sup>35</sup>

Considering the focus and characteristics of the brown agenda, anyone familiar with the socio-economic make-up of and the livelihood challenges in Africa will be able to appreciate the immediate relevance of this agenda for the continent. It is useful in this regard to consider the explanatory and differentiating characteristics of the green and brown environmental agenda as developed by McGranahan and Satterthwaite<sup>36</sup> (Table 1).

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<sup>29</sup> Nel and Kotzé "Environmental Management" 3.

<sup>30</sup> Khan 2014 *Policy Brief* 3.

<sup>31</sup> Connelly *et al* *Politics and the Environment* 6; and DANIDA 2000 <http://web.mit.edu/urbanupgrading/urbanenvironment/issues/green-agenda.html> 19.

<sup>32</sup> Allen 2002 <http://rec.brookes.ac.uk/research/relp/network/resources/GreenVBrownAgenda.doc> 1.

<sup>33</sup> Allen 2002 <http://rec.brookes.ac.uk/research/relp/network/resources/GreenVBrownAgenda.doc> 2.

<sup>34</sup> Bolnick *et al* 2006 <http://pubs.iied.org/pdfs/10533IIED.pdf> 2.

<sup>35</sup> See the discussion in the recent UNEP 2013 <http://www.unep.org/pdf/aeo3.pdf>; and UN Habitat 2014 <http://unhabitat.org/the-state-of-african-cities-2014/> for example.

<sup>36</sup> McGranahan and Satterthwaite "Environmental Health" 73.

**Table 1:** Differentiating characteristics of the green and brown environmental agenda

Characteristics	Green agenda	Brown agenda
<i>First order impact</i>	Ecosystem health	Human health
<i>Timing</i>	Delayed	Immediate
<i>Scale</i>	Regional and global	Local
<i>Worst affected</i>	Future generations	Lower income groups
<i>Attitude to nature</i>	Protect and work with	Manipulate to serve human needs
<i>Attitude to people</i>	Educate	Work with
<i>Attitude to environmental services</i>	Use less	Provide more
<i>Aspect emphasised in relation to natural resources (such as water)</i>	Overuse – need to protect resource	Inadequate access and poor quality of resource
<i>Typical proponent</i>	Environmentalists	Urbanists

Little is known from the environmental management and governance literature about the extent to which environmental *law* caters for the disposition of the green and brown environmental agenda. There is nonetheless sufficient proof that, in general, the legal fraternity (especially institutions responsible for the creation and adoption of legal instruments such as environmental agreements and legislation) has kept in step with the international reasoning since the 1990s, namely that "environmental" issues transcend matters purely ecological or "green". Some international soft law examples

include *Agenda 21* (1992), the *Habitat Agenda* (1996)<sup>37</sup> and the *Hyogo Framework for Action* (2005-2015).<sup>38</sup> The environmental provisions included in the *African Charter on Human and People's Development* (1987) and in recent constitutions of some African countries such as South Africa (section 24 of the *Constitution*), Namibia (article 95(1) of the *Constitution of Namibia*, 1990), Swaziland (articles 60(11) and 63(1) of the *Constitution of the Kingdom of Swaziland*), Mozambique (articles 90, 117 and 45(f) of the *Constitution of the Republic of Mozambique*, 2005), Kenya (article 42 of the *Constitution of Kenya*, 2010) and Zimbabwe (article 73 of the *Constitution of Zimbabwe*, 2013) have all clearly been developed to be anthropocentric in their nature and scope of application. Domestic environmental law scholars from various African countries further advocate for both agenda in their interpretation and analyses of the environmental laws of their countries.<sup>39</sup> South African environmental lawyers are not lagging behind. Considering the works in recent years of imminent scholars such as Glazewski, Kidd and Feris,<sup>40</sup> green and brown agenda-thinking has also infiltrated South African environmental lawyers' interpretations of "the environment". An interpretation which *inter alia* casts some contextual light on the meaning of South Africa's constitutional environmental right and the entitlements and duties flowing from it is further discussed in part 4 of this paper.

### **3 The interplay between the brown environmental agenda and local government in South Africa**

Twenty one years of democratic change and the redesign of South Africa's government and legal system have not (yet) done away with the widespread need for socio-economic development and the reduction of direct threats to human health in many

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<sup>37</sup> The *Habitat Agenda* of 1996 is the main political document that came out of the Habitat II conference in Istanbul, Turkey 3 to 14 June 1996. It deals with various human settlement issues. It was adopted by 171 countries.

<sup>38</sup> The *Hyogo Framework for Action* of 2005 is a ten-year plan to make the world safer from natural hazards. It was endorsed by the United Nations General Assembly (*United Nations General Assembly Resolution on International Strategy for Disaster Reduction* UN Doc A/RES/60/195 (2006)) following the 2005 World Disaster Reduction Conference. Also see Khan 2014 *Policy Brief*.

<sup>39</sup> See, for example, the approaches and analyses of environmental law scholars from different African countries in Faure and Du Plessis *Balancing of Interests*.

<sup>40</sup> See Glazewski *Environmental Law* 5-14 – 5-15; Kidd *Environmental Law* 22; and Feris 2013 [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2247843](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2247843) 880. See also Du Plessis and Nel "Introduction" 12-14.

parts of the country. The vulnerability of the urban poor, the dire state of livelihoods in various urban and rural areas, exposure to pollution as a result of apartheid spatial planning legacies and the basic needs for food, housing, health-care, water services and sanitation infrastructure and waste collection remain critical issues. Metropolitan, district and local municipalities<sup>41</sup> have a significant role to play in addressing these brown agenda issues. Municipalities in South Africa are responsible for air quality management, domestic waste management, the provision of sanitation and access to sufficient water and electricity reticulation, for example.<sup>42</sup> Research reports,<sup>43</sup> official government policy and planning documents,<sup>44</sup> explicit and more nuanced messages from the highest political authority<sup>45</sup> as well as the growing volume of relevant case law<sup>46</sup> underscore, however, the depth and detrimental impacts of poor local governance and service delivery backlogs. A more detailed discussion of these impacts falls beyond the scope of this paper.

The brown environmental agenda denotes concerns about urban development, the urban poor, local direct threats to human health, human livelihoods in urban belts and local vulnerability. The urban environmental hazards causing the most ill-health are those found in poor homes, neighbourhoods and workplaces principally located in the South; ie in countries in transition, such as South Africa.<sup>47</sup> The preeminence of the *urban* in the brown environmental agenda as indicated in Table 1 suggests that *local* authorities are key to its advancement. In South Africa, this finds support not only in the constitutional duties of local government, but also in post-apartheid local government's having been clothed with the status of "developmental" local

<sup>41</sup> These three categories of municipalities are provided for in s 155 of the *Constitution*.

<sup>42</sup> See Schedules 4B and 5B of the *Constitution*.

<sup>43</sup> See, for example, the SAHRC 2014 <http://www.gov.za/documents/report-right-access-sufficient-water-and-decent-sanitation-south-africa-2014>; and the CSIR and CIDB 2006 [http://cidbhstwebprd01/publications/Documents/State of Municipal Infrastructure in South Africa.pdf](http://cidbhstwebprd01/publications/Documents/State%20of%20Municipal%20Infrastructure%20in%20South%20Africa.pdf).

<sup>44</sup> See, for example, the National Planning Commission *National Development Plan* 133; and COGTA *Local Government Turnaround Strategy*.

<sup>45</sup> See, for example, Zuma 2014 <http://www.thepresidency.gov.za/pebble.asp?relid=17570>.

<sup>46</sup> See the sample of cases referenced in para 4 below. In the most recent case, decided in November 2014 by the Constitutional Court, the judges showed little mercy towards the Ngaka Modiri District Municipality for continued service delivery failures and approved of provincial intervention in the municipality to address the situation. See *Ngaka Modiri Molema District Municipality v Chairperson, North West Provincial Executive Committee* 2014 ZACC 31 (18 November 2014). See also Van der Waldt "Municipal Service Delivery" 319-344.

<sup>47</sup> Ling *Sustainability and Cities* 17.

government.<sup>48</sup> Christmas and De Visser state that "of all the spheres of government, local government arguably has the most immediate developmental mandate to realize the ideal physical environment for the communities it serves".<sup>49</sup>

Canvassed against the above, the next part of this paper questions the application of section 24 of the *Constitution* in the brown agenda context with specific reference to local government. This inquiry also draws upon some relevant dictates of South African local government law including that municipal councils, within the financial and administrative capacity of municipalities, have the duty to strive to ensure that municipal services are provided to local communities in a financially and environmentally sustainable manner; to promote a safe and healthy environment in municipalities; and ultimately to contribute, together with other organs of state, to the progressive realisation of section 24 of the *Constitution*.<sup>50</sup>

#### **4 South African law and local government's "non-environmental" constitutional duties**

It is trite that South Africa's constitutional environmental right caters for both the green and brown agendas. Section 24 states that:

Everyone has the right:

- (a) to an environment that is not harmful to their health or well-being; and
- (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;

<sup>48</sup> Developmental local government is described in part B of the 1998 *White Paper on Local Government*: "Developmental local government is local government committed to working with citizens and groups within the community to find sustainable ways to meet their social, economic and material needs and improve the quality of their lives ... In future, developmental local government must play a central role in representing our communities, protecting our human rights and meeting our basic needs. It must focus its efforts and resources on improving the quality of life of our communities, especially those members and groups within our communities that are most often marginalised or excluded, such as women, disabled people and very poor people."

<sup>49</sup> Christmas and De Visser 2009 *CJLG* 107. The Constitutional Court confirms this view in *Ngaka Modiri Molema District Municipality v Chairperson, North West Provincial Executive Committee* 2014 ZACC 31 (18 November 2014) para 1.

<sup>50</sup> Section 4(2) of the *Local Government: Municipal Systems Act* 32 of 2000.

- (ii) promote conservation; and
- (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

Read with section 7(2) of the *Constitution*, section 24(a) translates into a duty of the entire government to respect, protect, promote and fulfill the right of everyone<sup>51</sup> to an environment not harmful to health or well-being. Health and well-being in this context are not further described in section 24(a), which makes for conceptual malleability. This sub-section is widely understood, however, to protect more than merely the interests that people hold in the protection of the natural resource base.<sup>52</sup> It has been argued that it also protects interests such as, for example, good health, access to food and tourist-related income,<sup>53</sup> the relief of poverty,<sup>54</sup> the aesthetic and spiritual dimensions of the natural environment, including the idea of a "sense of place", and the protection of human health against the impacts of environmental pollution (such as littering) and against the indirect, deferred and displaced consequences of livelihood loss and population displacement.<sup>55</sup> It follows that section 24(a) bears potential relevance to many a brown agenda issue.

Two decades since the adoption of the environmental right, the judiciary and litigants *per se* have nonetheless made limited use of section 24(a) in court proceedings that have directly or in a consequential way concerned brown agenda conflicts. This can hardly be as a result of the lack of such cases before the courts, when one bears in mind the circumstances, facts and legal questions in land-mark cases such as but not limited to: *Government of the Republic of South Africa v Grootboom*,<sup>56</sup> *Mazibuko v City of Johannesburg*,<sup>57</sup> *City of Johannesburg Metropolitan Municipality v Blue Moonlight*

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<sup>51</sup> For a general discussion of this matrix of duties, see Liebenberg *Socio-economic Rights* 82.

<sup>52</sup> This can be deduced *inter alia* from the scholarly and judicial interpretation of "health" and "well-being" in recent years. See, for example, Glazewski *Environmental Law* 5-15 – 5-17.

<sup>53</sup> Glazewski *Environmental Law* 5-16.

<sup>54</sup> See Du Plessis 2011 *SAJHR* 297-307; and Kidd "Environment" 520-21.

<sup>55</sup> Kidd "Environment" 519; and Kidd *Environmental Law* 23.

<sup>56</sup> *Government of the Republic of South Africa v Grootboom* 2001 1 SA 46 (CC) (hereafter *Grootboom*). See also Fuo 2013 *Obiter* 77-95 where the author argues that although the court strongly asserted the interrelated and interdependent nature of the variety of rights in Bill of Rights in fostering the transformative vision of the *Constitution*, it failed in the *Grootboom*-matter to highlight the centrality of the s 24 environmental right in fostering that vision.

<sup>57</sup> *Mazibuko v City of Johannesburg* 2010 4 SA 1 (CC) (hereafter *Mazibuko*).

*Properties 39 (Pty) Ltd*,<sup>58</sup> *Beja and Others v Premier of the Western Cape*,<sup>59</sup> and *Joseph v City of Johannesburg*.<sup>60</sup> All of these cases called for judgment on the action or inaction of authorities (mainly municipalities) in relation to access to water,<sup>61</sup> electricity,<sup>62</sup> housing,<sup>63</sup> basic services and municipal amenities<sup>64</sup> – most (if not all) of these being amenities which are needed for human health and well-being. This said, it is notable that the government's duties in terms of section 24 are reiterated only once in the *Constitution* - in the form of an objective of *local government*. Section 152(d) of the *Constitution* states that municipalities must promote a safe and healthy environment.<sup>65</sup> This objective is complemented by the environmentally relevant areas of competence of local government such as air pollution, water and sanitation services, noise pollution, municipal health services and the management of solid waste.<sup>66</sup>

Environmental law scholars as well as the legislative and executive branches of the South African government seem to agree that local government has a significant role in the realisation of the constitutional environmental right.<sup>67</sup> Yet, "the environment" *per se* is listed as a function of national and provincial government in terms of Schedule

<sup>58</sup> *City of Johannesburg Metropolitan Municipality v Blue Moonlight Properties 39 (Pty) Ltd* 2012 2 SA 104 (CC) (hereafter *Blue Moonlight*).

<sup>59</sup> *Beja v Premier of the Western Cape* 2011 3 All SA 401 (WCC) (hereafter *Beja*).

<sup>60</sup> *Joseph v City of Johannesburg* 2010 4 SA 55 (CC) (hereafter *Joseph*).

<sup>61</sup> See *Mazibuko*.

<sup>62</sup> See *Joseph*.

<sup>63</sup> See *Grootboom and Blue Moonlight*.

<sup>64</sup> See *Beja and Joseph*.

<sup>65</sup> Section 152(1)(d) of the *Constitution*. See further Kidd *Environmental Law* 31-32, who elaborates on the constitutionally created role of local government in environmental matters.

<sup>66</sup> For the total list of areas of competence of local government, see Schedules 4B and 5B of the *Constitution*.

<sup>67</sup> See, for example, Du Plessis 2010 *Stell LR*; Fuo 2013 *Obiter* 77-95; Du Plessis 2009 *SA Public Law* 56-96; Du Plessis and Kotzé 2014 *J Afr L* 145-174; Du Plessis and Van der Berg 2014 *Stell LR* and the line of reasoning of the respondent municipalities (eThekweni and Cape Town) in *Le Sueur v eThekweni Municipality* 2013 ZAKZPHC 6 (30 January 2013) (hereafter *Le Sueur*). The degree to which existing South African environmental framework and sector legislation makes provision for multiple functions and duties of municipalities in the fields *inter alia* of biodiversity, the marine environment, waste, water, soil management, disaster management and cultural heritage protection is extensively covered in different chapters in Du Plessis *Local Government and Environmental Law*. Also note the fact that the Department of Environmental Affairs has a directorate for local government support and the South African Local Government Association (SALGA) has a number of working groups devoted to matters environmental. Framework national policies such as the *White Paper on Local Government* (1998) para 2.2; the *Climate Change Response White Paper* (2011) 38; and the Department of Environmental Affairs 2008 Development [https://www.environment.gov.za/?q=content/documents/strategic\\_docs/national\\_strategy\\_sustainable\\_development/](https://www.environment.gov.za/?q=content/documents/strategic_docs/national_strategy_sustainable_development/) 28, all make it abundantly clear that local government has a key role to play in the pursuit of ecologically sustainable development.

4A of the *Constitution*. This fuels support for another more skeptical school of thought that perceives the direct environmental governance role of local government to be non-existent or, at least, to be very limited.<sup>68</sup> This view is helped along by the fact that a range of municipal service delivery cases before the courts has been pervasively silent on the relevance of the constitutional environmental right. In addition to the cases already mentioned, the facts and legal questions in recently decided cases such as *Pheko v Ekurhuleni Metropolitan Municipality*,<sup>69</sup> *Federation for Sustainable Environment v Minister of Water Affairs*,<sup>70</sup> *Rademan v Moqhaka Local Municipality*,<sup>71</sup> and *Concerned Citizens of Tswaing / SIBU v Local Municipality of Tswaing*<sup>72</sup> come to mind.<sup>73</sup> All of these cases involved brown environmental agenda issues but none of them have been decided on the basis of or with detailed reference to section 24 of the *Constitution* and the protection that section 24(a) affords to the "social" issues of well-being and health. No mention has been made about the interrelatedness between and the indivisible nature of the interests protected by sections 24, 25, 26 and 27(1)(b) of the *Constitution*, for example. The immediate response to this may be the thought that these cases were not argued nor decided on the basis of section 24 since, quite simply, they did not concern "the environment". However, against the background of the meaning of the green and brown environmental agenda and its relevance for how the environment and the scope of section 24(a) may have to be interpreted, this

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<sup>68</sup> See, for example, the reasoning of the applicants in *Le Sueur* para [4]. Connelly *et al* *Politics and the Environment* 151 makes the interesting point that while governments may at times argue that economic, social and environmental issues are interrelated and should be considered in relation to one another, this is not generally reflected in wider public opinion. It is rather specific environmental issues such as nuclear power, climate change and the release of genetically modified organisms that capture public attention, not the broader policy implications of sustainable development with its environmental, social and economic dimensions.

<sup>69</sup> *Pheko v Ekurhuleni Metropolitan Municipality* 2012 2 SA 598 (CC) (hereafter *Pheko*). This case dealt with the demolishing of accommodation and shelter within a community for the purposes of municipal protection against the hazards of potential dolomitic-related disaster.

<sup>70</sup> *Federation for Sustainable Environment v Minister of Water Affairs* 2012 ZAGPPHC 128 (10 July 2012) (hereafter *Federation for Sustainable Environment*). This case dealt with the provision of access to sufficient and safe water.

<sup>71</sup> *Rademan v Moqhaka Local Municipality* 2013 4 SA 225 (CC) (hereafter *Rademan*). The issue in this matter was the termination of electricity supply to a resident who failed to pay property rates due to the municipality.

<sup>72</sup> *Concerned Citizens of Tswaing / SIBU v Local Municipality of Tswaing* 2009 ZANWHC 17 (26 June 2009) (hereafter *Tswaing*). This case concerned poor municipal service delivery in general.

<sup>73</sup> Some of these cases, such as the *Tswaing* case para 28, would cite and mention s 24 of the *Constitution* but without systematic and detailed explanation of its application, relevance and meaning in the context of the facts before the court.

immediate reaction is misguided. It is agreed with Connelly *et al* who state that: "everything hinges on interpretation".<sup>74</sup>

The legislature's "interpretation" of "the environment" provides meaningful guidance. The statutory definition of the environment seems to implicitly cater for the green and brown environmental agenda as well as for the synergy between the two. The *National Environmental Management Act* 107 of 1998 (the NEMA) defines the environment with reference to ecological and social aspects:<sup>75</sup>

'environment' means *the surroundings within which humans exist* and that are made up of-

- (i) the land, water and atmosphere of the earth;
- (ii) micro-organisms, plant and animal life;
- (iii) any part or combination of (i) and (ii) and the interrelationships among and between them; and
- (iv) the *physical, chemical, aesthetic and cultural properties and conditions of the foregoing that influence human health and well-being*.

Several of the characteristics of the green and brown agenda as discussed earlier can furthermore be seen in the NEMA's list of framework environmental management principles.<sup>76</sup> These principles<sup>77</sup> form the mainstay of the "legislative and other measures"<sup>78</sup> to be taken by the government in terms of section 24 of the *Constitution*. The principles should steer all government action that may significantly affect the environment and it is explicitly provided that the principles apply "alongside the State's responsibility to respect, protect, promote and fulfill the social and economic rights" in the *Constitution* and "in particular the basic needs of categories of persons disadvantaged by unfair discrimination".<sup>79</sup> The NEMA states that development "must

<sup>74</sup> Connelly *et al Politics and the Environment* 5.

<sup>75</sup> Own emphasis. S 1 of *National Environmental Management Act* 108 of 1998. Also see Glazewski *Environmental Law* 5-14 – 5-15; and Du Plessis and Nel "Introduction" 12-14.

<sup>76</sup> For a discussion of the significance of these principles, see Kidd *Environmental Law* 36-40.

<sup>77</sup> Section 2 of NEMA.

<sup>78</sup> Section 24(b) of the *Constitution*.

<sup>79</sup> Section 2(1)(a) of NEMA.

be socially, environmentally and economically sustainable" and provides for several factors that must be considered in this pursuit.<sup>80</sup> These factors perform a beautiful dance, a *pas de deux* between the green and brown environmental agenda, as they mirror the earlier characterisation by McGranahan and Sattertwhaite and range from non-discriminatory environmental management practice, public participation, issues of human access and intra-generational justice, to the protection of soil and air quality and highly dynamic or stressed ecosystems (such as coastal shores, estuaries and wetlands), and inter-generational justice.<sup>81</sup>

The NEMA's definition of the environment and the principles in the Act are promising as far as the adoption of green and brown thinking in planning and decision-making is concerned. The absence of "the environment's" being listed in the *Constitution* as a functional area of local government, however, renders illusive the application of the constitutional environmental right in *what* municipalities do and *how*. This is true from both a brown and green agenda perspective. Recently, however, the court has shed a ray of light on its understanding of section 24 in combination with local government authority concerning the role of municipalities in nature conservation; ie in the pursuit of the green agenda. In *RA le Sueur v eThekweni Municipality*,<sup>82</sup> the High Court of KwaZulu-Natal was confronted with the meaning of the planning powers of municipalities in relation to nature conservation. While this case was not the first to deal with the interface between local government and the environment,<sup>83</sup> it marks the moment when the judiciary most clearly had to express its view on the implications of the fact that the environment is listed as a constitutional functional area of concurrent national and provincial legislative competence. The court turned to South African framework environmental law and other sources of environmental law in deciding this matter. The litigants were *inter alia* reminded that the NEMA principles apply to all organs of state, including every municipality.<sup>84</sup> Contradicting the contention of the applicants and to substantiate the court's understanding of the environmental role of

<sup>80</sup> Sections 2(3) and (4) of NEMA.

<sup>81</sup> See ss 2(4)(a)(i)-(r) of NEMA.

<sup>82</sup> *RA le Sueur v eThekweni Municipality* 2013 JDR 0178 (KZP) (*Le Sueur*).

<sup>83</sup> See for example *Mazibuko; Fuel Retailers v Director-General: Environmental Management* 2007 6 SA 4 (CC); *Beja; ; Nokotyana v Ekurhuleni Metropolitan Municipality* 2009 JDR 1211 (CC); and *MacSand (Pty) Ltd v City of Cape Town* 2012 4 SA 181 (CC).

<sup>84</sup> *Le Sueur* para 34.

local government, the court further referred to section 33 of the NEMA<sup>85</sup> and its recognition of the competence of municipalities to legislate in respect of the environment.<sup>86</sup> With reference *inter alia* to the National Biodiversity Framework in terms of the *National Environmental Management: Biodiversity Act 10 of 2004*<sup>87</sup> and the provincial KwaZulu-Natal Environmental Implementation Plan (EIP),<sup>88</sup> the court in the final instance ruled that municipalities are authorised to regulate environmental matters from the micro level for the protection of the environment and that the eThekweni Municipality's use of its spatial planning instruments did not transgress the constitutional or other environmental powers of the national and provincial authorities.<sup>89</sup>

The *Le Sueur* case judicially confirmed that local government possesses powers that enable its active participation in the pursuit of the constitutional environmental agenda. The *Le Sueur* case, however, focused on issues of the green agenda. The facts in this matter did not require of the litigants or the court to make section 24(a) and the municipal protection of human health and well-being *per se* part of the judgment. The relevance of the brown environmental agenda for local government and, more specifically, for its service delivery mandate thus remains judicially undecided.<sup>90</sup>

It follows that the contextual relevance of the brown environmental agenda in a) the indivisible application of a range of relevant constitutional rights; and b) the interpretation of the constitutional duties of local government has not yet been fully developed. It is therefore understandable that the relevance of the constitutional

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<sup>85</sup> This section allows a person to institute a private prosecution in respect of a breach of any duty laid down *inter alia* in any municipal bylaw, where that duty is concerned with the protection of the environment and the breach of that duty is an offence. See s 33(1)(a)(b) of NEMA.

<sup>86</sup> *Le Sueur* para 36.

<sup>87</sup> *Le Sueur* para 38.

<sup>88</sup> *Le Sueur* para 35. See PN 76 in KwaZulu-Natal PG 271 of 13 May 2009.

<sup>89</sup> *Le Sueur* para 40.

<sup>90</sup> This is not to suggest, however, that s 24 of the *Constitution* has to date consistently been interpreted without recognition of the brown environmental agenda. For example, some cases in recent years dealt with the notion of "well-being". See, for example, *Minister of Health and Welfare v Woodcarb (Pty) Ltd* 1996 3 SA 155 (N); *Hichange Investments (Pty) Ltd v Cape Produce Co (Pty) Ltd t/a Pelts Products* 2004 2 SA 393 (E); *Fuel Retailers v Director-General: Environmental Management* 2007 6 SA 4 (CC); and *Oudekraal Estates (Pty) Ltd v City of Cape Town* 2004 6 SA 222 (SCA). Also see Donald *Advancing the Constitutional Goal of Social Justice* 84-88 and the reasoned approach of Nel *et al* "Key Elements for Municipal Action" 41-90.

environmental right in relation to the brown may not yet be completely internalised by the role-players in local government, including local government officials, municipal councilors, private consultants, non-governmental organisations (NGOs) and community-based organisations (CBOs). But case study-based research that involved the assessment of community members' personal framing of their "priority environmental challenges" suggests something different. A study conducted by Cock shows that:<sup>91</sup>

Informants from different communities cited very different priority environmental issues ranging from aids in Ivory Park, to the presence of sewage and human waste in water in Alexandra, illegal dumping, waste, land restitution, mining, industrial agriculture, genetic engineering, animal rights, intellectual property, nuclear energy, military activity as one of the most destructive environmental forces, corporate accountability, asbestos related illnesses, soil erosion, loss of biodiversity, poaching, overpopulation, drought, air pollution and climate change. Access to clean water and energy were the issues most frequently cited. Limited access to electricity means that many of the poor turn to burning soil and liquid fuels in poorly ventilated homes. This creates high levels of indoor air pollution and contributes to deforestation in the peri-urban areas as well as outdoor air pollution with serious health impacts such as asthma, bronchitis and lung cancers.

The research subjects in this study understood and experienced typical "socio-economic" problems (eg the lack of access to electricity, overpopulation and land restitution) to be of "environmental" relevance. Their problems were also framed as being issues of health and well-being. Notably, access to clean water, air and electricity as characterized by the research subjects are brown agenda issues also form part of the service-delivery mandate of local government.<sup>92</sup> The *Local Government: Municipal Systems Act* 32 of 2000<sup>93</sup> and the *White Paper on Local Government* (1998)<sup>94</sup> among other laws and policies, acknowledge that those particular amenities form a core part of social / urban development, the improvement of urban human livelihoods and the reduction of direct threats to human health in South Africa.

<sup>91</sup> Cock 2004 <http://ccs.ukzn.ac.za/files/Cock%20Connecting%20the%20red,%20brown%20and%20green%20The%20environmental%20justice%20movement%20in%20South%20Africa.pdf> 2-3.

<sup>92</sup> Schedules 4B and 5B and ch 7 of the *Constitution* read in combination with ss 4 and 73 of the *Local Government: Municipal Systems Act* 32 of 2000.

<sup>93</sup> See, for example, s 4 and ch 8 of the Act.

<sup>94</sup> See part F of the White Paper. An outline of "new approaches to service delivery" as well as a set of principles for service delivery are provided.

Why then, if 1) the historical and prevailing thinking and characterisation of the environment in environmental management circles, 2) the legal definition of "the environment" and the statutory principles for environmental management, as well as 3) the first-hand experience of local communities all point inclusively towards a brown environmental agenda, has section 24(a) of the *Constitution* not yet been employed in cases that involve municipal service delivery? Why is it that the environmental duties created by sections 24(a) and 7(2) of the *Constitution* are overlooked in cases that involve desperate urban communities' access to electricity, access to water and sanitation, access to shelter and domestic waste management, for example?<sup>95</sup> Why is section 24(a) disregarded as a constitutional provision that informs, together with the range of other applicable rights, the systematic interpretation of and demands the enforcement of the service delivery duties of municipalities? Why is section 24(a) not acknowledged as an additional source in keeping elected municipal councils and/or officials accountable for service-delivery failures? To what extent does municipal service-delivery failures compromise the constitutional mandate of "reasonable legislative and other measures" to be taken towards the protection of the environment "for the benefit of present and future generations", the securing of "ecologically sustainable development" and the promotion of "justifiable economic and social development" in the use of natural resources as per section 24(b) of the Constitution?

Detailed analyses of these questions fall beyond the scope of this note, but they certainly set the scene for in-depth future research. This much is clear, however: an entire menu of inter-related socio-economic rights is available from the Chapter 2 Bill of Rights in the *Constitution*. This menu offers ample sources of recourse for local communities confronted by social hardship and the lack of municipal amenities basic to their survival and livelihood.<sup>96</sup> Some may argue that litigants and the courts have access to a sufficient range of rights and duties for the purpose of taking government to task, and that additional reliance on section 24 of the *Constitution* is excessive and

<sup>95</sup> The brown issues in the cases of *Grootboom*, *Mazibuko*, *Blue Moonlight*, *Beja*, *Joseph*, *Pheko*, *Federation for Sustainable Environment*, *Rademan* and *Tswaing* as referred to earlier arguably all fit the scope of the protection and duties arising from s 24(b) of the *Constitution*.

<sup>96</sup> This is evident in the work performed in the past decades by the South African Human Rights Commission (SAHRC) and the Institute for Poverty, Land and Agrarian Studies, for example. Also see Liebenberg *Socio-economic Rights*; Currie and De Waal *Bill of Rights Handbook*; and Feris "Environmental Rights Protected" 219-239.

unnecessary.<sup>97</sup> Some may further argue that a too generous interpretation of section 24 may diminish the importance of the environmental provision and the important symbolic role it plays in affirming the importance of the environment and ecologically sustainable development. However, to reason in this way is to evade the interconnectedness of the rights in the Bill of Rights.<sup>98</sup> The "environmental" relevance of the seemingly "non-ecological" constitutional duties of local government lies in understanding the connection *inter alia* between sections 9, 10, 24, 25, 26, 27 and 28 of the *Constitution*.<sup>99</sup> Even though these duties may also be at the core of the property right (section 25) or the rights of access to housing (section 26) or water and sanitation (section 27(b)), for example, the potential of the constitutional environmental right (section 24(a)) is significant 1) to further reinforce the protection that communities enjoy in terms of sections 25 and 27 and other socio-economic rights, and 2) to protect socio-economic interests that are not necessarily explicitly captured in existing rights such as access to electricity, access to sanitation or disaster management infrastructure upgrades for the purposes of climate adaptation.<sup>100</sup> Of further significance is the fact that the right to an environment that is not detrimental to health or well-being (section 24(a)) is not internally limited by a "dependent on available resources"-clause. Section 24(a) can only be limited by virtue of the general section 36 limitation clause.<sup>101</sup>

For as long as section 24 remains uncoupled with municipal service delivery performance, understanding of how the environmental right informs municipal decision-making and planning as well as the design, adoption and implementation of local environmental governance instrumentation (eg integrated development plans,

<sup>97</sup> Kidd *Environmental Law* 526 explains that s 24 may "conceivably be used to 'fill the gaps'". This use of s 24 as a "gap filler" applies, not only in cases where the harm is done to the natural environment, but where harm is done more widely".

<sup>98</sup> On the interconnectedness of rights in the South African *Constitution*, see Liebenberg and Goldblatt 2007 *SAJHR* 335.

<sup>99</sup> These sections cover equality, dignity, environment, property, housing, food, water and childrens' rights, respectively.

<sup>100</sup> See Kidd *Environmental Law* 22-23 who also interprets these and other interests to form part of "well-being" in s 24(a) of the *Constitution*.

<sup>101</sup> Also see Kidd *Environmental Law* 29-30.

spatial plans, zoning schemes,<sup>102</sup> budgets, performance management systems, bylaws, public-private partnerships, public participation processes, municipal rates and taxes and municipal policies), will remain unexplored. This is worrying, given the internationally<sup>103</sup> and locally<sup>104</sup> established significance of these local government instruments for the transition to sustainability. Velverde states in this vein that: "in regulating space and looking after the "public welfare", municipalities can sometimes wield legal tools that have no equivalent in higher levels of government".<sup>105</sup>

## 5 Some conceptual remarks

Liebenberg<sup>106</sup> states that:

There are not watertight divisions between the different rights in the Bill of Rights, nor a universally accepted method of classification. A substantive interpretation of human rights norms recognises how various forms of social injustice overlap and interact with each other to create new forms of disadvantage and marginalisation. Instead of insisting on rigid boundaries between rights, it seeks to uncover the fluid interrelationship between rights and to develop their content and scope in a way which does justice to the holistic concept of human well-being endorsed by our Bill of Rights.

With this in mind, section 24 of the *Constitution* cannot and should not serve as the protective *chapeau* for all socio-economic interests of local communities in South Africa. Still, human health and well-being in section 24(a) of the *Constitution* denote extra-textual interests that, although not immediately clear, must (also) inform the functional interpretation of the service delivery mandate of local government. On the basis of its text, section 24 caters for the brown and green environmental agenda -

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<sup>102</sup> Land-use planning and spatial planning are often regarded as critical for overcoming socio-economic injustices at the municipal level, *inter alia*. See, for example, Velverde *Everyday Law on the Street* 139-40.

<sup>103</sup> See, for example, City Alliance 2007 [http://www.unep.org/urban\\_environment/PDFs/LiveableCities.pdf](http://www.unep.org/urban_environment/PDFs/LiveableCities.pdf); and Philip et al 2008 <http://www.gwp.org/Global/ToolBox/References/Understanding%20the%20Context.%20Role%20of%20Local%20Government%20in%20IWRM%20%28IUCN,ICLE%20et%20al,%202008%29.pdf>.

<sup>104</sup> See, for example, Nel, Du Plessis and Du Plessis "Instrumentation for Local Environmental Governance".

<sup>105</sup> Velverde *Everyday Law on the Street* 27.

<sup>106</sup> Liebenberg *Socio-economic Rights* 53-54.

an interpretation that complements the "fluid interrelationship" between the rights in the Bill of Rights, the statutory definition of the environment and the range of environmental management principles in section 2 of the NEMA. In general, the constitutional duties of developmental local government, as framed by Chapter 7 and Schedules 4B and 5B of the *Constitution*, render municipalities the responsible custodians and care-takers of much of the brown environmental agenda – ie of the pursuit of pro-poor socio-economic development in the urban context and of environmental health.<sup>107</sup>

The quotation by Allen situated at the beginning of this note brings across a message that is not new and that has in recent years often resounded in popular media, scholarly research, Parliamentary discussions, meetings of working and community groups in different parts of South Africa: municipalities are agents of social change and must clean up their service delivery act.<sup>108</sup> The objective of this note was to latch on to this entreaty by marrying the criticality of municipal service delivery with the promise, hope and government mandate entrenched in the entire Bill of Rights including the constitutional environmental right - the right that embodies the entitlement of everyone in South Africa to live and work in an environment that is not harmful to human health or well-being, the right to environmental protection, and to development that is sustainable. Ling states in general terms that "(t)he sustainable society will not undermine both its physical and social systems of support. In social terms, sustainability for the society means working towards a society in which the material living standard is adequate and secure for everyone, regardless of gender, ethnicity and income level".<sup>109</sup> A sustainable society may thus be understood as one where human health and well-being as per the vision of section 24(a) of the *Constitution* become an operational reality as opposed to a normative ideal. But what does this imply in more concrete terms and for whom?

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<sup>107</sup> See also Feris "Environmental Rights Protected" 224.

<sup>108</sup> Sánchez-Rodíquez "Urban Sustainability" 149-150 puts it in more general terms, albeit in sustainability language, that municipalities are "engines of economic growth", "loci of improved social wellbeing" and "agents of environmental change".

<sup>109</sup> Ling *Sustainability and Cities* 8.

Much more remains to be said about local environmental governance in South Africa and the details of its inter-relationship with the socio-economic and other rights (eg procedural rights) in the *Constitution*.<sup>110</sup> The ongoing, deep and widespread concern about service delivery in the country, however, renders it necessary to let the straight message take flight: failing municipal service delivery amounts to a breach of the general service delivery duties of municipalities (in the form of an omission). Section 24 of the *Constitution* calls upon all three spheres of government to devise and implement "legislative and other measures" towards environmental protection now and well into the future and for purposes of pollution prevention, conservation and ecologically sustainable development.

The failure to provide and maintain access to municipal services of an acceptable quality and to adopt and implement the necessary legislative<sup>111</sup> and other measures<sup>112</sup> amounts to the thus far downplayed and mostly silent violation of the constitutional environmental right read with other substantive and procedural rights. Judged from the public outcry, the plight of local communities before the courts, the worrying statistics on delivery progress and the state of local government audit reports, among other informal and formal indicators, it would seem that there is a total underestimation, a kind of obliviousness, in local government to the depth of its constitutional service delivery duty – especially when one considers the protection of brown agenda interests in section 24 in combination with Chapter 7 of the *Constitution* and other socio-economic rights such as the rights of access to water and sanitation.

Who knows how different the era before the "sanitary revolution" in the late 19<sup>th</sup> century would have looked if it had coincided with the era of human rights of some centuries later. I am the first to admit that the realisation of a better living environment for everyone in South Africa is not necessarily going to happen through more litigation against and/or stricter regulation and control of and by local government. The effective provision of basic and other municipal services has to do with the very complex mix of human, financial and governance capacity, intergovernmental cooperation,

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<sup>110</sup> For the most recent discussion on this topic, see Feris "Environmental Rights Protected" 219-239.

<sup>111</sup> Referring to municipal bylaws, for example.

<sup>112</sup> Referring to municipal policies, programmes and plans, for example.

sufficient geographical and governance scales, training and skills, the identification, adoption and use of suitable governance instrumentation and the effective implementation of management systems, among other governance factors.<sup>113</sup> For this reason, I petition instead for the rigorous interpretation and internalization of section 24(a) of the *Constitution* in the execution of the work of municipal councils, municipal administrations, relevant national and provincial government departments and those appearing and presiding over the courts. This is not to advocate for a strict distinction between any of the rights in the Bill of Rights. The activities or inactivity of the South African government must however be subject to the closest possible scrutiny to ascertain both its immediate and its eventual impacts on the environment as well as on the health and well-being of people – i.e. the subject matter of section 24. Considering the list of its areas of responsibility given in Schedules 4B and 5B of the *Constitution*, there is little purpose in repeating how important this is for local government. The continued search for optimal local environmental governance that meets the demands especially of the constitutional environmental right and that moves from rhetoric to action is the task of everyone working with and for local government; it is the task of every judicial and other institution that must protect and enforce the rights of poor and exposed urban dwellers. In line with the transformative objectives of the *Constitution* and the pursuit of social and environmental justice, the benefits of proper local environmental governance must reach the urban poor as well as the elites, and must be extended to both rural-dwellers and future generations.<sup>114</sup> With a little support in the form of proper municipal service delivery, municipalities in South Africa can, in the words of Martine *et al*, "help to unshackle the bonds of perennial poverty, give people a better chance to live fuller lives and even help to deflect environmental damage".<sup>115</sup> Municipal planning, both strategic and spatial, is likely to turn out to be a critical governance instrument in this regard, given for example the fact that "low-income settlements often contravene existing building codes, zoning regulations and property laws – at least in part because the codes, regulations and laws were not

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<sup>113</sup> See the detailed explanations in Du Plessis and Nel "Introduction" 3-39; Nel *et al* "Key Elements for Municipal Action" 41-90; and Nel, Du Plessis and Du Plessis "Instrumentation for Local Environmental Governance" 91-166.

<sup>114</sup> Martine "Introduction" 2. See also Wilson and Dugard "Taking Poverty Seriously" 222-225.

<sup>115</sup> Martine "Introduction" 1.

developed with the needs of the urban poor in mind, let alone with their involvement".<sup>116</sup>

## 6 Conclusion

In talks of "radical and meaningful change in the performance of local government" it is more relevant than ever to conceptually develop and act upon the constitutional protection of critical brown agenda interests. This is to be done with the indivisible nature of rights in mind and in a fashion that supplements the more direct protection offered by rights such as the right of access to adequate housing. The extent of the success of such efforts will depend on the gleaning of additional knowledge and findings from the scientific fields of environmental management, environmental governance and climate change.<sup>117</sup> For the moment, though, it may be concluded that every municipality in South Africa must be informed and directed by section 24 of the *Constitution* as far as concerns the quantity, quality and sustainability of basic municipal services to be provided, from water and sanitation services through to electricity and local planning. These services underpin human health and well-being, they strengthen urban community resilience and local economic growth, and, together with the green agenda, they determine how the people in South Africa live, work, play and associate every day.

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<sup>116</sup> McGranahan et al "Land and Services for the Urban Poor" 77.

<sup>117</sup> For a brief discussion of the impacts on human health of climate change in urban areas, see Sánchez-Rodíquez "Urban Sustainability" 157.

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## **LIST OF ABBREVIATIONS**

BYU L Rev	Brigham Young University Law Review
CBOs	Community-based organisations
CIDB	Construction Industry Development Board
CJLG	Commonwealth Journal of Local Governance
COGTA	Department of Cooperative Government and Traditional Affairs
CSIR	Council for Scientific and Industrial Research
Curr Opin Env Sust	Current Opinion in Environmental Sustainability
DANIDA	Danish International Development Agency
EIP	Environmental Implementation Plan

ICLEI	International Council for Local Environmental Initiatives / Local Governments for Sustainability
J Afr L	Journal of African Law
NGOs	Non-governmental organisations
PELJ	Potchefstroom Electronic Law Journal
SAHRC	South African Human Rights Commission
SAJHR	South African Journal on Human Rights
SALGA	South African Local Government Association
Stell LR	Stellenbosch Law Review
UN	United Nations
UNEP	United Nations Environment Programme

# THE "BROWN" ENVIRONMENTAL AGENDA AND THE CONSTITUTIONAL DUTIES OF LOCAL GOVERNMENT IN SOUTH AFRICA: A CONCEPTUAL INTRODUCTION

AA Du Plessis\*

## SUMMARY

This note explores the interrelationship between ecologically sustainable development (the green environmental agenda) and pro-poor urban development and environmental health (the brown environmental agenda) in relation to local government in South Africa. The meaning and relevance of the brown agenda versus the green agenda in environmental governance are discussed in general. This discussion subsequently feeds into the argument that South Africa's constitutional environmental right also foresees the advancement of the brown environmental agenda, which has implications for the interpretation and enforcement of local government's service delivery mandate. This link between municipal service delivery and the environmental right further informs understanding of what is required of government to fulfill this right. This paper is thus devoted to an introductory conceptual framing of South Africa's environmental right that goes beyond the green agenda. This impacts on how the constitutional duties of municipalities are interpreted and executed.

**KEYWORDS:** South African local government; brown environmental agenda; green environmental agenda; local environmental governance; constitutional environmental right.

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\* Anél du Plessis. BA, LLB, LLM, LLD. Professor of Law, Faculty of Law, North-West University (Potchefstroom Campus), South Africa. Email: anel.duplessis@nwu.ac.za. This note draws in part upon a paper that was delivered at the International Institute for Sociology of Law Workshop on *Human Rights and the Environment: In Search of a New Relationship*, Onati, Spain, June 2012. The author wishes to thank the workshop organisers and the Alexander von Humboldt Foundation for its financial support towards this research.