

**An interpretation of the South African Constitutional
'Environmental Right' (Section 24 of the Constitution of the
Republic of South Africa, 1996) and an Assessment of its
relationship to *Sustainable Development***

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October 2014

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DECLARATION

I, Andrew Robert Muir, do hereby declare that unless specifically indicated to the contrary in this text, this dissertation is my own original work and has not been submitted to any other university in full or partial fulfilment of the academic requirements of any other degree or other qualification.

Signed at Pietermaritzburg on this the 24th day of October 2014

Signature: -----

ACKNOWLEDGMENTS

I am extremely grateful to the support and tolerance provided to me by my wife, Alta, during the long hours spent on this dissertation. I am also grateful to Professor Kidd for the perseverance he has shown in repeatedly suggesting that I do my Masters and to his supervision in getting it done. Finally, I wish to thank my mother, Sheila, who introduced me to the Silent Spring way back when.

Abstract

Sustainable Development is a widely used phrase. A superficial search for the phrase on the internet indicates that it is used by a diverse range of users who imbue it with various interpretations depending upon their purpose and intentions as well as depending upon the manner of application (or usage) of the phrase. As such there does not appear to be any single accepted definition of the phrase.

Sustainable Development has been widely referred to in international conventions, international tribunal findings and by academics yet its precise legal status remains uncertain. Its status, particularly in a legal context, as a concept, legal principle or policy objective will be examined in light of its origins in international conventions and declarations. Its usage in international law will also be examined in this dissertation.

The Constitution of the Republic of South Africa appeared to introduce and cement the phrase into South Africa's legal lexicon through Section 24 and, in particular, 24(b)(iii). Section 24 of the Constitution of the Republic of South Africa is commonly referred to as the 'environmental right'. Reference in Section 24(b)(iii) to 'ecologically sustainable development' appears to have been assumed to refer to *Sustainable Development* and to incorporate *Sustainable Development* into South African law. The phrase has been used in South African law with increasing frequency as a building block of legislation and as a basis of judicial findings. Despite this reliance on the phrase the phrase itself remains poorly defined and open to subjective interpretations.

This dissertation will look at the origin and meanings of the phrase *Sustainable Development* and compare these to a textual, contextual and purposive interpretation of Section 24(b) in an attempt to determine whether or not there is a relationship between the two and, if so, what the nature of this relationship is.

List of Citations, Abbreviations and Acronyms

A Blueprint for Survival	A Blueprint for Survival (1972) by Goldsmith <i>et al.</i>
Brundtland Commission	The World Commission on Environment and Development, 1987, under the chair of Gro Harlem Brundtland
Brundtland Report	United Nations Report of the World Commission on Environment and Development: Our Common Future (1987)
Caring for the Earth	IUCN. 'Caring for the Earth: A Strategy for Sustainable Living' (1991)
Constitution	The Constitution of the Republic of South Africa, 1996
DFA	Development Facilitation Act no. 67 of 1995
Earth Charter	The Earth Charter Initiative's 'The Earth Charter' (2000)
ECA	The Environment Conservation Act, 73 of 1989
EIA	Environmental Impact Assessment as a general concept
ILA Delhi Declaration	Proceedings of the 70th Conference of the International Law Association, held in New Delhi, April 2002
Interim Constitution	The Constitution of the Republic of South Africa 1993 (Act 200 of 1993)
IPCC	The United Nations Intergovernmental Panel on Climate Change
Limits to Growth	The Limits to Growth: A Report for the Club of Rome's Project on the Predicament of Mankind published in 1972
National Development Plan or NDP	South Africa's National Development Plan 2030 published in 2012
NEMA	National Environmental Management Act, 107 of 1998
NFSD	National Framework for Sustainable Development
NSD	Sustainable Development as defined in NEMA
NSSD	National Strategy for Sustainable Development and Action Plan

Rio Conference	The United Nations Conference on the Environment and Development (also known as the Earth Summit) held Rio de Janeiro in 1992
Rio Declaration	The United Nations Rio Declaration on Environment and Development (1992)
Stockholm Conference	United Nations Conference on the Human Environment held in Stockholm in 1972
Stockholm Declaration	Declaration of the United Nations Conference on the Human Environment, Stockholm, 1972
Technical Report 2011	Environmental Sustainability Indicators: Technical Report 2011. SA Dept. of Env. Affairs
Total Wealth	The World Bank's 'Total Wealth' measure
World Conservation Strategy	The IUCN, 'World Conservation Strategy' (1980)
WSSD	World Summit on Sustainable Development, Johannesburg , 2002

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Part One: Introduction

Section 24 of the South African Constitution¹ sets out what is known as the 'Environmental Right'. It is composed of two parts, Section 24(a) and Section 24(b). Prior to promulgation of the Constitution South Africa was governed in terms of an Interim Constitution.² The Interim Constitution also contained an environmental right which was, essentially, replicated as Section 24(a). Section 24(b) had no antecedent in the Interim Constitution. To this date Section 24(b) has not been definitively interpreted.³ The Interim Constitution and the Constitution were drafted during the early 1990's with the Constitution becoming law in 1996.

Coinciding with the drafting of the Constitutions the international community was giving substance to the concept of *Sustainable Development* most notably through the Rio Conference.⁴ Section 24(b) appears to refer to or even to incorporate *Sustainable Development* through its use of 'ecologically sustainable development'⁵ as well as reference to environmental protection, economic development and social development⁶ which are the fundamentals of *Sustainable Development*. Despite the lack of definitive interpretation Section 24(b) (and Section 24(b)(iii) in particular) have been equated with *Sustainable Development*. De Waal *et al.* regard Section 24(b) as having remedied the 'potentially dangerous omission'⁷ of the concept of *Sustainable Development*⁸ from section 29 of the Interim Constitution. Murombo states that 'the Constitution expressly incorporates [sustainable development] in s 24(b)(iii).'⁹ Similarly:

'South Africa's definition of sustainable development is influenced by the globally accepted definition provided by the Brundtland Commission and which is entrenched in the Constitution. Section 24 (b)(ii) of the Constitution

¹ The Constitution of the Republic of South Africa, 1996 (previously also Act 108 of 1996).

² The Constitution of the Republic of South Africa, Act 200 of 1993.

³ Kidd, M 'Environment' in Currie, I and De Waal, J (eds) *The Bill of Rights Handbook* (6th ed) (2013), Juta & Co., Cape Town at 525 see fn 11 below.

⁴ The United Nations Conference on the Environment and Development (also known as the Earth Summit) held Rio de Janeiro in 1992.

⁵ See Section 24(b)(iii).

⁶ See Section 24(b) generally.

⁷ De Waal, J., Currie, I. and Erasmus, G. *The Bill of Rights Handbook*, 4th ed (2001), Juta & Co, Landsdowne at 406.

⁸ 'Sustainable development means that development takes place in a way that allows renewable resources to re-accrue. The environment should thus be exploited in such a way that it will be able to sustain human, plant and animal life over the longest possible period.' De Waal *et al.* fn 7, at 406.

⁹ Murombo, T. 'From Crude Environmentalism to Sustainable Development: *Fuel Retailers*' (2008) 125(3) *SALJ* pages 488 – 504 at 494.

guarantees everyone the right to having “the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.” South Africa has formalised its definition of sustainable development by including it in law.¹⁰

This dissertation will examine these assumptions through attempting a legally defensible and practical interpretation of Section 24(b). It will compare Section 24(b) to *Sustainable Development* whilst also assessing the legal merit and status of *Sustainable Development*. No detailed assessment or interpretation of Section 24(a) is undertaken and the dissertation focusses, almost exclusively, on Section 24(b).

The second half of this introduction will focus on determining the textual or grammatical interpretation of Section 24(b) as well as justifying why this is done. Part Two will set out the origins and evolution of *Sustainable Development* up until the WSSD (World Summit on Sustainable Development in Johannesburg in 2002) as this process predated and overlapped the drafting of the Constitution. Part Two will also investigate the legal status of *Sustainable Development* in international and South African law. Part Three will then use the assessment of *Sustainable Development* to provide a more detailed interpretation of Section 24(b) before Part Four examines the context, both environmental and historical, of Section 24(b). The context provides insight as to both the intention of the drafters of Section 24(b) as well as identifying some of the possible issues Section 24(b) was intended to or will need to address. Section 24(b) is then given a broadly purposive interpretation in Part Five based on the understanding developed in the previous parts.

At the heart of the discussion lie two issues. The first is the question of whether or not Section 24(b)(iii) is a somewhat clumsy¹¹ recordal of the concept of *Sustainable*

¹⁰ This is taken from [2.1] at page 14 of Department of Environment & Tourism, Republic of South Africa, *A National Framework for Sustainable Development in South Africa* (2008) and the erroneous reference to s24(b)(ii) is as published.

¹¹ By pure coincidence ‘clumsy’ was also used by Kidd who, in suggesting that using ‘ecologically sustainable development’ to require the integration of environmental, social and economic development would make the subsequent ‘whilst promoting justifiable economic and social development’ redundant notes: ‘If, however, ecologically sustainable development means something different from economic and social development,

Development or whether its peculiar wording allows for a 'more carefully phrased and counterpoised'¹² meaning. The second is, in answering the first question, how can Section 24 be interpreted in a practical manner to achieve its apparent purpose?

1.1 Constitutional Interpretation

In this dissertation legislation will not be used to interpret a Constitutional provision. This is because law which is inconsistent with the Constitution is invalid¹³ and therefore legislation has to be interpreted with reference to the Constitution and not the other way around. Decisions of the Constitutional Court will be regarded as definitive statements, either peremptory or persuasive, of Constitutional interpretation whilst those of the Supreme Court of Appeals and High Courts are indicative and will be used in conjunction with general rules of interpretation.

"A Constitution is an organic instrument. Although it is enacted in the form of a statute it is *sui generis*. It must broadly, liberally and purposively be interpreted so as to avoid "the austerity of tabulated legalism" and so as to enable it to continue to play a creative and dynamic role in the expression and the achievement of the ideals and aspirations of the nation, in the articulation of the values bonding its people and in disciplining its Government."¹⁴

In interpreting a Constitutional provision one should utilise 'the text of [a] section, read in its context and with regard to the objects of the Constitution'.¹⁵ Context 'requires the consideration of two types of context. On the one hand, rights must be understood in their textual setting. This will require a consideration of chap[ter] 2 [the bill of rights] and the Constitution as a whole. On the other hand, rights must also be understood in their social

there would be no redundancy, which would usually be the preferable way of interpreting a phrase. This issue has not been considered by any commentators to the best of my knowledge, and it is most likely that the phrase is simply the result of clumsy drafting.' Kidd, M 'Environment' in Currie, I and De Waal, J *The Bill of Rights Handbook* (6th ed) (2013), Juta & Co., Cape Town at 525.

¹² See part 4.3 and fn 307 below.

¹³ Section 2 of the Constitution.

¹⁴ *Government of the Republic of Namibia and Another v Cultura 2000 and Another* 1994 (1) SA 407 (NASC) at 418 quoted with approval by Mahomed J in *S v Mhlungu* 1995 (3) SA 867 (CC) at [8]

¹⁵ *S v Mhlungu* 1995 (3) SA 867 (CC) at [46].

and historical context.¹⁶ But 'whilst paying due regard to the language that has been used, [interpretation] is "generous" and "purposive" and gives expression to the underlying values of the Constitution.'¹⁷ '[E]mbodiment of fundamental rights should as far as its language permits be given a broad construction'.¹⁸ Although interpretation is ultimately based on perceived values the language used cannot be disregarded. Undue preference given to its values in favour of its language will lead, not to interpretation, but to 'divination'.¹⁹

The interpretation which follows therefore follows these requirements in firstly using a textual (or language) based interpretation followed by a contextual and then a broadly purposive and generous interpretation.

1.2 Some Constitutional Concepts

The 'Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.'²⁰ The Bill of Rights is contained in chapter two of the Constitution and sets out 27 substantive rights. It also contains sections important for interpretation and application purposes. These will be referred to in the course of this discussion.

The Constitutional Court is the highest²¹ court in South Africa and is the final²² decision maker regarding constitutional matters. 'A constitutional matter includes any issue involving the interpretation, protection or enforcement of the Constitution.'²³ As the highest court its

¹⁶ *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) at [22]

¹⁷ *S v Makwanyane and Another* 1995 (3) SA 391 (CC) at [9].

¹⁸ *S v Moagi* 1982(2) Botswana LR 124,184 at 184 and quoted with approval in *S v Zuma and Others* 1995 (2) SA 642 (CC) at [18].

¹⁹ 'We must heed Lord Wilberforce's reminder that even a constitution is a legal instrument, the language of which must be respected. If the language used by the lawgiver is ignored in favour of a general resort to "values" the result is not interpretation but divination.' *S v Zuma and Others* 1995 (2) SA 642 (CC) at [18] and quoted with approval in *S v Jafta; S v Ndondo; S v Mcontana* 2005 (1) SA 108 (E) at [18].

²⁰ Section 2 of the Constitution.

²¹ Section 167(3)(a) of the Constitution. In this dissertation Constitutional Court judgements are indicated by (CC), Supreme Court of Appeal judgements by (SCA) and other High Courts by a variety of letters.

²² Section 167(3)(b)(i), read with s 167(3)(c) and s 167(5) of the Constitution.

²³ Section 167(7) of the Constitution.

decisions (the *rationes decidendi*) are binding on all other courts in South Africa. This supremacy extends to the 'common law' where there is a constitutional element.²⁴

1.3 The Origin of Section 24

The Interim Constitution was promulgated as an Act of the South African parliament in 1993. In 1996 it was replaced by the Constitution. The Interim Constitution contained a Bill of Rights which provided, in section 29, an 'environmental right'. This read:

'Every person shall have the right to an environment which is not detrimental to his or her health or well-being.'

In the course of negotiating the Constitution it was proposed to replace section 29 with the following (then proposed as section 23):

'23. Everyone has the right-

- (a) to an environment that is not harmful to their health or well-being;
- (b) to have their environment protected through reasonable legislative and other measures designed to-
 - (i) prevent pollution and ecological degradation;
 - (ii) promote conservation; and
 - (iii) secure sustainable development and use of natural resources.²⁵

This proposed section 23 was then redrafted to become the more detailed Section 24. Section 24 has been described as '[o]ne of the more elaborate [environmental rights] provisions'²⁶ and reads as follows:

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

²⁴ *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) at [44].

²⁵ As quoted by Glavovic, P. D., 'Environmental Rights as Fundamental Rights' (1996) 3 *SAJELP* 71 - 79 at 79.

²⁶ May, J. R. and Daly, E., 'Vindicating Fundamental Environmental Rights Worldwide' (2009) 11 *Oregon Review of International Law*. 365 - 439 at 376.

It has been recognised that, apart from some minor differences in wording, 's24(a) of the final Constitution is identical to s29 on the interim Constitution'.²⁷ Section 24(b) however was a completely new provision and furthermore it departs from the proposed section 23 in some respects. The essence of this dissertation is therefore to determine an appropriate interpretation of Section 24(b) given that it was a deliberate insertion not found in the Interim Constitution and that there appears to have been considerable debate around its final formulation. Because Section 24(b) was a new insertion it will not be assumed to necessarily be an expansion of Section 24(a). The interpretation of Section 24(b) will be based, firstly on a textual interpretation, followed by a contextual and then, finally, a generous purposive interpretation.

1.4 Textual Interpretation of Section 24(b)

Sub-sections 24(b)(i) and (ii) seem to be reasonably clear in their grammatical construct. The word 'and' in Section 24(b)(i) should probably, correctly, be interpreted as 'and / or' but this is a trite rule of legal interpretation. Further grammatical assessment of Sections 24(b)(i) and (ii) will therefore not be undertaken at this stage. However Section 24(b)(iii) is less clear. Section 24(b)(iii) could be read in a number of ways. The first part could be read in one of the following ways:

1. '...that secure ecologically sustainable, development and use, of natural resources...'; or
2. '...that secure ecologically sustainable development and ecologically sustainable use of natural resources...';

While the last part could be read either as:

3. '...while promoting justifiable economic development and justifiable social development.' Or
4. '...while promoting justifiable, economic and social, development.'

Based on these possibilities there could, potentially, be four linguistic constructs. Not only must the individual constructs be legally justified but the two parts must, together, result in a legally coherent and justified overall construction.

²⁷ Liebenberg, S., 'Section 29/24: Environment' in Davis, Cheadle and Haysom (eds.) *Fundamental Rights in the Constitution: Commentary and Cases* Cape Town, Juta and Co., (1997), 256-263 at page 260.

The first possible construct requires the words ‘development and use’ to be grouped together. Dictionary definitions indicate that the two concepts conveyed by the words are diametrically opposed. ‘Development’ envisages a process of growth, progress, advancement or expansion; ‘use’ means the ‘putting into service’ or ‘consumption’ of something. Envisaging the simultaneous development and use of a resource is therefore nonsensical. It would be more logical for the two to be used in the alternative and not to link them. Therefore the first possible construct must be rejected.

The second construct requires the insertion of the phrase ‘ecologically sustainable’ before the word ‘use’. This is problematic in that, had that been the intention of the lawmakers, then one would presume that they would have made the insertion themselves. It is not impermissible though. The second part of Section 24(b)(iii), commencing ‘while...’, seems to act as a proviso in that it qualifies or limits the extent of the substance of the first part. The correct interpretation of the first part should therefore allow the proviso to flow ‘naturally and logically to qualify the substantive provision’.²⁸ It is noteworthy that Ngcobo J, in discussing this section in the *Fuel Retailers*²⁹ case says: ‘This is apparent from s 24(b)(iii) which provides that the environment will be protected by securing “ecologically sustainable development and use of natural resources while promoting justifiable economic and social development”’. Sustainable development and **sustainable** use and exploitation of natural resources are at the core of the protection of the environment.³⁰ Whilst this comment cannot be regarded as being definitive it does seem to support the contention that both development and use must be sustainable and that this is the correct interpretation³¹ of the section.

Determining which of the third or fourth constructs is to be preferred essentially relies on whether or not ‘economic’ development is distinct from ‘social’ development. The dictionary³² defines ‘economic’ to be ‘*adj* 1 of or relating to an economy, economics or finance’. ‘Economy’ is similarly defined as ‘*n* 1 careful management of resources to avoid unnecessary expenditure or waste; thrift. 2 a means or instance of this; saving. 3 sparing, restrained, or efficient use ... 4a the complex of human activities concerned with the production,

²⁸ *S v Mhlungu* at [32].

²⁹ *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province, and Others* 2007 (6) SA 4 (CC)

³⁰ At [45] emphasis added.

³¹ It has been and will be further argued that the qualification is not ‘sustainable’ but, rather, ‘ecologically sustainable’.

³² *Collins English Dictionary Millennium Edition*, HarperCollins Publishers, Glasgow, 1998.

distribution, and consumption of goods and services.’ While ‘social’ is defined as ‘*adj* 1 living or preferring to live in a community rather than alone. 2 denoting or relating to human society or any of its subdivisions. 3 of, relating to, or characteristic of the experience, behaviour, and interaction of persons forming groups.’ The meanings given to ‘economic’ and to ‘social’ strongly suggest that they should not be joined together in a single phrase as contemplated in the fourth construct. Rather, they are distinct concepts and should therefore be treated separately. Both are also commonly associated with the word ‘development’ and, for these reasons, the third construct is preferred. If the concepts are to be separated then it would follow that both have to be ‘justifiable’. This preference is not absolute though and, as will be seen later on, general parlance uses ‘socio-economic’ as a widely accepted conjunction.³³ It is interesting to note that the fourth construct implies that the word ‘development’ was deliberately omitted after the word ‘economic’ and if this is accepted as the style used by the drafters in the provision then the acceptance of the second construct is supported.

Thus Section 24(b)(iii) may be properly read, with the insertions in **bold**, as follows:

Everyone has the right to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that secure ecologically sustainable development and **[ecologically sustainable]** use of natural resources while promoting justifiable economic **[development]** and **[justifiable]** social development.

At first glance there appear to be a number of elements usually associated with the concept of *Sustainable Development* included in Section 24(b). Most notable is the phrase ‘ecologically sustainable development’ although ‘benefit of present and future generations’ and ‘justifiable economic **[development]** and **[justifiable]** social development’ similarly resonate.

³³ Tladi argues against this conflation in the context of *Sustainable Development*, in which it is stressed that there are ‘subtle but important distinctions between economic concerns and social concerns,’ and that *Sustainable Development* ‘was born out of a realisation that the existing paradigm (in which economic concerns trumped all other concerns (social and environment) — could not continue. By blurring the distinction between social and economic concerns, our jurisprudence flirts with the undesirable outcome of preserving the *status quo*’. Tladi, D. ‘*Fuel Retailers, Sustainable Development & Integration: a Response to Feris*’ (2008) 1 *Constitutional Court Review* 254 – 258 at 258.

Because of this apparent commonality and the assumptions referred to³⁴ this interpretation will be contrasted and compared to *Sustainable Development* as generally used in international policy in order to determine the nature of the relationship between the two. This will be discussed in detail further on but, in essence, *Sustainable Development* is popularly held to encompass three elements, namely environmental protection, economic development and social development. The phrase has been popularly defined³⁵ as a derivative of the word sustainable to mean '(of economic development, energy sources, etc.) capable of being maintained at a steady level without exhausting natural resources or causing severe ecological damage'.

It is also important to note that the textual interpretation favoured above, i.e. 'ecologically sustainable development and [ecologically sustainable] use of natural resources' suggests that both development and the use of natural resources must be ecologically sustainable. This suggests that, rather than development and use of resources being sustainable, in pursuing these outcomes it is ecological processes that must be sustained. This is possibly a key distinction between Section 24(b)(iii) and *Sustainable Development*.³⁶ This interpretive element is critical to the following discussion.

Part Two: Sustainable Development

2.1 Sustainability

Sustainability is a concept which evolved in parallel to that of *Sustainable Development* and the two are closely related. Both concepts arose out of a growing realisation that the human population was consuming natural resources at a rate which jeopardised, not only the survival of the living resources, but of humankind itself.

³⁴ See fn 7 -12 of the Introduction.

³⁵ *Collins English Dictionary Millennium Edition*, HarperCollins Publishers, Glasgow, 1998.

³⁶ Feris makes the same observation: 'Section 24(b)(iii) of the Constitution refers to the need to 'secure *ecologically* sustainable development'. It can be argued that 'ecologically' qualifies the type of sustainable development that is envisioned by the Constitution. It therefore clearly places an emphasis on environmental considerations and as such it places the environmental value centre-stage.' Feris, L., 'Sustainable Development In Practice: *Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province*' (2008) 1 *Constitutional Court Review* – 253 at 252 the emphasis is the author's.

The authors of the seminal *Limits to Growth*³⁷ developed a model 'built specifically to investigate five major trends of global concern – accelerating industrialization, rapid population growth, widespread malnutrition, depletion of nonrenewable resources, and a deteriorating environment' and concluded that two pathways existed for human society as a whole:

'1. If the present growth trends in world population, industrialization, pollution, food production, and resource depletion continue unchanged, the limits to growth on this planet will be reached sometime within the next one hundred years. The most probable result will be a rather sudden and uncontrollable decline in both population and industrial capacity.

[or]

2. It is possible to alter these growth trends and to establish a condition of ecological and economic stability that is sustainable far into the future. The state of global equilibrium could be designed so that the basic material needs of each person on earth are satisfied and each person has an equal opportunity to realize his individual human potential.'³⁸

Similarly in *A Blueprint for Survival*³⁹ which was prepared in anticipation of and for presentation at the 1972 Stockholm Conference it was stated:

'The principal defect of the industrial way of life with its ethos of expansion is that it is not sustainable. Its termination within the lifetime of someone born today is inevitable - unless it continues to be sustained for a while longer by an entrenched minority at the cost of imposing great suffering on the rest of mankind. We can be certain, however, that sooner or later it will end (only the precise time and circumstances are in doubt), and that it will do so in one of two ways: either against our will, in a succession of famines, epidemics, social crises and wars; or because we want it to - because we wish to create a society which will not impose hardship and cruelty upon our children - in a succession of thoughtful, humane and measured changes. We believe that a growing number of people are aware of this choice, and are more interested in our proposals for creating a sustainable society than in yet another recitation of the reasons why this should be done.'⁴⁰

Both of these works call for a more stable society, one where the expansion of industrialisation is curtailed and human population growth is limited.

³⁷ Meadows, D. H., Meadows, D. L., Randers, J. and Behrens III, W. W., *The Limits to Growth: A Report for the Club of Rome's Project on the Predicament of Mankind* (1972) Universal Books, New York.

³⁸ *Limits to Growth*, at 23 -24.

³⁹ Goldsmith, E., Allen, R., Allaby, M., Davoll and Lawrence, S., *A Blueprint for Survival* (1972) 2:1 The Ecologist.

⁴⁰ *A Blueprint for Survival* at [110].

'It should go without saying that the world cannot accommodate this continued increase in ecological demand [i.e. a measurement of: 'The combination of human numbers and *per capita* consumption [which] has a considerable impact on the environment, in terms of both the resources we take from it and the pollutants we impose on it.'⁴¹]. Indefinite growth of whatever type cannot be sustained by finite resources. This is the nub of the environmental predicament. It is still less possible to maintain indefinite exponential growth - and unfortunately the growth of ecological demand is proceeding exponentially (i.e. it is increasing geometrically, by compound interest).'⁴²

These works can therefore be regarded as promoting environmental conservation at the cost of human population growth and /or its resource consumption (which were the key measures of development); i.e. they promote 'stability' rather than 'development'. Rather than advocating *Sustainable Development* (which as will be seen promotes development with environmental consideration) a policy of curtailing development in favour of environmental conservation was called for. It was seemingly for this reason that *Sustainability* failed to gain traction; developing nations were opposed to environmental protection which was regarded as being incompatible with economic development. This sentiment has been noted in discussing *Sustainable Development*:

'In fact, they [leaders of developing countries] questioned the rationale for developed countries and indeed, the emergence of an international regime on environmental protection, demanding that their development projects should be environment friendly. Leaders of developing countries suspected that this was another ploy by the developed countries to keep them perpetually under-developed. They found no moral justification for the developed countries that could not adhere to the principles of protecting and preserving the environment during their early stage of development and are at the moment the worst polluters of the environment suddenly becoming champions of environmental protection.'⁴³

And it is this sentiment which led to the wider acceptance of *Sustainable Development* with its anthropocentric focus on development rather than *Sustainability* with its ecocentric focus on the environment.

⁴¹ *A Blueprint for Survival* at [113].

⁴² *A Blueprint for Survival* at [114].

⁴³ Okon E. E., 'The Environmental Perspective in the 1999 Nigerian Constitution' (2003) 5 *Environmental Law Review* 256 at 260.

Sustainability formed a basis for *Caring for the Earth: A Strategy for Sustainable Living*⁴⁴ in 1991 coinciding with the Rio Conference. One of the nine principles proposed in *Caring for the Earth* was that ‘conservation-based development needs to include deliberate action to protect the structure, functions and diversity of the world’s natural systems, on which our species utterly depends.’⁴⁵ It also tried to introduce a new definition of *Sustainable Development* in contrast to the, by then, accepted UNCED *Brundtland Commission* definition.⁴⁶ In the *Caring for the Earth* definition: Sustainable Development means ‘improving the quality of human life while living within the carrying capacity of supporting ecosystems.’⁴⁷

Notably *Caring for the Earth* defined the concept of sustainable use to apply only to the use of renewable resources and to mean ‘using them at rates within their capacity for renewal.’⁴⁸ Non-renewable resources therefore cannot be used sustainably but may be used more efficiently and therefore for longer through a variety of mechanisms.⁴⁹ The concept of sustainable use was carried forward into the, predominantly ecocentric, *Convention on Biological Diversity*⁵⁰ which is premised⁵¹ on the ‘intrinsic value of biological diversity’ and ‘the importance of biological diversity for evolution and for maintaining life sustaining systems of the biosphere’ and pursues⁵² ‘...the conservation of biological diversity, the sustainable use of its components...’⁵³

Prior to the WSSD the *Earth Charter*⁵⁴ was produced. In turn this had built on the preceding *Caring for the Earth* as an alternative to *Sustainable Development*. Like its antecedents it too is ecocentric ‘recognis[ing] that all beings are interdependent and every form of life has value regardless of its worth to human beings.’⁵⁵ And regards ecological systems as being critically

⁴⁴ IUCN/UNEP/WWF, ‘Caring for the Earth: A Strategy for Sustainable Living’ (1991) Gland, Switzerland.

⁴⁵ *Caring for the Earth* at 9.

⁴⁶ ‘Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs’ *Brundtland Report* at [1]

⁴⁷ *Caring for the Earth*, Box 1 page 10.

⁴⁸ *Caring for the Earth*, Box 1 page 10.

⁴⁹ *Caring for the Earth* at 10.

⁵⁰ United Nations, *Convention on Biological Diversity* (1992) .

⁵¹ As set out in the preamble to the *Convention on Biological Diversity*.

⁵² Article 1 of the *Convention on Biological Diversity*.

⁵³ Article 1 of the *Convention on Biological Diversity*.

⁵⁴ The Earth Charter Initiative, *The Earth Charter* (2000).

⁵⁵ *The Earth Charter* at I.1.a.

important requiring steps to: 'Protect and restore the integrity of Earth's ecological systems, with special concern for biological diversity and the natural processes that sustain life.'

The *Sustainability* movement can therefore be regarded as having similar origins to those of *Sustainable Development* both in timing and concepts and to have continued alongside the evolution of *Sustainable Development* as its ecocentric 'poor cousin'. Despite its commonality with *Sustainable Development*, and presumably because of its contra-development basis, it appears to have never achieved the universal acclaim of *Sustainable Development*.

2.2 Sustainable Development

2.2.1 Sustainable Development in the Broad, World Context

Sustainable Development can trace its roots back to the 1972 Declaration of the United Nations Conference on the Human Environment (referred to as the *Stockholm Declaration*) which produced 26 'common' principles necessary to 'preserve and enhance' the human environment. A common recurring theme of the principles is the need to consider both present and future scenarios. The eighth principle is a clear forerunner of what is now known as *Sustainable Development* and states: 'Economic and social development is essential for ensuring a favorable living and working environment for man and for creating conditions on earth that are necessary for the improvement of the quality of life.' Although concerned primarily with the human environment⁵⁶ (both natural and built) the *Stockholm Declaration* is important for highlighting the need for a long term approach and for introducing economic and social development alongside the environment as being the factors defining human well-being. This anthropocentric viewpoint is summarised in the first principle: 'Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being, and he bears a solemn responsibility to protect and improve the environment for present and future generations...'.

⁵⁶ See point 2 of the preamble to the declaration: "The protection and improvement of the human environment is a major issue which affects the well-being of peoples and economic development throughout the world; it is the urgent desire of the peoples of the whole world and the duty of all Governments."

In 1980 the IUCN produced the *World Conservation Strategy* which had the ‘..aim...to achieve the three main objectives of living resource conservation’.⁵⁷ These objectives were firstly to maintain essential ecological processes and life support systems, secondly to preserve genetic diversity and, thirdly to ensure the sustainable utilisation of species and ecosystems.⁵⁸ Conservation of the natural world was again unashamedly justified from an anthropocentric viewpoint with reasons being based on human support, development and resource economics – ‘Conservation, like development, is for people; while development aims to achieve human goals largely through use of the biosphere⁵⁹ conservation aims to achieve them by ensuring such use can continue’.⁶⁰ Most notable though was the introduction,⁶¹ as a global concept, of a precursor of *Sustainable Development*:

‘Development is defined here as: the modification of the biosphere and the application of human, financial, living and non-living resources to satisfy human needs and improve the quality of human life. For development to be sustainable it must take account of social and ecological factors, as well as economic ones; of the living and non-living resource base; and of the long term as well as the short term advantages and disadvantages of alternative actions.’⁶²

In other words economic development must take into account social and ecological factors. It is not bound by these factors and exactly what ‘take account of’ means is not certain. The intertwined relationship between conservation, poverty alleviation and development was summarised thus:

‘People whose very survival is precarious and whose prospects of even temporary prosperity are bleak cannot be expected to respond sympathetically to calls to subordinate their acute short term needs to the possibility of long term returns. Conservation must therefore be combined with measures to meet short term economic needs. The vicious circle by which poverty causes ecological degradation which in turn leads to more poverty can be broken only by development. But if it not to be self-defeating it must be development that is sustainable — and conservation helps make it so.’⁶³

A position statement which would be appealing to developing nations.

⁵⁷ IUCN, 1980, *World Conservation Strategy*, point 1 of page vi.

⁵⁸ IUCN, 1980, *World Conservation Strategy*, point 1 of page vi.

⁵⁹ Biosphere is defined as ‘the thin covering of the planet that contains and sustains life’ in paragraph 2, Chapter 1 of the *World Conservation Strategy*.

⁶⁰ In paragraph 5 of Chapter 1 of the ‘*World Conservation Strategy*’.

⁶¹ In paragraph 3 of Chapter 1 of the ‘*World Conservation Strategy*’.

⁶² In paragraph 3 of Chapter 1 of the ‘*World Conservation Strategy*’.

⁶³ Paragraph 11, chapter 1 of the ‘*World Conservation Strategy*’.

The globally accepted concept of *Sustainable Development* was finally cast by the *Brundtland Report* in 1987.⁶⁴ The general assembly of the United Nations had tasked the World Commission on Environment and Development to formulate 'a global agenda for change' in the early 1980's. Building on the growing realisation of and general acceptance that economic development is inextricably linked to environmental consideration and social development, the chairperson of the commission states, in her foreword:

'When the terms of reference of our Commission were originally being discussed in 1982, there were those who wanted its considerations to be limited to "environmental issues" only. This would have been a grave mistake. The environment does not exist as a sphere separate from human actions, ambitions, and needs, and attempts to defend it in isolation from human concerns have given the very word "environment" a connotation of naivety in some political circles. The word "development" has also been narrowed by some into a very limited focus, along the lines of "what poor nations should do to become richer", and thus again is automatically dismissed by many in the international arena as being a concern of specialists, of those involved in questions of "development assistance".

But the "environment" is where we all live; and "development" is what we all do in attempting to improve our lot within that abode. The two are inseparable. Further, development issues must be seen as crucial by the political leaders who feel that their countries have reached a plateau towards which other nations must strive. Many of the development paths of the industrialized nations are clearly unsustainable. And the development decisions of these countries, because of their great economic and political power, will have a profound effect upon the ability of all peoples to sustain human progress for generations to come.

Many critical survival issues are related to uneven development, poverty, and population growth. They all place unprecedented pressures on the planet's lands, waters, forests, and other natural resources, not least in the developing countries. The downward spiral of poverty and environmental degradation is a waste of opportunities and of resources. In particular, it is a waste of human resources. These links between poverty, inequality, and environmental degradation formed a major theme in our analysis and recommendations. What is needed now is a new era of economic growth - growth that is forceful and at the same time socially and environmentally sustainable.'

The *Brundtland Report* provides a concise and generally accepted definition: 'Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs'.⁶⁵

⁶⁴ United Nations 'Report of the World Commission on Environment and Development: Our Common Future' (1987) WCED.

⁶⁵ Paragraph 1 of Chapter 2 of the *Brundtland Report*.

In 1992 and as a direct result⁶⁶ of the *Brundtland Report* the Rio Conference was convened and this produced the *Rio Declaration on Environment and Development* (1992). The *Rio Declaration* was a reaffirmation of and modification of the *Stockholm Declaration*. The *Rio Declaration* similarly produced a number of principles (27 in total). Principle 1 states that 'human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature.' While principle 3 provides that 'the right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.' Principle 4 emphasises the relationship between environment and development where it states that 'in order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.'

2.2.2 Sustainable Development in a South African Context

The concise *Brundtland Report* definition⁶⁷ of *Sustainable Development* requires the context, provided by the *Brundtland Report* and its antecedents, to clarify its meaning. As has been observed '[s]ince the Brundtland Commission first defined sustainable development, dozens, if not hundreds, of scholars and practitioners have articulated and promoted their own alternative definition; yet a clear, fixed, and immutable meaning remains elusive.'⁶⁸ Arguably this lack of precision is what makes the concept universally attractive.

'In fact, this commonly accepted meaning of sustainable development [i.e. the *Brundtland Commission* definition] is championed as a reason for its popularity, for it is acceptable to all interested parties, developed and developing countries, environmentalists and developmentalists, State and non-State actors. Where the ambiguity and confusion lie is in taking this meaning of sustainable development and applying it within a particular international, regional, national or local context.'⁶⁹

⁶⁶ 'The [Brundtland] report placed the concept of sustainable development as an urgent imperative on the global agenda, and led directly to the decision by the United Nations to convene the 1992 Earth Summit.' Introduction to 'The Earth Summit and Agenda 21', UNCED (1992).

⁶⁷ Paragraph 1 of Chapter 2 of the *Brundtland Report*.

⁶⁸ Kates *et al.* at 20.

⁶⁹ Rieu-Clarke, A., *International Law and Sustainable Development* (2005) IWA Publishing, London at 56 footnote omitted.

The WSSD was convened by the United Nations as a continuation of the work of the Stockholm and Rio Conferences and reaffirmed the *Rio Declaration*. It produced the *Johannesburg Declaration on Sustainable Development*.^{70,71} The WSSD was then followed, in June 2012, by the Rio +20 Conference which 'resulted in a forty-four page, nonbinding "Declaration" that many consider a failed document.'⁷² Subsequent developments will not be considered here.

The *Johannesburg Declaration* provided a clarification of *Sustainable Development* in paragraph [5]: 'Accordingly, we assume a collective responsibility to advance and strengthen the interdependent and mutually reinforcing pillars of sustainable development - economic development, social development and environmental protection - at the local, national, regional and global levels.' And similarly at paragraph [2] of the Implementation Plan, '[The Implementation Plan]...will also promote the integration of the three components of sustainable development - economic development, social development and environmental protection - as interdependent and mutually reinforcing pillars'. This is probably a crystallisation of the earlier *Brundtland Report* Definition and reflects an interpretation of the spirit of the *Brundtland Report* which required 'economic growth...that is forceful and at the same time socially and environmentally sustainable.'⁷³ The conceptual amalgam that is the Brundtland Definition has been simplified by reducing it to three distinct pillars, each capable of measurement in isolation. Kidd uses what he refers to as the 'commonly held view'⁷⁴ that these three pillars of sustainable development can be likened to the three legs of a traditional African cast iron cooking pot. The metaphor is developed thus:

'Without the three legs (environmental, economic and social), the pot will be useless. Moreover, no one of the legs is more important than the others, or the pot will be unbalanced and topple over. Sustainable development, on the basis of this view, thus regards the economic, environmental and social legs as all equally important – none of them ought to be regarded as a primary consideration.'⁷⁵

Whilst the three-pillar view of sustainable development evolved before the WSSD it was formally adopted then and 'is the view that is reflected in South African legislation.'⁷⁶

⁷⁰ United Nations September 2002, *World Summit on Sustainable Development*, A/Conf.199/20.

⁷¹ For a synopsis of the process from Stockholm to WSSD see Tladi, D., 'Intragenerational Equity: A New Name for International Environmental Justice' (2003) 9 *Fundamina* 197 – 204 at 199 – 202.

⁷² Craig, R. K. and Benson, M. H., 'Replacing Sustainability' (2013) 46 *Akron Law Review* 841 – 880 at 841.

⁷³ Chairman's Foreword to the *Brundtland Report*.

⁷⁴ Kidd, M., 'Removing the Green-Tinted Spectacles' (2008) 15 *SAJELP* 85 at 86.

⁷⁵ Kidd, M., 'Removing the Green-Tinted Spectacles' (2008) 15 *SAJELP* 85 at 86.

⁷⁶ Kidd, M., 'Removing the Green-Tinted Spectacles' (2008) 15 *SAJELP* 85 at 87.

Figure One – Diagrammatic Representations of *Sustainable Development*

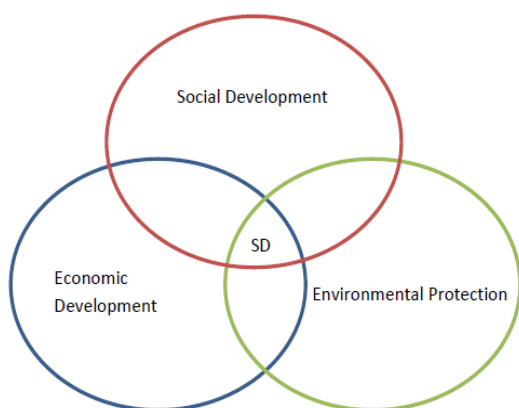


Figure 1.1: An adaptation of the 'three circle' diagrammatic representation of *Sustainable Development*. The area of Sustainable Development lying in the intersection of the three elements.

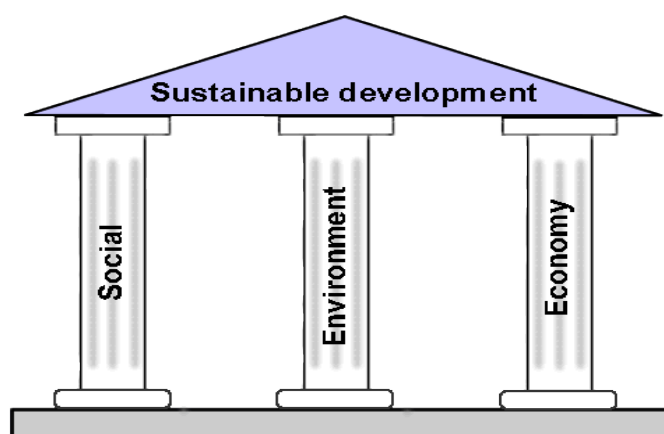


Figure 1.2: diagrammatic representation of the 'Three Pillar' model of *Sustainable Development*. Taken from <http://www.sustainability-ed.org.uk/pages/what3-1.htm#> accessed 12 April 2014

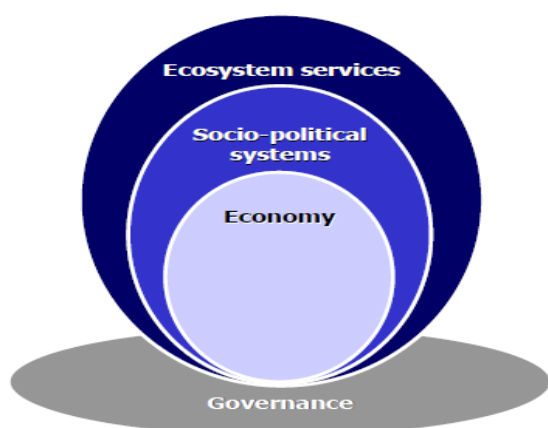


Figure 1.3: The 'Nested Model' of *Sustainable Development*. Department of Environment and Tourism, Republic of South Africa 'A National Framework for Sustainable Development in South Africa' (2008) at 15

Sustainable Development has environmental, economic and social connotations. It is a malleable phrase: subjective interpretations, usages and agenda mean that the phrase has found acceptance by a diverse group of people and organisation who use it to justify myriad and sometimes antagonistic, activities and arguments. *Sustainable Development* is also a continuously evolving phrase where its evolution appears to be giving rise, not only to wider interpretations, but to separate branches as differing scenarios and differing agenda continually mould and re-mould *Sustainable Development* to fit.

2.2.3 Some Limitations of the ‘Three-Pillar’ Concept

In the African three legged cooking pot metaphor⁷⁷ the legs represent, ‘environmental protection’, ‘economic development’ and ‘social development’. If we are to accept this metaphor then humankind is represented by the contents of the pot itself and is supported by the three legs. If the legs are not in equilibrium then the pot topples over and the contents are lost. This understanding (which seems to correctly represent generally accepted *Sustainable Development*) reflects the anthropocentric origins and focus of *Sustainable Development*. The purpose of the three legs is to support humankind, the legs lack individual purpose and lack any independent merit other than as a necessary support component of humankind. Despite possibly being a somewhat quaint and, given the context of the WSSD, parochial metaphor it is a useful one in that it allows a number of inherent problems with the three pillar approach to be recognised.

The first of these problems lies in the inherent assumption that equilibrium should be sought⁷⁸ and that it can be reached. If placed on a level surface the three legs must be of equal length or roughly equal length to allow the pot to stand level and prevent the contents spilling out. (An extrapolation of the metaphor would be that the greater the human population the greater the respective volume of the contents of the pot in relation to the pot and therefore the greater the susceptibility to spill over if the legs are unequal or if equilibrium is lost). Equilibrium assumes that there is a direct correlation between the three legs, thus an

⁷⁷ Kidd, M., ‘Removing the Green-Tinted Spectacles’ (2008) 15 *SAJELP* 85 at 86 as discussed previously.

⁷⁸ The focus on the three pillars ‘seems deficient because, while it may convey an understanding that sustainable development is about upholding the three ‘mutually reinforcing pillars’ of economic development, social development and environmental protection, it does not tell us why or to what end.’ Field, T-L., ‘Sustainable development versus environmentalism: Competing paradigms for the South African EIA regime’ (2006) 123 *SALJ* 409 at 412.

increase in environmental protection can only be sustained if both social development and economic development increase by the same proportion. An increase in social development (or economic development) which does not result in a proportionate increase in environmental protection similarly unbalances the pot. The state of equilibrium however is a mythical concept, it cannot be measured and therefore it cannot be aimed for or maintained.

The problem with equilibrium reflects an earlier problem associated with the 'three circle' depiction. In practice the three circles do not carry equal importance in the decision making process, instead one or two are given value based priority, therefore 'sustainable development decisions are inevitably value driven. It means that decision-makers decide in advance which of the values they prefer to advance, and whilst still taking into account the other two values, base the decision on the preferred value.'⁷⁹ Strictly speaking this requires the favouring of economic development and merely considering environmental and social issues. Tladi notes that there are three variations of *Sustainable Development* depending on which of the three circles is emphasised.⁸⁰ In other words the *Sustainable Development* focus can be shifted to suit the proponent's agenda and 'allows decision-makers to decide which variation best serves the aims of sustainable development.'⁸¹ Such subjectivity in application is concerning if the concept is to be used as a basis for law.

A further problem which is well illustrated by the cooking pot metaphor is the presumption that equilibrium can be reached and that the pot is located on a level substrate. In a South African context the substrate is not level. History has determined that the substrate or starting point is anything but level. South Africa has a GINI Index⁸² value of 63.1⁸³ which is the highest in the world. As a measure of inequality this is indicative of the highly skewed

⁷⁹ Feris, L., 'Sustainable Development In Practice: *Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province*' (2008) 1 *Constitutional Court Review* 249 – 253 at 251.

⁸⁰ Tladi, D., *Sustainable Development in International Law: an Analysis of Key Enviroeconomic Instruments* (2007) Pretoria University Press, Pretoria at 80-83.

⁸¹ Tladi, D., *Sustainable Development in International Law: an Analysis of Key Enviroeconomic Instruments* (2007) Pretoria University Press, Pretoria at 82.

⁸² 'Gini index measures the extent to which the distribution of income or consumption expenditure among individuals or households within an economy deviates from a perfectly equal distribution. A Lorenz curve plots the cumulative percentages of total income received against the cumulative number of recipients, starting with the poorest individual or household. The Gini index measures the area between the Lorenz curve and a hypothetical line of absolute equality, expressed as a percentage of the maximum area under the line. Thus a Gini index of 0 represents perfect equality, while an index of 100 implies perfect inequality.' World Bank see fn 83 below.

⁸³ <http://data.worldbank.org/indicator/SI.POV.GINI> accessed 12 April 2014.

substrate. Seeking equilibrium from a skewed base will be self-defeating. From a South African perspective the cooking pot equilibrium is not appropriate, at least not in the short to medium term.

The task of balancing the three elements of *Sustainable Development* (even if the pursuit of equilibrium is abandoned) is made difficult in practical situations by the problem of scale. The three-pillar definition might be useful in making strategic large scale decisions. At a fine scale it might not be appropriate to try to balance all three pillars. For example a localised development might result in a total destruction of the environment in that locality and therefore, at that scale, it would not constitute *Sustainable Development*. At a slightly larger scale the environmental damage is not total and, as the scale is gradually increased, the relative environmental damage decreases until the two are balanced. The issue is therefore, in practical terms, at what scale does one assess whether or not development is sustainable? Therefore as a concept *Sustainable Development* can be difficult to apply on an *ad hoc* basis by decision makers assessing development applications.

A final word on the African cooking pot metaphor: the purpose of the legs is to hold the pot (and its contents) off of the fire, presumably, should the legs become too short then the contents will burn. Implicit in this metaphor is a requirement that the three legs be kept long enough so as to preserve humankind. Humankind cannot subsist without the trifecta of environmental protection, economic development and social development, this is possibly the underlying premise of *Sustainable Development*. Despite its shortcomings the metaphor remains one of the more certain renditions of the concept of *Sustainable Development*.

2.2.4 How is Sustainable Development Evolving?

A New Vision

As a concept *Sustainable Development* was traditionally depicted using three overlapping circles as an illustration. The junction of the three circles (each respectively representing, environmental protection, economic development and social development) described a conceptual space where development could occur and which would qualify as being sustainable. This illustration then evolved into the 'three pillars' model also described using

the African three legged cooking pot metaphor. These illustrations now seem to have been replaced by using a nested model. Where 'social, economic and ecosystem factors are embedded within each other, and are underpinned by our systems of governance.'⁸⁴

A 'New' Economic Model

The accepted measure of economic development has, since the 1940's, been Gross Domestic Product (GDP). There is, however, an increasingly strong movement⁸⁵ towards measures which, unlike GDP, include the environment and human well-being as factors in measuring success.⁸⁶ GDP 'ignores social costs, environmental impacts and income inequality.'⁸⁷ A primary driver of GDP is the amount spent by an individual within an economy; thus increasing spending on health, crime prevention, counselling because of unhappiness and buffering the negative impacts of environmental degradation all contribute positively to GDP. Quality of life is therefore not always a function of GDP. Increasingly there is a move to replace GDP as the measure of economic performance with measures such as GPI (genuine progress indicator) or the World Bank's *Total Wealth*.⁸⁸ GPI measures an

⁸⁴ Department of Environment and Tourism, Republic of South Africa, *A National Framework for Sustainable Development in South Africa* (2008) at 14 also see the later Department of Environmental Affairs, Republic of South Africa, *National Strategy for Sustainable Development and Action Plan (NSSD1) 2011 – 2014* (November 2011).

⁸⁵ This is not a new concept. In *A Blueprint for Survival* (1972) it was stated: 'It is in terms of these market prices that the GNP is calculated, and as we have seen, this provides the most misleading indication of our well-being. Edward Mishan points out that "An increase in the numbers killed on the roads, an increase in the numbers dying from cancer, coronaries or nervous diseases, provides extra business for physicians and undertakers, and can contribute to raising GNP. A forest destroyed to produce the hundreds of tons of paper necessary for the American Sunday editions is a component of GNP. The spreading of concrete over acres of once beautiful countryside adds, to the value of GNP ... and so one could go on.'" At paragraph 343 footnotes omitted.

⁸⁶ See e.g. Costanza, R., Kubiszewski, I., Giovannini, E., Lovins, L. McGlade, J., Pickett, K. E., Ragnarsdóttir, K. V., Roberts, R., Roberto De Vogli, R. and Wilkinson, R. 'Time to leave GDP behind' (16 Jan 2014) 505 *Nature* 283 – 285 at 283. The World Bank's *Total Wealth* measure (discussed later on) is one of these.

⁸⁷ Costanza *et al.*, fn 86 above at 283.

⁸⁸ '*Total wealth*: The measure of total (or comprehensive) wealth is built upon the intuitive notion that current wealth must constrain future consumption. ... [and which comprises of:]

- *Produced capital*: This comprises machinery, structures, and equipment.

- *Natural capital*: This comprises agricultural land, protected areas, forests, minerals, and energy.

- *Intangible capital*: This asset is measured as a residual, the difference between total wealth and produced and natural capital. It implicitly includes measures of human, social, and institutional capital, which includes factors such as the rule of law and governance that contribute to an efficient economy. Net foreign financial assets, the balance of a country's total financial assets and financial liabilities, are generally included as part of intangible capital....' The International Bank for Reconstruction and Development / The World Bank, *The changing wealth of nations: measuring sustainable development in the new millennium*. (2011) The World Bank, Washington DC at 4 -5.

individual's spending but then accounts for a variety of social factors (for instance the value of volunteer work, the costs of divorce, crime and pollution).⁸⁹ GDP however continues its predominant role, for instance it is elemental in the *National Development Plan*.⁹⁰ Conversely the *National Strategy for Sustainable Development and Action Plan* recognises the inherent problem, from a *Sustainable Development* perspective, of measuring development through GDP:

‘South Africa's current economic development path is based primarily on maximising economic growth – as measured by the gross domestic product (GDP), particularly through mining, manufacturing and agricultural activities. This has resulted in an energy-intensive economy and an erosion of the resource base: a situation that is clearly unsustainable.’⁹¹

GDP does not measure environmental capital. Environmental capital (or ‘natural capital’) comprises goods and services, provided by the environment (valuable and usually freely).⁹² Thus the economic production (which by definition means ‘the complex of human activities concerned with the production, distribution, and consumption of goods and services’⁹³) represents a situation ‘where total production of an economy is a function of natural capital, human capital, and built capital.’⁹⁴ ‘The economies of the Earth would grind to a halt without the services of ecological life-support systems, so in one sense their total value to the economy is infinite.’⁹⁵ This factor means that environmental goods and services cannot be reduced to a monetary ‘built capital’ as they are, in their own right, infinitely important and

⁸⁹ See generally Costanza *et al.*, fn 86.

⁹⁰ For instance: ‘Gross Domestic Product (GDP) should increase by 2.7 times in real terms, requiring average annual GDP growth of 5.4 percent over the period. GDP per capita should increase from about R50 000 per person in 2010 to R110 000 per person in 2030 in constant prices.’ South African National Planning Commission ‘National Development Plan 2030 Our Future-make it work’ (2012) at 64.

⁹¹ Department of Environmental Affairs, Republic of South Africa, *National Strategy for Sustainable Development and Action Plan (NSSD1) 2011 – 2014* (November 2011) at 12.

⁹² It has been estimated, with some degree of certainty, ‘that the annual value of these services is US\$16–54 trillion, with an estimated average of US\$33 trillion. The real value is almost certainly much larger, even at the current margin. US\$33 trillion is 1.8 times the current global GNP [gross national product]. One way to look at this comparison is that if one were to try to replace the services of ecosystems at the current margin, one would need to increase global GNP by at least US\$33 trillion, partly to cover services already captured in existing GNP and partly to cover services that are not currently captured in GNP. This impossible task would lead to no increase in welfare because we would only be replacing existing services, and it ignores the fact that many ecosystem services are literally irreplaceable.’ Costanza, R., d’Arge, R., de Groot, R., Farber, S., Grasso, M., Hannon, B., Limburg, K., Naeem, S., O’Neill, R. V., Paruelo, J., Raskin, R. G., Sutton, P. and van den Belt, M., ‘The value of the world's ecosystem services and natural capital’ (15 May 1997) 387 *Nature* 253 – 260 at 259.

⁹³ *Collins English Dictionary Millennium Edition*, HarperCollins Publishers, Glasgow, 1998.

⁹⁴ Brown, T. C. Bergstrom, J. C. and Loomis, J. B., ‘Defining, Valuing and Providing Ecosystem Good and Services’ (2007) 47 *Natural Resources Journal* 329 – 376 at 336.

⁹⁵ Costanza, *et al.* fn 92 above at 253.

often irreplaceable. Human capital includes social elements including health, education and human well-being.

‘Similarly, the meaning of "labor" has been broadened to include both the knowledge that people bring to the production process and the institutional and social networks (e.g., laws, educational systems, and practices of child upbringing) that underlie the formation of a trained labor force. It is now common to refer to labor and the familial and institutional processes that support it as "human capital"’.⁹⁶

The ‘economy’ is increasingly seen as, in itself, comprising human (social), natural (environmental) and built (financial) capital. This change in perspective reflects a growing realisation that the three legs cannot be truly separated and therefore cannot be balanced.⁹⁷

Reference in *Sustainable Development* to economic or economy is therefore a reference to a fluid concept which increasingly includes environmental components; one which has changed and which will continue to change as perceptions change. As economy is one of the foundational pillars of *Sustainable Development* it follows that *Sustainable Development* is a similarly fluid concept.

Sustainable Development and Sustainability

Sustainable Development is anthropocentric in its focus. This is clear from its formulation and its evolution. The environment is there to serve humankind and the needs of humankind are at the centre of the concept of *Sustainable Development*. ‘Although the protection of the environment is regarded as being essential to the present and future needs of the people, in the final analysis the environment is regarded as being subservient to those needs.’⁹⁸ Any move to protect, conserve or manage the environment is purely to serve the human interest.

⁹⁶ Brown, *et al.* fn 94 above at 336.

⁹⁷ This interrelationship and the need for complex, multi-dimensional, assessments of the whole is discussed by Field, T-L., ‘Sustainable development versus environmentalism: Competing paradigms for the South African EIA regime’ (2006) 123 *SALJ* 409 at 417 – 420.

⁹⁸ Pete, S., ‘Shuffling Deckchairs on the Titanic? A Critique of the Assumptions Inherent in the South African *Fuel Retailers Case* from the Perspective of Deep Ecology’ (2008) 15 *SAJELP* 103 – 127 at 110.

Historically *Sustainability* embodied a concept which was distinct from that of *Sustainable Development*.⁹⁹ 'The concept of *sustainability* is linked to developments in Western countries when the seriousness of the effects on the environment of consumption and production, which was attributable to post-war industrialisation, became widely realised.'¹⁰⁰ *Sustainability* was used to describe the ecological sustainability called for in these, primarily ecocentric, reports. Writing with regard to the notion of eco-justice, Bosselmann notes:

'Despite the ongoing confusion surrounding the meaning of 'sustainable development', a good argument can be made that sustainability is an ethical concept rooted in ecocentrism. Ecological sustainability implies acknowledgement of the intrinsic values of 'non-human others', and the need to express such intrinsic value in political and legal concepts, not the least of which is the idea of justice.'¹⁰¹

Similarly Meyers and Muller argue¹⁰² that 'ecologically sustainable development' means 'development which either improves, maintains, or does not materially interfere with the ecological structure and functions of the area in which such development takes place.' The emphasis placed on ecological conservation agrees with the interpretation favoured here. The implication is that 'ecologically sustainable' is conceptually distinct from *Sustainable Development*. Conversely *Sustainable Development* was a response to the emergence of the concept of *Sustainability* and redirected the focus from limiting development because it was unsustainable to promoting sustainable development; this resulted in a shift in focus from protecting the environment through limiting development to promoting an alternative model of development.

The distinction between the concepts has become blurred and there is clearly confusion in the everyday usage of 'sustainable development', 'sustainability' and 'sustainable 'X'' (where 'X' represents the noun of choice, e.g. job creation, livelihoods, exploitation of resources, globalisation and national policies to name but five taken from the NDP¹⁰³). This muddying of the waters of *Sustainable Development* means that the phrase has acquired shades which it may never have been intended to have.

⁹⁹ As discussed earlier on in sections 2.1 and 2.2.

¹⁰⁰ Burns, M and Hattingh, J., 'Locating Policy within the Taxonomy of Sustainable Development' (2007) 14 *SAJELP* 1 – 29 at 2 – 3 footnotes omitted.

¹⁰¹ Bosselmann, K., 'Ecological Justice and Law' in Richardson B J and Wood, S (eds.) *Environmental Law for Sustainability* (2006) Hart Publishing, USA, pages 129 -163 at 130 -131.

¹⁰² Meyers, G. D. and Muller, S. C., 'The Ethical Implications, Political Ramifications and Practical Limitations of Adopting Sustainable Development as National and International Policy' (1997) 4 *Buffalo Environmental Law Journal* 1 generally, with the definition taken from page 15.

¹⁰³ South African National Planning Commission 'National Development Plan 2030 Our Future-make it work' (2012).

The impermissible grafting of the two concepts is clearly shown in the following extract from the NSSD:

'Sustainability (or a sustainable society) is seen as the overall goal of the NSSD 1. Sustainability in this context implies **ecological sustainability**. In the first instance, it recognises that the maintenance of healthy ecosystems and natural resources are preconditions for human wellbeing. In the second instance, it recognises that there are limits to the goods and services that can be provided. In other words, ecological sustainability acknowledges that human beings are part of nature and not a separate entity.

Sustainable development is the process that is followed to achieve the goal of sustainability. Sustainable development implies the selection and implementation of a development option, which allows for appropriate and justifiable social and economic goals to be achieved, based on the meeting of basic needs and equity, without compromising the natural system on which it is based.¹⁰⁴

This is not only confusing but is conceptually wrong. *Sustainability* and *Sustainable Development* were and are technically distinct and the distinction is important.

Self-Serving Interpretations

Sustainable Development is a multi-faceted concept open to varied and self-serving interpretations. Its lack of rigid definition and its wide subject matter make it impossible to define in a clear, consistent and robust manner.

A very cursory example of such flexibility in interpretation can be deduced from the NSSD.¹⁰⁵ The definition of *Sustainable Development* has changed from that of the *Brundtland Report* 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs'¹⁰⁶ to 'the integration of social, economic and environmental factors into planning, implementation and decision-making so as to ensure

¹⁰⁴ Department of Environmental Affairs, Republic of South Africa, *National Strategy for Sustainable Development and Action Plan (NSSD1) 2011 – 2014* (November 2011) at 8.

¹⁰⁵ Department of Environmental Affairs, Republic of South Africa, *National Strategy for Sustainable Development and Action Plan (NSSD1) 2011 – 2014* (November 2011).

¹⁰⁶ Paragraph 1 of Chapter 2 of the *Brundtland Report*.

that development serves present and future generations'¹⁰⁷ to 'the process that is followed to achieve the goal of sustainability. Sustainable development implies the selection and implementation of a development option, which allows for appropriate and justifiable social and economic goals to be achieved, based on the meeting of basic needs and equity, without compromising the natural system on which it is based.'¹⁰⁸

The changes listed above will not be discussed here and no comment is offered other than simply to record that *Sustainable Development* is a constantly shifting concept.¹⁰⁹ It cannot be defined definitively nor can any particular meaning be pegged to it with any degree of certainty or assurance of consistency. It has been suggested¹¹⁰ that the popularity and widespread adoption of the concept of *Sustainable Development* can be attributed to 'the concept's lack of precise definition' and the 'theory's widespread appeal to its vagueness'. This vagueness, although aiding in the concept's adoption is, ultimately, a fatal flaw.

'[T]he vagueness of the term sustainable development has led such diverse groups as the scientific community, conservation organizations, governments, labor unions, industry groups, and the public in general to agree that they are in favor of [*Sustainable Development*], without being able to pinpoint what in fact they are in favor of. As such, the concept is meaningless, and, in fact, its use is counter-productive, because resolving the true meaning of sustainable development now constitutes the debate, rather than resolving the debate, about how we are to live sustainably in nature's community.'¹¹¹

The lack of precision renders *Sustainable Development* completely unsuitable to be a basis of law.¹¹² In grappling with the true meaning of 'the concept of sustainable development' Field concludes that:¹¹³

'At the very core of the notion of sustainable development is the moral choice to pursue equity in the light of a certain consciousness of the linkages between human and natural systems in the context of past and continuing unsustainable practices. Equity, not environmental protection, is the absolute

¹⁰⁷ As defined in section 1 of the National Environmental Management Act no. 107 of 1998 and quoted in Department of Environment and Tourism, Republic of South Africa, *A National Framework for Sustainable Development in South Africa* (2008) at 14.

¹⁰⁸ Department of Environmental Affairs, Republic of South Africa, *National Strategy for Sustainable Development and Action Plan (NSSD1) 2011 – 2014* (November 2011) at 8.

¹⁰⁹ The discussion of 'The New Vision' applies here too.

¹¹⁰ Meyers, G. D. and Muller, S. C., *The Ethical Implications, Political Ramifications and Practical Limitations of Adopting Sustainable Development as National and International Policy* (1997) 4 Buffalo Environmental Law Journal 1 at 12 -13.

¹¹¹ Meyers, G. D. and Muller, S. C. fn 110 above at 15.

¹¹² Smith, S. L. *Ecologically Sustainable Development: Integrating Economics, Ecology, and Law* (1995) 31:2 Willamette L. Rev. 261 – 306 at 282 - 283 footnotes omitted.

¹¹³ Field, T-L., 'Sustainable development versus environmentalism: Competing paradigms for the South African EIA regime' (2006) 123 SALJ 409 - 436 at 411 – 417.

core of sustainable development, notwithstanding the concept's origin in texts aimed at environmental protection.¹¹⁴

This conclusion is at variance with the more widely accepted interpretation that *Sustainable Development* is defined by the integration principle¹¹⁵ (discussed below) and this is indicative of the inherent contradictions within the concept, the inherent uncertainty and the need to distil measurable normative elements. Without doing so the concept remains fatally vague.

2.2.5 The International Legal Status of Sustainable Development

Despite its unsuitability as a basis for law there is reference to *Sustainable Development* in public international law. Public International law describes a set of rules established between international role players, primarily sovereign states, which, when the rules are generally accepted and enforceable, are regarded as being law.¹¹⁶ Public international law is founded on universal consensus (usually evidenced by agreement or treaty) between sovereign states where such consensus evidences a 'shared understanding of the world, the nature of the actors [role players] that populate it, their relationships to one another, and the various avenues available to them to pursue their goals and to interact with each other.'¹¹⁷ This consensus and consent acts '[a]s a substitute [to the lack of formal law making or legislative mechanisms at the international level] and perhaps an equivalent, there is the principle that the general consent of states creates rules of general application.'¹¹⁸ A rule may, because of its general and fundamental nature, acquire the status of a principle.¹¹⁹ Such consensus as to the nature of the rule and the consequences of breaching it becomes international law when there is a clear process for airing and hearing disputes as well as clear principles to be applied in determining such disputes. If these elements are present then consensus becomes law.

¹¹⁴ Field, T-L., fn 113 above at 417.

¹¹⁵ 'For this reason, it is wrong to reduce sustainable development to the principle of integration.' Field, T-L., fn 113 above at 416.

¹¹⁶ See Brownlie fn 118 at 3 and Rieu-Clarke fn 119 at 12.

¹¹⁷ Ellis, J and Wood, S 'International Environmental Law' in Richardson B J and Wood, S (eds.) *Environmental Law for Sustainability* (2006) Hart Publishing, USA, pages 343 – 380 at 348, see also Brownlie at 4.

¹¹⁸ Brownlie, I., *Principles of Public International Law* 6th ed (2003) Oxford University Press, New York. at 3.

¹¹⁹ Rieu-Clarke, A., *International Law and Sustainable Development* (2005) IWA Publishing, London. At 15

The International Court of Justice (the ICJ¹²⁰) has identified¹²¹ the sources of public international law as being:

- ‘a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.’

These four categories are ‘generally regarded as a complete statement of the sources of international law.’¹²² The first three categories are referred to as primary sources of law and the last as a secondary source of law ‘because rather than creating law, [judicial decisions] point to where the law may be found.’¹²³ Brownlie suggests that this listing of the sources creates a hierarchy of importance.¹²⁴

Law making treaties (conventions) create on-going legal obligations of a permanent nature and are the ‘most concrete evidence of the existence of rights and obligations between States.’¹²⁵ It is critical that the treaty creates obligations of a legal, i.e. binding and enforceable, nature and there must be evidence of the consensus and consent by the party to be bound by the treaty.

International custom derives from evidence that parties regard a ‘certain practice as obligatory’¹²⁶ and this implies twin requirements¹²⁷ of firstly a recognised practice and secondly an acceptance of the practice as law, the *opinio juris*. Evidence of the practice requires three elements to be met,¹²⁸ namely: duration; uniformity and consistency of the practice; and the universality of the practice. Duration implies either a long standing practice or one which is more recent but with strong indications of acceptance. Uniformity and consistency implies a ‘virtually uniform practice’¹²⁹ and consistency implies that there is general consistency and an inconsistency is regarded as a breach of a rule rather than

¹²⁰ The International Court of Justice was founded by the United Nations through the Statute of the Court [of International Justice].

¹²¹ Article 38(1) of the Statute of the Court.

¹²² Brownlie at 5. Rieu-Clarke at 15 also uses Article 38(1) as evidence of the sources of international law.

¹²³ Rieu-Clarke at 15.

¹²⁴ Brownlie at 5.

¹²⁵ Rieu-Clarke at 15 and see generally Brownlie at 12 -15.

¹²⁶ Brownlie at 6.

¹²⁷ Rieu-Clarke at 17, also see Brownlie 6 – 10.

¹²⁸ These requirements and the interpretations used here are discussed as discussed by Rieu-Clarke 17 – 20 and Brownlie 6 -10.

¹²⁹ Rieu-Clarke at 18 footnote omitted.

evidence of a new rule.¹³⁰ Finally, the practice must be generally applicable and accepted albeit this does not have to be universal and, where the subject matter restricts the number of parties, then universality is met if the practice is generally accepted by the affected parties.¹³¹ Treaties and other writings, which themselves are not international law, may contain records of international legal practices.

The second element which must be present is the *opinio juris* and this differentiates custom from, the non-legal, usage. A usage which is regarded as being obligatory becomes custom and has legal status. The *opinio juris* is often inferred from the nature of the practice rather than being expressly stated.¹³²

The third category is that of 'general principles of law'¹³³ and this requires that general principles of national (domestic) law, as widely practised by nations or within the nation, may be 'borrowed' by the international community and to be regarded as having acquired international legal status. 'An international tribunal chooses edits and adapts elements from better developed systems: the result is a new element of international law the content of which is influenced historically and logically by domestic law.'¹³⁴ This third category ranks third in hierarchy according to Brownlie and last amongst the primary sources of international law: 'the role of principles in the international legal system is very limited...the ICJ has seldom applied general principles of law,'¹³⁵ preferring the first two categories. It must be noted though that strong argument has been made that general principles are 'guiding principles of general content'¹³⁶ and that 'they differ from the norms or rules of positive international law, and transcend them.'¹³⁷ They are the 'basic pillars of the international legal system'¹³⁸ and in the result:

'General principles of law emanate, in my perception, from human conscience, from the universal juridical conscience, which I regard as the ultimate material "source" of all law.'¹³⁹

¹³⁰ Rieu-Clarke at 18 footnote omitted.

¹³¹ Rieu-Clarke at 18 – 19 and Brownlie at 7 – 8.

¹³² See Rieu-Clarke at 19 – 20 and Brownlie at 8 – 10.

¹³³ General principles are discussed by Rieu-Clarke at 27 – 29 and Brownlie at 15 – 16.

¹³⁴ Brownlie at 16.

¹³⁵ Rieu-Clarke at 29.

¹³⁶ Judge Cançado Trindade's separate opinion in the *Pulp Mills* case at [39].

¹³⁷ Judge Cançado Trindade's separate opinion in the *Pulp Mills* case at [39].

¹³⁸ Judge Cançado Trindade's separate opinion in the *Pulp Mills* case at [39].

¹³⁹ Judge Cançado Trindade's separate opinion in the *Pulp Mills* case at [52].

The fourth category¹⁴⁰ is regarded as a secondary¹⁴¹ or material¹⁴² (i.e. non formal) source of international law. International judicial decisions are regarded as providing evidence of the existence of one of the first three categories of international law and are not binding except on the parties to the judicial process.¹⁴³ Reference to various earlier international law decisions is sometimes made as these 'judgements' can be persuasive.

As stated, public international law binds and applies to international role players, primarily sovereign states. Public international law does not usually apply within a state's borders to the relationship between private entities or between private entities and the state. In South Africa the Constitution affects this usual situation in three ways: firstly, international law (all four categories) **must** be considered by 'a court, tribunal or forum' when interpreting the Bill of Rights;¹⁴⁴ secondly, a treaty may become domestic law 'if enacted into law by national legislation';¹⁴⁵ and thirdly, '[c]ustomary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.'¹⁴⁶

The formal principles of *Sustainable Development* are contained in the *Stockholm Declaration*, the *World Conservation Strategy*, the *Brundtland Report*, the *Rio Declaration* and the *Johannesburg Declaration*. Each builds on the previous and all are interrelated. The *World Conservation Strategy* and the *Brundtland Report* are discussion documents and, accordingly, have little if any legal force. The *Stockholm*, *Rio* and *Johannesburg Declarations* have been widely ratified (including by South Africa). Thus they have the status of international conventions (treaties) but are not binding international law. Treaties can be important and persuasive in a court's decision making but unless the treaty has been 'approved by resolution in both the National Assembly and the National Council of Provinces'¹⁴⁷ it is not binding in the Republic and accordingly cannot acquire the status of law. Even where a treaty has been approved as required it usually only 'becomes law in the

¹⁴⁰ See Rieu-Clarke 29 – 30 and Brownlie 19 – 23.

¹⁴¹ Rieu-Clarke at 29.

¹⁴² Brownlie at 5.

¹⁴³ Article 59 of the Statute of the Court [of International Justice] states: 'The decision of the Court has no binding force except between the parties and in respect of that particular case.' http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0#CHAPTER_III accessed 24 April 2014.

¹⁴⁴ Section 39(1)(c) of the Constitution (emphasis added).

¹⁴⁵ Section 231(4) of the Constitution.

¹⁴⁶ Section 232 of the Constitution.

¹⁴⁷ Section 231(2) of the Constitution.

Republic when it is enacted into law by national legislation;...¹⁴⁸ and accordingly these records of the principles of *Sustainable Development* have no legal standing in South Africa despite being incorporated in ratified documents.¹⁴⁹

Judge Weeramantry (of the ICJ) argued, in a separate opinion in the *Gabčíkovo-Nagymaros Project* case,¹⁵⁰ that *Sustainable Development* existed as a firm principle of international law.¹⁵¹ However it would appear that *Sustainable Development* is too fluid a concept to constitute a legal principle *per se* but rather presents an ideology applying to the interpretation and application of other legal principles. Rieu-Clarke, after assessing the legal relevance of *Sustainable Development*, concludes that:

‘[T]he major body of opinion points away from sustainable developing having any normative status within international law...[S]ustainable development is a goal of the international community. Recent treaties, non-binding instruments, and the decision of courts and tribunals point towards sustainable development being a goal of the international community....[I]t is difficult to see how sustainable development, as a goal of the international community, could become a rule or principle of international law.’¹⁵²

Similarly the ICJ, in the main judgement of *Gabčíkovo-Nagymaros Project*, stated:

‘This need to reconcile economic development with protection of the environment is aptly expressed in the **concept** of sustainable development.’¹⁵³

Likewise, in the later *Pulp Mills Case* the ICJ, seemed to regard *Sustainable Development* as an ‘objective’ to be aimed for rather than as a legal principle to be guided by (or implemented).¹⁵⁴

As outlined previously Judge Weeramantry regarded *Sustainable Development* as a stronger legal instrument than a concept or objective. Judge Cançado Trindade in his separate opinion in the *Pulp Mills Case* argues that general principles of international environmental law should have formed a basis for deciding the matter. The judge attaches significance to the role of general principles. However even this opinion falls short of regarding *Sustainable*

¹⁴⁸ Section 231(4) of the Constitution.

¹⁴⁹ This is not to suggest that these principles or similar principles cannot be directly incorporated into South African law. Later discussion indicates that many have been directly incorporated through individual legislation.

¹⁵⁰ *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I. C. J. Reports 1997, p. 7.

¹⁵¹ Separate opinion of Weeramantry, *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I. C. J. Reports 1997, at page 89.

¹⁵² Rieu-Clarke at 56.

¹⁵³ *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I. C. J. Reports 1997, p. 7 at [140] emphasis added.

¹⁵⁴ *Pulp Mills Case* at [177].

Development as a general legal principle and reverts to the more widely recognised general principles being the ‘precautionary principle’ and the ‘preventative principle’. More importantly though, the judge notes that both parties to the dispute refer to *Sustainable Development*, interchangeably, as a ‘concept’ and as a ‘principle’.¹⁵⁵ This is possibly symptomatic of the inherent uncertainty of the phrase’s true import. The judge concludes that *Sustainable Development* is a manifestation of the underlying temporal (or intergenerational equity)¹⁵⁶ general legal principle.¹⁵⁷ Thus, even in this opinion which argues that *Sustainable Development* should have been given greater import in the hearing than its cursory description as an objective, it falls short of being a general legal principle in its own right.

Tladi suggests that *Sustainable Development* is not a rule but is a principle which must be considered and equates this consideration to the South African legal consideration of reasonableness in delict and contract law.¹⁵⁸ ‘Arguably sustainable development, like the notion of justice, which has been without a universal definition since time immemorial, is an ideal to which humanity aspires’.¹⁵⁹ This view fits in with the statement of Judge Cançado Trindade¹⁶⁰ where general principles emanate from human conscience and amount to a source of law rather than to law *per se*. Whilst general principles should not be disregarded they do not necessarily amount to firm law and are often more akin to a concept than to a law.

It has previously been argued that *Sustainable Development* is a concept rather than a firm, well defined, principle. As such it is more in keeping with the notion of a concept than a law. As a concept it may very well form a basis of a general principle but probably has not yet been sufficiently concretised into a legal principle. Given its myriad interpretations *Sustainable Development* will need to be legally defined before it can emerge as a legal

¹⁵⁵ Judge Cançado Trindade’s separate opinion in the *Pulp Mills* case at [99], [124] and [141].

¹⁵⁶ Judge Cançado Trindade’s separate opinion in the *Pulp Mills* case at [120].

¹⁵⁷ Judge Cançado Trindade’s separate opinion in the *Pulp Mills* case at [147].

¹⁵⁸ Tladi, D., *Sustainable Development in International Law: an Analysis of Key Enviroeconomic Instruments* (2007) Pretoria University Press, Pretoria at 102 – 104.

¹⁵⁹ Murombo, T., ‘From Crude Environmentalism to Sustainable Development: *Fuel Retailers*’ (2008) 125(3) *SALJ* pages 488 – 504 at 492.

¹⁶⁰ See fn 139 above.

principle. Accordingly, in this dissertation, *Sustainable Development* will continue to be regarded as a concept and not as a legal principle.¹⁶¹

2.2.6 Incorporated Principles of Sustainable Development Law

Although the treaties and conventions are, pending possible approval and enactment, not law within South Africa they may, nonetheless, contain evidence of customary law. Customary international law is, automatically, 'law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.'¹⁶² Furthermore such documents as may constitute international law of the first category must be used in interpreting the Bill of Rights. Certain principles of *Sustainable Development* have acquired (or seem to be acquiring) customary international legal status. As such these principles, if indeed they are customary international law, are law in South Africa (unless inconsistent with national law) and must also guide interpretation.

A number of individual principles contained in the conventions are suggested as meeting the necessary requirement and therefore forming part of customary international law. Whether or not these principles actually form customary international law so as to convince a South African court that they apply remains to be proven. These principles include Principle 17 of the *Stockholm Declaration* and Principles 4, 5, 7, 8, 9, 11, 20, 21, 22, 24 and 27 of the *Rio Declaration* as listed by van Reenen¹⁶³ in citing a number of authors and sources. On the other hand Preston¹⁶⁴ recognises Principles 3, 4, 15 and 16 of the *Rio Declaration* as having international legal status. These principles will be discussed below.

¹⁶¹ Other authors also describe sustainable development as a concept. See e.g. Meyers, G. D. and Muller, S. C. 'The Ethical Implications, Political Ramifications and Practical Limitations of Adopting Sustainable Development as National and International Policy' (1997) 4 *Buffalo Environmental Law Journal* 1 at page 3; and see Tladi, D. *Sustainable Development in International Law: an Analysis of Key Enviroeconomic Instruments* (2007) Pretoria University Press, Pretoria at 96.

¹⁶² Section 232 of the Constitution.

¹⁶³ van Reenen, T., 'Rudiments of a Jurisprudential Methodology of Sustainable Development: the Judgement of Ngcobo J in *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province, and Others* 2007 (6) SA 4 (CC)' (2008) 15 *SAJELP* 169 – 182 at 180.

¹⁶⁴ Preston, B. J., *Ecologically Sustainable Development in the Courts in Australia and Asia*. A paper presented to a seminar on environmental law organised by Buddle Findlay, Lawyers, Wellington, New Zealand, 28 August 2006.

The international law elements of *Sustainable Development* therefore influence South African law either through actual incorporation or as interpretive guidelines. (Ngcobo J has referred to the ICJ decision in *Gabcikovo-Nagymaros* as being guidance on how ‘the concept of sustainable development must be construed and understood in our law.’¹⁶⁵) The discussion of these elements must therefore be considered in this light. The principles discussed here are those that may be incorporated into South African law through their putative status as customary international law. Other principles of *Sustainable Development* may and have been incorporated directly through domestic South African law. Furthermore all law (and this would include incorporated principles of *Sustainable Development*) has to conform to the Constitution which ‘is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled’¹⁶⁶ and includes the Bill of Rights which ‘applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.’¹⁶⁷

2.2.7 Declaration Principles

A number of principles are listed below. These are taken directly from an international document and could be regarded as a statement of an international legal principle. As such it is not suggested or implied that the source document was the origin of such putative principle. The roots of *Sustainable Development* and *Sustainability* extend back before the Stockholm Conference of 1972 and principles of the two concepts can similarly be traced back to before that time. Further, reference to a ‘principle’ is to a declaration principle and does not imply that the principle is a principle of international law, i.e. a rule which, because of its general and fundamental nature, has acquired the status of an international legal principle.

Certain declaration principles appear to have been originally incorporated into South African law through the NEMA (the National Environmental Management Act, no. 107 of 1998). Where this has happened the NEMA principle will be deemed to be the equivalent to the

¹⁶⁵ *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province, and Others* 2007 (6) SA 4 (CC) at [56].

¹⁶⁶ Section 2 of the Constitution.

¹⁶⁷ Section 8(1) of the Constitution.

declaration principle even where different wording permits a possible divergence in meaning. The use of 'equivalent' therefore does not imply actual equivalency.

Stockholm Declaration, Principle 17

'Appropriate national institutions must be entrusted with the task of planning, managing or controlling the environmental resources of States with a view to enhancing environmental quality.'

This element probably is a limiting component of the 'only one of the main rules and principles [which] can be considered as binding international law; sovereignty over natural resources.'¹⁶⁸ Part of the sovereignty over natural resources would require a state to take active control and manage these resources. This principle has been stated in the *ILA Delhi Declaration*¹⁶⁹ as principle 1.2:

'States are under a duty to manage natural resources, including natural resources within their own territory or jurisdiction, in a rational, sustainable and safe way so as to contribute to the development of their peoples'

As such this principle must be regarded as an element of the right of state sovereignty over their own resources and limits the right. This does not seem to have acquired universal acceptance.

Although not appearing as a NEMA principle *per se* it could be argued that NEMA, in its entirety, is a manifestation of this Principle and this appears from the long title¹⁷⁰ and preamble to NEMA.

¹⁶⁸ Rieu-Clarke at 96.

¹⁶⁹ *ILA New Delhi Declaration of Principles of International Law Relating to Sustainable Development*, 2 April 2002 proceedings of the 70th Conference of the International Law Association, held in New Delhi, India, 2–6 April 2002.

¹⁷⁰ 'To provide for co-operative environmental governance by establishing principles for decision-making on matters affecting the environment, institutions that will promote cooperative governance and procedures for co-ordinating environmental functions exercised by organs of state; to provide for certain aspects of the administration and enforcement of other environmental management laws; and to provide for matters connected therewith.' NEMA long title.

Rio Declaration, Principle 3

‘The right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.’

Whilst seemingly widely recognised this principle suffers from an inherent uncertainty¹⁷¹ in that its meaning is open to interpretation and cannot be given a firm, enforceable interpretation. ‘The right to development remains ambiguous at best’¹⁷² and should probably be regarded as ‘soft law’.

This right to development has been recognised¹⁷³ by the Constitutional Court as the first of two primary principles of *Sustainable Development*. This is an indication of the understandable importance South Africa has placed on social and economic development. NEMA reiterates ‘the State’s responsibility to respect, protect, promote and fulfil the social and economic rights in’¹⁷⁴ the Bill of Rights and this implies the right of development. The needs of present and future generations are catered for by the public trust doctrine.¹⁷⁵

Rio Declaration, Principle 4

‘In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it.’

The ICJ has explicitly recognised the importance of the environment and a state’s duty to respect the environment.

‘The Court recalls that it has recently had occasion to stress, in the following terms, the great significance that it attaches to respect for the environment, not only for States but also for the whole of mankind:

“the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.”¹⁷⁶

¹⁷¹ See Brownlie at 277.

¹⁷² Rieu-Clarke at 79 footnote omitted.

¹⁷³ *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province, and Others* 2007 (6) SA 4 (CC) at [50].

¹⁷⁴ S 2(1)(a) of NEMA.

¹⁷⁵ See section 2(4)(o) of NEMA, the Public Trust Doctrine is discussed in detail later on.

¹⁷⁶ *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I. C. J. Reports 1997, p. 7 at [53].

And that, based on the importance of the environment, 'safeguarding the ecological balance has come to be considered an 'essential interest' of all States.'¹⁷⁷ The so-called Integration Principle is recognised a principle of international law.¹⁷⁸ Principle 7.1 of the *ILA Delhi Declaration*¹⁷⁹ states:

'The principle of integration reflects the interdependence of social, economic, financial, environmental and human rights aspects of principles and rules of international law relating to sustainable development as well as of the interdependence of the needs of current and future generations of humankind.'

And the ICJ has reflected that it is this integration which forms the basis of *Sustainable Development*.

The Court has observed in this respect, in its Order of 13 July 2006, that such use should allow for sustainable development which takes account of "the need to safeguard the continued conservation of the river environment and the rights of economic development of the riparian States"¹⁸⁰

And finally, in the *Iron Rhine Railway*,¹⁸¹ the integration principle was accepted as a principle of international law:

'Importantly, these emerging principles now integrate environmental protection into the development process. Environmental law and the law on development stand not as alternatives but as mutually reinforcing, integral concepts, which require that where development may cause significant harm to the environment there is a duty to prevent, or at least mitigate, such harm. This duty, in the opinion of the Tribunal, has now become a principle of general international law. This principle applies not only in autonomous activities but also in activities undertaken in implementation of specific treaties between the Parties.'¹⁸²

The integration principle has been recognised¹⁸³ by the Constitutional Court as the second of two primary principles¹⁸⁴ of *Sustainable Development* and forms a key part of NEMA.¹⁸⁵ Interestingly the Constitutional Court has, probably correctly, interpreted the integration

¹⁷⁷ *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I. C. J. Reports 1997, p. 7 at [53].

¹⁷⁸ See Brownlie at 276, Rieu-Clarke at 88 and Ellis and Wood at 378.

¹⁷⁹ *ILA New Delhi Declaration of Principles of International Law Relating to Sustainable Development*, 2 April 2002 proceedings of the 70th Conference of the International Law Association, held in New Delhi, India, 2–6 April 2002.

¹⁸⁰ *Pulp Mills Case* at [75] footnotes and references omitted.

¹⁸¹ Award of the Arbitral Tribunal regarding *The Iron Rhine ("Ijzeren Rijn") Railway* (The Kingdom of Belgium, The Kingdom of the Netherlands), the Hague, 24 May 2005.

¹⁸² *Iron Rhine Railway* at [59].

¹⁸³ *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province, and Others* 2007 (6) SA 4 (CC) at [50].

¹⁸⁴ Contrast with Field's conclusion that equity is the core element of *Sustainable Development* fn 114 above.

¹⁸⁵ S 2(1)(a), s 2(2), s 2(3) and s 2(4) of NEMA.

principle as a pro-developmental principle and that: 'The practical significance of the integration of the environmental and developmental considerations is that environmental considerations will now increasingly be a feature of economic and development policy.'¹⁸⁶ Environmental protection is not the objective, environmental consideration is. As has been stated:

'Sustainable development is not a euphemism for environment. The emphasis is on development-development that proceeds sustainably but proceeds nonetheless. According to *Agenda 21*, sustainable development should lead to the "fulfilment of basic needs, improved living standards for all, better protected and managed ecosystems and a safer, more prosperous future."¹⁸⁷

Rio Declaration, Principle 5

'All States and all people shall co-operate in the essential task of eradicating poverty as an indispensable requirement for sustainable development, in order to decrease the disparities in standards of living and better meet the needs of the majority of the people of the world.'

Co-operation is an important feature and recognised principle of international law. This is primarily because the law operates as between sovereign states and compulsion is not an option.¹⁸⁸ Poverty eradication is regarded as a part of the right to development which is discussed further on.

The NEMA equivalent can be found in the State's duty to promote socio-economic rights.¹⁸⁹

Rio Declaration, Principle 7

'States shall co-operate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.'

¹⁸⁶ *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province, and Others* 2007 (6) SA 4 (CC) at [52].

¹⁸⁷ Silveira, M. P. W., 'International Legal Instruments and Sustainable Development: Principles, Requirements, and Restructuring' (1995) 31:2 *Willamette Law Review* 239 - 251 at 251.

¹⁸⁸ See Ellis and Wood at 368.

¹⁸⁹ S 2(1)(a) of NEMA.

The common but differentiated responsibilities provision appears to be an emergent global usage. Provisions to this effect are found in a number of international treaties and there appears to be growing acceptance of this. However this has not achieved the required universality nor does it create legal obligations and therefore should only be regarded as a growing global practice.¹⁹⁰

NEMA requires that: 'Global and international responsibilities relating to the environment must be discharged in the national interest.'¹⁹¹

Rio Declaration, Principle 8

'To achieve sustainable development and a higher quality of life for all people, States should reduce and eliminate unsustainable patterns of production and consumption and promote appropriate demographic policies.'

This seems to conflict with many states' avowed right to develop and the legal principle of sovereignty over resources. As such this has not achieved universal acceptance.

NEMA equivalents require the promotion of socio-economic rights¹⁹² and that: 'Development must be socially, environmentally and economically sustainable.'¹⁹³

Rio Declaration, Principle 9

'States should co-operate to strengthen endogenous capacity-building for sustainable development by improving scientific understanding through exchanges of scientific and technological knowledge, and by enhancing the development, adaptation, diffusion and transfer of technologies, including new and innovative technologies.'

This requires sovereign states to voluntarily assist each other. As a voluntary requirement it cannot be enforced and cannot therefore, create legal obligations. There does not seem to be a NEMA equivalent principle.

¹⁹⁰ See generally Rieu-Clarke at 74 – 78.

¹⁹¹ S 2(4)(n) of NEMA.

¹⁹² S 2(1)(a) of NEMA.

¹⁹³ S 2(3) of NEMA.

Rio Declaration, Principle 11

‘States shall enact effective environmental legislation. Environmental standards, management objectives and priorities should reflect the environmental and developmental context to which they apply. Standards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries.’

This is similar to the status of Principle 7 discussed above, similarly there does not appear to be a NEMA equivalent although NEMA itself probably amounts to fulfilment of this principle.

Rio Declaration, Principle 15

‘In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.’

The need for a precautionary approach can be gleaned from the Principle requiring an EIA to be conducted and from the following reasoning¹⁹⁴ of the ICJ:

‘Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind - for present and future generations - of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development.’¹⁹⁵

NEMA states that sustainable development requires consideration of factors including: ‘that a risk-averse and cautious approach is applied, which takes into account the limits of current knowledge about the consequences of decisions and actions’.¹⁹⁶

¹⁹⁴ See also fn 155.

¹⁹⁵ *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I. C. J. Reports 1997, p. 7 at [140].

¹⁹⁶ S 2(4)(a)(vii) of NEMA.

Rio Declaration, Principle 16

‘National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.’

This principle may be interpreted in two ways; firstly, where quantifiable damages to another party occur then, as was held in the *Trail Smelter Case*,¹⁹⁷ the offending party should compensate the injured party. Pollution thus becomes an actionable wrong. Secondly, this has an economic dimension. ‘The source of the principle is in the economic theory of externalities.’¹⁹⁸ Where a party benefits financially from pollution then they should bear some of the costs of the pollution. As such this principle has been criticised¹⁹⁹ as being an economic measure and not a legal measure. There is no doubt that where the pollution amounts to a wrong it will be actionable however a blanket provision might amount to a case of strict liability. Either way this principle does not seem to have been widely accepted as yet although it is gaining purchase in municipal law.

‘The language used in international instruments is more qualified than the statement of the polluter pays principle at the national level. As Sands explains, the reason for this is that the text “derives, at least in part, from the view held by a number of states, both developed and developing, that the polluter-pays principle is applicable at the domestic level but does not govern rights or responsibilities between states at the international level”.’²⁰⁰

NEMA requires that: ‘The costs of remedying pollution, environmental degradation and consequent adverse health effects and of preventing, controlling or minimising further pollution, environmental damage or adverse health effects must be paid for by those responsible for harming the environment.’²⁰¹

¹⁹⁷ *Trail Smelter Case (United States, Canada)* Reports of International Arbitral Awards, United Nations, vol III pp 1905-1982, 16 April 1938 and 11 March 1941.

¹⁹⁸ Preston, B. J., *Ecologically Sustainable Development in the Courts in Australia and Asia* A paper presented to a seminar on environmental law organised by Buddle Findlay, Lawyers, Wellington, New Zealand, 28 August 2006 at page 33 footnote omitted.

¹⁹⁹ See Brownlie at 277.

²⁰⁰ Preston, B. J., *Ecologically Sustainable Development in the Courts in Australia and Asia* A paper presented to a seminar on environmental law organised by Buddle Findlay, Lawyers, Wellington, New Zealand, 28 August 2006 at page 33 footnote omitted.

²⁰¹ S 2(4)(p) of NEMA.

Rio Declaration, Principle 17

‘Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority.’

The duty upon a state to prevent its territorial activities from having a negative impact upon the environment of other states is regarded as being a principle of international law:

“The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.”²⁰²

This duty has long been recognised and forms the basis for the legal requirement of conducting an EIA. It has also been proposed that this duty extends to a situation where a state legally conducts an activity in another state with regard to protecting the second state.²⁰³

EIA has some international legal status in particular when applied to transboundary impacts. Rieu-Carke states that ‘[o]ver 100 countries are believed to include environmental impact assessment as part of their national legislation.’ Furthermore several ICJ decisions endorse the need for EIA. E.g. the *Trail Smelter Case*,²⁰⁴ the *Gabčíkovo-Nagymaros Project*²⁰⁵ and the *Pulp Mills Case*.²⁰⁶ The obligation to conduct an EIA forms part of a state’s necessary assessment in exercising its international legal duty not to harm another state’s environment:

²⁰² *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, pp. 241-242, para. 29 and quoted with approval in the *Pulp Mills Case* at [193].

²⁰³ See *Iron Rhine Railway* at [223].

²⁰⁴ *Trail Smelter Case (United States, Canada)* Reports of International Arbitral Awards, United Nations, vol III pp 1905-1982, 16 April 1938 and 11 March 1941. See pages 1934 – 1937 for a description of an ‘EIA’ process ordered by the Tribunal, pages 1962 – 1966 for a discussion leading to the Tribunal’s ‘conclusions, namely, that, under the principles of international law, ..., no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.’ (page 1965) and ordered, at page 1974: ‘In order to prevent the occurrence of sulphur dioxide in the atmosphere in amounts, both as to concentration, duration and frequency, capable of causing damage in the State of Washington, the operation of the Smelter and the maximum emission of sulphur dioxide from its stacks shall be regulated as provided in the following [ongoing EIA] régime.’

²⁰⁵ *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I. C. J. Reports 1997, p. 7.

²⁰⁶ *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010, p. 14.

‘The [ICJ] points out that the principle of prevention, as a customary rule, has its origins in the due diligence that is required of a State in its territory. It is “every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States”. A State is thus obliged to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State. This Court has established that this obligation “is now part of the corpus of international law relating to the environment”.’²⁰⁷

And further:

‘In this sense, the [contractual] obligation to protect and preserve [the environment], ..., has to be interpreted in accordance with a practice, which in recent years has gained so much acceptance among States that it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource. Moreover, due diligence, and the duty of vigilance and prevention which it implies, would not be considered to have been exercised, if a party planning works liable to affect the régime of the river or the quality of its waters did not undertake an environmental impact assessment on the potential effects of such works.’²⁰⁸

The requirement to conduct an EIA is therefore an element of an older legal principle. The ICJ has also held that the requirement to conduct an EIA is an ongoing requirement.

‘The awareness of the vulnerability of the environment and the recognition that environmental risks have to be assessed **on a continuous basis** have become much stronger in the years since the Treaty’s conclusion.’²⁰⁹

This requirement, for ongoing or continuous assessment was discussed at length by Judge Weeramantry²¹⁰ who argues strongly ‘that this principle [of EIA] was gathering strength and international acceptance, and had reached the level of general recognition at which this Court should take notice of it’²¹¹ and that the assessment should be continuous:

‘The greater the size and scope of the project, the greater is the need for a continuous monitoring of its effects, for EIA before the scheme can never be

²⁰⁷ *Pulp Mills Case* at [101] (footnotes and references omitted) read with [105].

²⁰⁸ *Pulp Mills Case* at [204].

²⁰⁹ *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I. C. J. Reports 1997, p. 7 at [112] emphasis added.

²¹⁰ Separate opinion of Weeramantry, *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I. C. J. Reports 1997, p. 7 at page 108 -113.

²¹¹ Separate opinion of Weeramantry, *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I. C. J. Reports 1997, p. 7 at page 89 at 108.

expected, in a matter so complex as the environment, to anticipate every possible environmental danger.’²¹²

NEMA requires that: ‘The social, economic and environmental impacts of activities, including disadvantages and benefits, must be considered, assessed and evaluated, and decisions must be appropriate in the light of such consideration and assessment’²¹³ and in keeping with the continuous assessment requirement: ‘Responsibility for the environmental health and safety consequences of a policy, programme, project, product, process, service or activity exists throughout its life cycle.’²¹⁴

Rio Declaration, Principle 20

‘Women have a vital role in environmental management and development. Their full participation is therefore essential to achieve sustainable development.’

This principle and principles 21, 22, 24 and 27 which follow are all related to the right to development and co-operation. The right to development has not been universally accepted and therefore cannot be regarded as forming part of international law.²¹⁵ At best this right can be regarded as ‘soft law’ i.e. persuasive at best.

NEMA incorporates this principle (and the following principle) as: ‘The vital role of women and youth in environmental management and development must be recognised and their full participation therein must be promoted.’²¹⁶

Rio Declaration, Principle 21

‘The creativity, ideals and courage of the youth of the world should be mobilized to forge a global partnership in order to achieve sustainable development and ensure a better future for all.’

²¹² Separate opinion of Weeramantry, *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I. C. J. Reports 1997, p. 7 at page 89 at 108.

²¹³ S 2(4)(i) of NEMA.

²¹⁴ S 2(4)(e) of NEMA.

²¹⁵ See Rieu-Clarke at 79 – 84.

²¹⁶ S 2(4)(q) of NEMA.

Rio Declaration, Principle 22

‘Indigenous people and their communities, and other local communities, have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.’

NEMA’s equivalent principle is: ‘Decisions must take into account the interests, needs and values of all interested and affected parties, and this includes recognising all forms of knowledge, including **traditional** and ordinary knowledge.’²¹⁷

Rio Declaration, Principle 24

‘Warfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in times of armed conflict and co-operate in its further development, as necessary.’

There is no NEMA equivalent.

Rio Declaration, Principle 27

‘States and people shall co-operate in good faith and in a spirit of partnership in the fulfilment of the principles embodied in this Declaration and in the further development of international law in the field of sustainable development.’

There is no NEMA equivalent.

2.2.8 Summary

In summary the following extract from the *Iron Rhine Railway* appears to accurately summarise the status of the various principles of *Sustainable Development*:

‘Further, international environmental law has relevance to the relations between the Parties. There is considerable debate as to what, within the field of environmental law, constitutes “rules” or “principles”; what is “soft law”; and which environmental treaty law or principles have contributed to the

²¹⁷ S 2(4)(g) of NEMA, emphasis added.

development of customary international law. Without entering further into those controversies, the Tribunal notes that in all of these categories “environment” is broadly referred to as including air, water, land, flora and fauna, natural ecosystems and sites, human health and safety, and climate. The emerging principles, whatever their current status, make reference to conservation, management, notions of prevention and of sustainable development, and protection for future generations.²¹⁸

Rather than being regarded as principles of international *Sustainable Development* law they should rather be regarded as being emergent principles²¹⁹ of international environmental law. *Sustainable Development* is a concept or goal directing the integration of environmental law into developmental law and policy; the Integration Principle is possibly the only element of *Sustainable Development* to have truly acquired the status of customary international law.

2.3 Sustainable Development in South African Law

Sustainable Development is a nebulous concept and as such is unsuitable as either a basis for law or a legal principle. In the realm of public international law the concept has certain emergent legal qualities but these are to be found in underlying principles rather than in the concept *per se*. The failure to regard these emergent principles as customary international law does not prevent *Sustainable Development* from forming part of South African domestic law. All the failure does is to prevent their incorporation through the Constitutional mechanisms discussed previously. There is no prohibition on principles of *Sustainable Development* being incorporated directly by legislation intended to do so provided that, in doing so, the legislation remains Constitutionally compliant.

Sustainable Development has been directly incorporated into South African domestic law. The first attempt to do so pre-dates Section 24(b) and is found in the DFA (the Development Facilitation Act no. 67 of 1995). The DFA was intended to ‘introduce extraordinary measures to facilitate and speed up the implementation of [housing] programmes...and...to lay down general principles governing land development’.²²⁰ Section 3(1) created general principles which applied to all land developments and s 3(1)(c)(viii) provided that:

²¹⁸ *Iron Rhine Railway* at [58].

²¹⁹ The authors, Brownlie, Rieu-Clarke and Ellis and Wood all refer to the environmental law principles which they discuss as ‘emergent principles’.

²²⁰ From the long title.

'Policy, administrative practice and laws should promote efficient and integrated land development in that they encourage environmentally sustainable land development practices and processes.'

Like the Constitution the DFA is a contemporary of the *Rio Declaration* and use of 'environmentally sustainable land development' suggests an attempt to include *Sustainable Development* in its early guise. As in the Constitution, there appears to be an emphasis on 'environmentally sustainable' as opposed to merely 'sustainable'. The coincidence of the DFA and the Constitution and the thematic similarity between 'environmentally sustainable' and 'ecologically sustainable' suggest a conscious attempt to provide a guide as to what this phrase was intended to mean. This qualification is absent from NEMA.

Sustainable Development then appeared in the NEMA in 1998. Possibly recognising the inherent ambiguity in the concept the NEMA defines, from a planning decision making perspective, what it means by the phrase: "sustainable development" means 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'²²¹ (this NEMA definition of sustainable development will be referred to as NSD to differentiate it from *Sustainable Development* as used elsewhere). NEMA also sets out defined principles of how NSD is to be interpreted and applied. These NSD principles are contained in s 2(4)(a) which is set out below:

'Sustainable development requires the consideration of all relevant factors including the following:

- (i) That the disturbance of ecosystems and loss of biological diversity are avoided, or, where they cannot be altogether avoided, are minimised and remedied;
- (ii) that pollution and degradation of the environment are avoided, or, where they cannot be altogether avoided, are minimised and remedied;
- (iii) that the disturbance of landscapes and sites that constitute the nation's cultural heritage is avoided, or where it cannot be altogether avoided, is minimised and remedied;
- (iv) that waste is avoided, or where it cannot be altogether avoided, minimised and re-used or recycled where possible and otherwise disposed of in a responsible manner;

²²¹ S 1 of NEMA.

- (v) that the use and exploitation of non-renewable natural resources is responsible and equitable, and takes into account the consequences of the depletion of the resource;
- (vi) that the development, use and exploitation of renewable resources and the ecosystems of which they are part do not exceed the level beyond which their integrity is jeopardised;
- (vii) that a risk-averse and cautious approach is applied, which takes into account the limits of current knowledge about the consequences of decisions and actions; and
- (viii) that negative impacts on the environment and on people's environmental rights be anticipated and prevented, and where they cannot be altogether prevented, are minimised and remedied.

NEMA is, in keeping with *Sustainable Development*, unashamedly anthropocentric. It directs that '[e]nvironmental management must place people and their needs at the forefront of its concern, and serve their physical, psychological, developmental, cultural and social interests equitably'²²² and emphasises social sustainability: 'Development must be socially, environmentally and economically sustainable.'²²³ NEMA provides a framework for 'integrating good environmental management into all development activities'²²⁴ and governs environmental impact assessments generally and specifically in regard to a 'specific environmental management Act'.²²⁵

It is important to note that the NEMA sets out and defines NSD and, rightly, does not rely on *Sustainable Development per se*. Secondly, the NEMA does not require that the environment be protected absolutely, instead it requires a minimisation of harm. Additionally, NEMA specifically incorporates certain emergent international environmental law principles.

²²² S 2(2) of NEMA.

²²³ S 2(3) of NEMA.

²²⁴ Preamble to NEMA.

²²⁵ S 1 of NEMA defines this term. "specific environmental management Act' means-

- (a) the Environment Conservation Act, 1989 (Act 73 of 1989);
- (b) the National Water Act, 1998 (Act 36 of 1998);
- (c) the National Environmental Management: Protected Areas Act, 2003 (Act 57 of 2003);
- (d) the National Environmental Management: Biodiversity Act, 2004 (Act 10 of 2004);
- (e) the National Environmental Management: Air Quality Act, 2004 (Act 39 of 2004);
- (f) the National Environmental Management: Integrated Coastal Management Act, 2008 (Act 24 of 2008);
- (g) the National Environmental Management: Waste Act, 2008 (Act 59 of 2008); or
- (h) the World Heritage Convention Act, 1999 (Act 49 of 1999),

and includes any regulation or other subordinate legislation made in terms of any of those Acts;'

These NEMA principles, however, are proper law and supersede the equivalent emergent international environmental law provision. (Although the emergent provisions may be used as interpretive guidance). Finally, environmental protection is subsumed in favour of perceived human needs. There can be no clearer endorsement of the NEMA as a pro-developmental, rather than environment protecting, legislation than the words of Ngcobo J in the *Fuel Retailers case*.²²⁶

[60] One of the key principles of NEMA requires people and their needs to be placed at the forefront of environmental management - 'batho pele'. It requires all developments to be socially, economically and environmentally sustainable....

[61] Construed in the light of s 24 of the Constitution, NEMA therefore requires the integration of environmental protection and economic and social development. It requires that the interests of the environment be balanced with socio-economic interests. Thus, whenever a development which may have a significant impact on the environment is planned, it envisages that there will always be a need to weigh considerations of development, as underpinned by the right to socio-economic development, against environmental considerations, as underpinned by the right to environmental protection. In this sense, it contemplates that environmental decisions will achieve a balance between environmental and socio-economic developmental considerations through the concept of sustainable development.'

The *Fuel Retailers case* confirms that *Sustainable Development* is, at best, 'an evolving concept of international law'²²⁷ and that:

'Commentators on international law have understandably refrained from attempting to define the concept of sustainable development. Instead they have identified the evolving elements of the concept of sustainable development. These include the integration of environmental protection and economic development (the principle of integration); sustainable utilisation of natural resources (the principle of sustainable use and exploitation of natural resources); the right to development; the pursuit of equity in the use and allocation of natural resources (the principle of intra-generational equity); the need to preserve natural resources for the benefit of present and future generations (the principle of inter-generational and intra-generational equity); and the need to interpret and apply rules of international law in an integrated systematic manner.'²²⁸

²²⁶ *Fuel Retailers case* at [60] and [61] footnotes omitted.

²²⁷ *Fuel Retailers case* at [46].

²²⁸ *Fuel Retailers case* at [51].

Sustainable Development therefore does form part of South African law and it may even be ‘the fundamental building block around which environmental legal norms have been fashioned,...in South Africa’.²²⁹ It is argued though that this has been through NEMA which has ascribed the concept a distinct defined meaning and has given it a set of principles. The Constitutional Court has recognised the concept, its inherent weaknesses as a possible legal basis and has shed light on how NEMA has framed an otherwise nebulous concept.

Part Three: Section 24(b) Unpacked

Previously it has been argued that Section 24(b) reads as follows:

- (i) Everyone has the right to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that prevent pollution and / or ecological degradation.
- (ii) Everyone has the right to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that promote conservation.
- (iii) Everyone has the right to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that secure ecologically sustainable development and ecologically sustainable use of natural resources while promoting justifiable economic development and justifiable social development.

The discussion that follows is based on this construction of the Section as well as some of the understanding of *Sustainable Development* explored previously.

‘Everyone has the right to have the environment protected’ is reasonably clear and accords everyone (presumably all human²³⁰ inhabitants and not only a resident or citizen of South

²²⁹ *BP Southern Africa* case at 144 A – B.

²³⁰ Section 7(1) of the Constitution states that: ‘This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.’ As such it would be a stretch to include any non-human in the concept of ‘everyone’.

Africa)²³¹ this right. This is also evidence of the justiciable nature of the right, it addresses some of the concerns raised regarding the Interim Constitution in that the right is given to all people which makes it individually enforceable. The broad *locus standi* provision²³² of the Constitution makes this right potentially exercisable on a 'class action' basis and this accords with the solidarity element usually found in 'third-generation' rights. The right can be exercised by an individual in their own right or on behalf of the 'collective'.²³³

Using the dictionary²³⁴ definition 'Environment' is defined as 'the external surroundings in which a plant or animal lives, which tend to influence its development and behaviour' or simply 'external conditions or surroundings'.²³⁵

It has been suggested that, in the context of Section 24, 'environment' should 'not be limited to the non-human natural environment, but must be understood broadly to include, for example, socio-economic and cultural dimensions of the inter-relationships between people and the natural environment'.²³⁶ By regarding any external influence which can affect human well-being as comprising the 'environment' the potential definition of environment is open ended. 'The term 'well-being' is open-ended and, manifestly, is incapable of precise definition'.²³⁷ It has even been suggested that poverty is an environmental factor.²³⁸ Presumably though 'environment' as used in both Section 24(a) and in Section 24(b) should have the same meaning. If this is the case then 'environment' would be limited to the external surroundings which may influence human health or well-being **and** which can be polluted, ecologically degraded, conserved or ecologically sustained. This seemingly limits

²³¹ The Bill of Rights seems to make a clear distinction between 'everyone' and 'citizen' and the two are used in clear distinction in the same right, see for instance Section 21 of the Constitution. Everyone therefore means everyone and not just citizens.

²³² Section 38 of the Constitution.

²³³ In this regard see De Waal, J., Currie, I. and Erasmus, G., *The Bill of Rights Handbook*, 4th ed (2001), Juta & Co, Landsdowne at 403.

²³⁴ *Collins English Dictionary Millennium Edition*, HarperCollins Publishers, Glasgow, 1998.

²³⁵ This is similar to the then applicable legal definition, as set out in the Environment Conservation Act no. 73 of 1989 "environment" means the aggregate of surrounding objects, conditions and influences that influence the life and habits of man or any other organism or collection of organisms;".

²³⁶ du Plessis, A., 'Adding Flames to the Fuel: Why Further Constitutional Adjudication is Required for South Africa's Constitutional Right to Catch Alight' (2008) 15 *SAJELP* 57 – 84 at 63 – 64.

²³⁷ *HTF Developers case* at [18] also see Kidd, M 'Environment' in Currie, I and De Waal, J., *The Bill of Rights Handbook* (6th ed) (2013), Juta & Co., Cape Town.

²³⁸ Du Plessis has gone so far as to argue that poverty is an environmental factor contrary to human health and well-being therefore requiring State intervention in terms of Section 24. Du Plessis, A., 'South Africa's Constitutional Environmental Right (Generously) Interpreted: What is in it for Poverty?' (2011) 27 *SAJHR* 279 – 307.

the open endedness somewhat and largely confines 'environment' to ecological and physical surroundings. Such a limitation would prevent possible dilution of Section 24 to such an extent as to render the Section largely meaningless.

'For the benefit of present and future generations,' is clearly an intragenerational and intergenerational provision similar to that found in *Sustainable Development*. This is discussed in detail later on.

'Through reasonable and other measures that secure' suggests that this is a 'positive right' which, presumably, is to be developed over time. However the wording used distinguishes Section 24(b) from the socio-economic rights and this is discussed in detail later on.

3.1 Section 24(b)(i)

Section 24(b)(i) requires that the environment be protected through legislative and other measures which prevent pollution and which prevent ecological degradation. Ecological degradation would encompass any process or event which negatively impacted upon the ecological process or ecosystem and which had a permanent effect. Degradation means²³⁹ 'the act of degrading' or 'the state of being degraded' and degrading (or being degraded) means to reduce in worth,' or 'to reduce in in strength [or] quality,'. Implicit in this wording is the prohibition on the action of degrading and that the action will lead to a state of impairment. There is a degree of permanence, an action which leaves no discernible impairment would not constitute degradation but it may nonetheless constitute pollution. It also follows that the environmental 'health' must be measurable in order to determine whether or not degradation has occurred.

Pollution requires the addition of an element into an ecosystem or into the environment which will have an adverse impact. Unlike degradation the effect may be temporary or short-lived. Pollution would encompass elements which do not necessarily have a long term adverse impact which degrades an ecosystem or ecological process, e.g. excessive dust production may pose a threat to human health but, ultimately, the dust would be absorbed

²³⁹ From the *Collins English Dictionary Millennium Edition*, HarperCollins Publishers, Glasgow, 1998.

by the environment without a lasting change in state of the ecosystem. The environment was not degraded but a pollution event occurred, similarly noise can constitute pollution.

3.2 Section 24(b)(ii)

Section 24(b)(ii) requires that the legislative and other measures promote (i.e. positively enhance) conservation. This would require measures to protect, preserve, improve and carefully manage ecosystems.²⁴⁰ Conserve must, in the context used, refer to conservation of the environment and ecosystems but may also describe the manner in which non-renewable resources are used.

3.3 Section 24(b)(iii)

We need to examine precisely what is meant by the phrase ‘ecologically sustainable’ as this is critical to understanding Section 24(b)(iii). One interpretation of ecologically sustainable is that it simply equates to *Sustainable Development*.

The Australian *Environment Protection and Biodiversity Conservation Act 1999*²⁴¹ makes reference to the principles of ‘ecologically sustainable development’. One of the objects of the Act is ‘to promote ecologically sustainable development through the conservation and ecologically sustainable use of natural resources;’²⁴² and these principles are applied, generally, through requiring the Minister to consider them when making a decision in terms of the Act.

The phrase ‘ecologically sustainable development’ is defined as ‘development that improves the total quality of life, both now and in the future, in a way that maintains the ecological processes on which life depends’²⁴³ This has been interpreted as recording *Sustainable Development* as articulated in the *Brundtland Report* in which ‘the adjective “sustainable” is

²⁴⁰ From the *Collins English Dictionary Millennium Edition*, HarperCollins Publishers, Glasgow, 1998.

²⁴¹ Act 91 of 1999.

²⁴² Section 3(1)(b) of the Act.

²⁴³ *The Australian National Strategy for Ecologically Sustainable Development Part 1 - Introduction*

qualified by “ecologically” to emphasise the necessary integration of economy and environment.²⁴⁴ That the Australian version is indeed a formulation of *Sustainable Development* can be deduced from the three core objectives of the *Australian National Strategy*²⁴⁵ which are:

- ‘to enhance individual and community well-being and welfare by following a path of economic development that safeguards the welfare of future generations
- to provide for equity within and between generations
- to protect biological diversity and maintain essential ecological processes and life-support systems’

The *Australian National Strategy* then sets out guiding principles which were promulgated as section 3A of the Act. The core objectives are clearly development focused and, in keeping with the developmental nature of *Sustainable Development* must be regarded as being anthropocentric in focus. The Australian principles clearly indicate that the environment is not the primary object, it is merely a ‘fundamental consideration in decision making’ while the primary object is, in keeping with *Sustainable Development per se*, that ‘decision-making processes should effectively integrate both long-term and short-term economic, environmental, social and equitable considerations.’

Sustainable Development from the original *Brundtland Report* definition has incorporated elements of intra and intergenerational environmental protection, economic development and social development so why then does Section 24(b)(iii) refer to sustainable development and also uses the explicit terms, ‘ecologically’, ‘economic’ and ‘social’ as well as the reference to ‘present and future generations’? It might well be that the section is merely a recording of *Sustainable Development* and that the final, tautologous, wording is an unpacking of the phrase or it might indicate a closer relationship to *Sustainability* or it might be a nuanced formulation of its own. It is submitted that Section 24(b)(iii) is distinguishable from *Sustainable Development* for the following reasons:

1. The original formulation, as proposed section 23, was deliberately changed from ‘sustainable development’ to ‘ecologically sustainable development’ and this change presumably had a reason.

²⁴⁴ Preston, B. J., *Ecologically Sustainable Development in the Courts in Australia and Asia* A paper presented to a seminar on environmental law organised by Buddle Findlay, Lawyers, Wellington, New Zealand, 28 August 2006 at page 6.

²⁴⁵ See fn 243 above.

2. Grammatically, 'ecologically sustainable development' implies that the ecology must be sustained and this is different to *Sustainable Development* which requires [economic] development to be sustainable.
3. Pollution, Conservation and ecological degradation (as used in Section 24(b)), all carry specific ecological connotations which suggest that 'ecological sustainable development' and 'ecologically sustainable use' also have specific ecological meanings.
4. Authors such as Bosselmann²⁴⁶ as well as Meyers and Muller²⁴⁷ ascribe the phrase 'ecologically sustainable' with an ecocentrism which is distinct from the anthropocentrism of *Sustainable Development*.
5. *Sustainable Development* is patently unsuitable as a basis (without providing definitions such as appear in the NEMA and the Australian law) for law and especially for a constitutional right.
6. NEMA refers simply to 'sustainable development' whilst the Constitution and the earlier DFA qualified the phrase respectively as 'ecologically sustainable development' or 'environmentally sustainable land development' and this seems to entrench a difference.
7. Finally, other elements suggestive of *Sustainable Development* are found elsewhere in Section 24(b) and simply equating the two would render Section 24(b)(iii) a tautologous mess.

Instead of attributing a purely *Sustainable Development* meaning to ecologically sustainable development the element 'ecologically sustainable' will be interpreted as having an important meaning of its own. 'Ecologically sustainable' will therefore be read as 'sustaining the ecosystem'. Sustain, sustaining and sustainability have their ordinary grammatical meanings,²⁴⁸ as an adjective, of 'to maintain or prolong' and 'capable of being maintained at a steady level'.

The United Nations Declaration on the Right to Development²⁴⁹ states that: 'development is a comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of

²⁴⁶ See fn 101.

²⁴⁷ See fn 102.

²⁴⁸ *Collins English Dictionary Millennium Edition*, HarperCollins Publishers, Glasgow, 1998.

²⁴⁹ <https://www.un.org/en/events/righttodevelopment/declaration.shtml>, accessed 1 May 2013.

benefits resulting therefrom,²⁵⁰ Similarly the dictionary²⁵¹ defines development as being: ‘the act or process of growing, progressing, or developing’.

‘Ecological sustainable development’ can therefore be interpreted to mean the act or process of growing, progressing or developing with the intention of improving general humankind’s benefits whilst maintaining or prolonging the underlying ecological processes (including the ecosystem).

‘Use’ can be contrasted with ‘development’ in that ‘development’ contemplates growth and developing or building, adding to an existing resource or creating new resource. ‘Use’ has the opposite meaning as it implies consumption and, ultimately, exhaustion of the existing resource. The discussion of ‘ecologically sustainable...’ used above applies here too. On this basis ‘ecologically sustainable use’ means the act or process of consuming or exhausting a resource whilst maintaining or prolonging the underlying ecological processes (including the ecosystem).

‘Use’ and ‘development’ seem to encapsulate most possible human activities, those which deplete a resource or those which add to a resource. Activities which comprise both activities are covered by the conjunction ‘and’.

‘Economic development’ is not, on the face of it, a contentious term. ‘Economic’ is capable of a number of definitions (as discussed previously) although the most appropriate in the context is ‘the complex of human activities concerned with the production, distribution, and consumption of goods and services.’²⁵² Economic development is therefore the act or process of growing, progressing or developing (with the intention of improving general humankind’s benefits) the production, distribution and consumption of goods and services.

Social development is usually taken to mean the betterment of humankind through increasing benefits. The eighth principle in the *Stockholm Declaration* is a useful reference:

²⁵⁰ Preamble to the United Nations *Declaration on the Right to Development*, paragraph 2.

²⁵¹ *Collins English Dictionary Millennium Edition*, HarperCollins Publishers, Glasgow, 1998.

²⁵² *Collins English Dictionary Millennium Edition*, HarperCollins Publishers, Glasgow, 1998.

‘Economic and social development is essential for ensuring a favorable living and working environment for man and for creating conditions on earth that are necessary for the improvement of the quality of life.’ Social development is therefore the pursuit of creating more beneficial living conditions and improving the quality of life of humankind.

Part Four: Section 24 in Context

Before examining Section 24(b) in a purposive and generous manner, and in light of the detailed textual interpretation given above, we will look at a brief introduction to the concepts of ecology, ecological sustainability and the nature of environmental rights. We will then look at the historical context prevailing when both Constitutions were produced and the state of the South African environment to distil some of the issues which an environmental right, such as Section 24, would have to address. In the course of this discussion we will also try to establish the possible intention of the drafters of the Constitution which will form a basis for the purposive interpretation of Section 24(b).

4.1 A Discussion of Ecology, Ecological Processes and Ecosystems

‘As each organism adapts to its environment, it also modifies its environment, sometimes in minute ways and sometimes more dramatically. Meanwhile, the environment is continually changing as a result of landscape processes, such as soil erosion, storm damage, or subsidence. "The result is a coupled, complex, dynamic system of organism and environment, wherein natural selection optimizes the fitness of populations amid a continually changing, biotically driven environment."’²⁵³

Section 24(b) refers to ‘environment’ and to ecology (as used in ‘ecologically sustainable’) and both of these have distinct technical meanings. The word ‘ecology’ does not appear to be legally defined by South African law although it has been used in a number of legal

²⁵³ Bosselman, F., ‘What Lawmakers Can Learn From Large-scale Ecology’ (2001) 17 *Journal of Land Use and Environmental Law* 207 - at 219 at 229 footnotes omitted.

documents including legislation²⁵⁴ and reported judgements.²⁵⁵ The environment has historically been defined as the totality of biotic and abiotic elements.²⁵⁶ And, in this regard, it is a static aggregation of things. Ecological processes describe the interactions between the components of an environment. They are the dynamic elements. The ECA defines²⁵⁷ an 'ecological process' which 'means the process relating to the interaction between plants, animals and humans and the elements in their environment'.

Ecology is the study of living organisms within the context of the interactions of the study organism with other living organisms and with their abiotic surroundings. 'It is a mathematical study which uses empirical data, statistics and deductive reasoning in an effort to understand the mechanics of the natural world.'²⁵⁸ In its simplest form 'ecology' operates at three levels, namely those of organism, population (consisting of individuals of the same species) and community (consisting of various populations of different species). At the organism level ecology deals with how individuals of a single species react with and influence their environment. At the population level ecology is the study of a population's dynamic elements such as distributions, scarcity and changes in population. Community ecology deals with the structure of communities and the interactions of populations within such communities. Community ecology also examines the processes and functioning of the community i.e. issues such as nutrient flow, biomass flow and energy transfers.²⁵⁹ These three levels can be subdivided further and the result is that ecological studies are conducted from the sub-cellular gene level through to the ultimate community ecosystem, the biosphere²⁶⁰ (or ecosphere).

²⁵⁴ See for instance: s26(1)(e) of the National Forests Act 84 of 1998 and 'ecologically' in ss17(a) & (f) of the NEM: Protected Areas Act 57 of 2003. References to 'ecologically sustainable development' (or 'use') as in the Constitution and directly incorporated elsewhere has been deliberately omitted here.

²⁵⁵ See for instance: *Khabisi N.O. and Ano v Aquarella Investments 83 (Pty) Ltd and Others* 2008(4) SA 195 (T) at [27], [30]; *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province, and Others* 2007 (6) SA 4 (CC) at [44]; *Foodcorp (Pty) Ltd v Deputy Director-General, Department of Environmental Affairs and Tourism, Branch Marine and Coastal Management* 2004 (5) SA 91 (C) at [12]; *Corium (Pty) Ltd and Others v Myburgh Park Langebaan (Pty) Ltd and Others* 1995 (3) SA 51 (C) in the headnotes and at 66.

²⁵⁶ See for instance section 1 of the ECA and *A Blueprint for Survival*, Appendix A at [2] .

²⁵⁷ Section 1 of the ECA.

²⁵⁸ Brooks, R. O., Jones, R. and Virginia, R. A., *Law and Ecology: the rise of the ecosystem legal regime* (2002) Ashgate Publishing, London at page 17.

²⁵⁹ Begon M., Harper J. L. and Townsend C. R., *Ecology, Individuals, Populations and Communities* (second ed.) Blackwell Science, Cambridge, 1995 at page xxx.

²⁶⁰ Biosphere is defined as 'the thin covering of the planet that contains and sustains life' in paragraph 2, Chapter 1 of the *World Conservation Strategy*.

The ecology of an area may be taken to mean the interaction between organisms and their environment, within and between organisms comprising a population and / or between populations which form communities. Crucially this concept of ecology also encompasses the processes governing the community's dynamic, notably energy (food or trophic), flows. Begon *et al.* mention that a fourth type of ecology may be referred to, namely the 'ecosystem' which comprises the study of ecology at the community level but with specific reference to the community's abiotic environment (the community is the biotic component).²⁶¹ In all these studies environment includes both biotic and abiotic elements. Essentially, therefore, the concept of community ecology is synonymous with the concept of ecosystem.

The concept of an ecosystem is usually used to describe a portion of the wider environment in which community ecological processes can be measured and the community is 'self-sustaining and self-regulating'.²⁶² Ecosystem can be distinguished from the environment in two ways, firstly it is a sub-set of the larger environment and, secondly, it is composed of both the static physical (environmental) components and the dynamic ecological processes.

It must be noted that an ecosystem is a conceptual tool rather than a discrete physical entity. An ecosystem represents a conceptual ring-fencing of a section of the environment in order to study a self-sustaining community ecological process or for purposes of managing a community. Ecosystems tend to be defined by the objectives of a study or by the resources of the ecologist.²⁶³ The division of the environment into ecosystems is therefore artificial. The ring-fencing occurs along recognisable fault lines but these are not real divisions and the environment cannot be truly compartmentalised. Ultimately there is only one real ecosystem, the biosphere (ecosphere), and even this relies on externalities of sunlight, gravity, the earth's spin and celestial orbit.

'Perhaps the most important feature of the ecosphere is its degree of organisation. It is made up of countless ecosystems, themselves organised into smaller ones, which are further organised into still smaller ones. Each of these is made up of populations of different species in close interaction with

²⁶¹ Begon *et al.* fn 259, Chapter 17, page 613.

²⁶² Definition of 'ecosystem' section 1 of the ECA.

²⁶³ Brooks *et al.* at 11.

each other, some of which are usually organised into communities and families-further organised into cells, molecules and atoms etc.’²⁶⁴

Ecological sustainability therefore implies that an ecosystem comprising of both the ecological processes and the physical environment will be sustained. Ecological processes can be measured at organism, population or community levels. Communities comprise populations which in turn comprise organisms. From this it may be inferred that an ecologically sustainable community is, by definition, composed of ecologically sustainable populations and organisms.

Ecological sustainability can best be conceptualised through the ecological study of ‘resilience’.

‘The emerging ecological concept of resilience provides an umbrella theory for integrating concepts of ecosystem management with ecological response to achieve sustainability.’²⁶⁵

Ecological resilience has been proposed as the successor to *Sustainable Development* as it addresses a number of flaws in *Sustainable Development*.²⁶⁶ The achievement of ecological sustainability requires and contemplates active environmental management and the tool for determining appropriate management interventions uses the concept of the ecosystem as a study and management tool.

‘Resilience is a measure of the amount of perturbation a social-ecological system can withstand and still maintain the same structure and functions; it addresses the ability of a complex system to continue to provide a full range of ecosystem services in the face of change.’²⁶⁷

And

‘Resilience is about dynamic and complex systems and is here defined as the capacity of a system to absorb disturbance and reorganize while undergoing change so as to still retain essentially the same function, structure, identity, and feedbacks’²⁶⁸

²⁶⁴ A *Blueprint for Survival* Appendix A at [7].

²⁶⁵ Cosens, B. A., ‘Legitimacy, adaptation, and resilience in ecosystem management’. (2013) *Ecology and Society* 18(1:3) at 3 reference omitted.

²⁶⁶ Craig, R. K. and Benson, M. H., ‘Replacing Sustainability’ (2013) 46 *Akron Law Review* 841 - 880 at 862

²⁶⁷ Cosens, B. A. ‘Legitimacy, adaptation, and resilience in ecosystem management’. (2013) *Ecology and Society* 18(1: 3) at 3

²⁶⁸ Folke, C., Jansson, A., Rockström, J., Olsson, P., Carpenter, S. R. Stuart Chapin III, F. Crépin, A., Daily, G., Danell, K., Ebbesson, J., Elmqvist, T., Galaz, V., Moberg, F., Nilsson, M., Österblom, H., Ostrom, E., Persson, A.,

Given that sustainability implies maintaining or prolonging a state of affairs then the ecosystem's resilience is a useful measure of ecological sustainability. The greater an ecosystem's resilience the better it will withstand negative impacts and therefore the greater the likelihood of the cause of such negative impacts being 'ecologically sustainable'.²⁶⁹

In a review of ecosystem resilience Gunderson²⁷⁰ identified three forms of resilience. The first is 'adaptive capacity' this refers to the environment's capacity to retain its shape over time or despite an external impact. Within the environment the ecological processes themselves show resilience. If it is assumed that there is not a single equilibrium point but rather multiple steady states then 'resilience is measured by the magnitude of disturbance that can be absorbed before the system redefines its structure by changing the variables and processes that control behaviour'.²⁷¹ The single state equilibrium form is described as 'engineering resilience' as it assumes only one acceptable state and which state can be achieved through an engineered solution. In the multiple steady state system process resilience is described as ecological resilience as it describes a situation where the process can continue to be resilient up until the point where it 'flips' into the next equilibrium state in which case the process itself has changed and has assumed a new identity. The resilience is described by the plasticity of the process, its capacity to absorb changes without itself fundamentally changing. Ecological resilience seems to better describe ecosystems, especially where influenced by humans, whilst single state systems might exist in wholly natural systems. An ecosystem's resilience is therefore determined by its environmental adaptive capacity and by its equilibrium state. However, even if the ecosystem remains stable, there is flux²⁷² within it. The third form of resilience relates to 'adaptive capacity' which describes an ecosystem's capacity to organise and adapt to a change in its environment. The environment never remains constant (e.g. nutrient levels, species composition and physical structures change over time) and these changes may be regarded as a perturbation which the ecosystem is unable to resist and which causes it to 'flip' into a

Peterson, G., Polasky, S., Steffen, W., Walker, B. and Westley, F. 'Reconnecting to the Biosphere' (2011) 40 *AMBIO: A Journal of the Human Environment* 719 – 738 at 721 footnote and reference omitted

²⁶⁹ See generally Demange, L. H. M. D. L. 'The Principle of Resilience' (2012) 30 *Pace Environmental Law Review* 695 at 700 – 706.

²⁷⁰ Gunderson L. H. 'Ecological Resilience - In Theory and Application' (2000) 31 *Annual Review of Ecological Systems* 425–439. The discussion of ecological resilience which follows in this paragraph and the next three is based on this paper, unless otherwise referenced, and any error in interpretation is the author's and not Gunderson's.

²⁷¹ Gunderson fn 269 at 426.

²⁷² Ecosystems are dynamic, a fact recognised in the Convention on Biological Diversity in its definition (Art 2) of "Ecosystem" [which] means a dynamic complex of plant, animal and micro-organism communities and their non-living environment interacting as a functional unit.'

new stable state. Adaptive capacity is the system's ability to organise around a new stable equilibrium after such 'flip'.

The flux within an ecosystem is described by a four phase adaptive cycle of self-organisation. Each phase exhibits different degrees of resilience and the relationship between cycles in a complex system is described as panarchy as it is non-linear and non-hierarchical.

Panarchy describes the relationship between adaptive (flux) cycles in complex systems.

'An adaptive cycle describes the process of development and decay in a system. The initial stage of development of short duration consists of a rapid exploitation and garnering of resources by system components. This stage has been termed the *r* stage or function. The *r* stage is followed by a *k* stage or function, a stage of longer duration characterized by the accumulation of capital or other system elements or energies and increasing connectivity and rigidity. Increasing connectivity and rigidity during the *k* phase leads to decreased resilience and eventual collapse. This stage of collapse, the omega, is rapid and unleashes the "energy" accumulated and stored during the *k* phase.'²⁷³

In panarchy (as opposed to a linear or nested hierarchy) the flux cycles co-exist and influence each other in a non-hierarchical or random manner which prevents an engineered type solution to managing systems for resilience.²⁷⁴

It is therefore difficult to measure ecological resilience itself. Resilience depends on which of the stable states an ecosystem is in (presuming it is not in an unstable state) and which phase of its state of flux it is in. Instead of trying to measure resilience itself it is preferable to measure various components which are indicative of resilience. First and foremost of these is biodiversity.

Ecosystems with higher numbers of species tend to be more resilient than those with fewer species. The reasons for this are that they are less brittle in the mature phase and are more stable in the reorganisation phase. In the conservative phase the fewer species there are the

²⁷³ Garmestani, A. S., Allen, C. R. and Heriberto Cabezas, H. 'Panarchy, Adaptive Management and Governance: Policy Options for Building Resilience' (2009) 87 *Nebraska Law Review* 1036 – 1054 at 1037 footnotes omitted

²⁷⁴ Garmestani, A. S., Allen, C. R. and Heriberto Cabezas, H. 'Panarchy, Adaptive Management and Governance: Policy Options for Building Resilience' (2009) 87 *Nebraska Law Review* 1036 – 1054 at 1037 – 1038.

greater the impact if one species is removed by the disturbance agent. If however there are numerous apex species then where one is removed it can be replaced without the ecosystem being pushed into reorganisation. If the ecosystem does enter the reorganisation phase then the greater the number of species the more heterogeneous it will be and therefore the lower the chance of the reorganisation phase being dominated by one coloniser or a new coloniser which means it has a greater chance of reverting to a state approximating its previous conservative state.

Generally the greater the number of component species the more stable or resilient the ecosystem although this is not always the case. This is because the greater the complexity of the interrelationships between the species within the ecosystem the greater the ecosystem's resilience. However this is not a function of the number of species *per se*, rather the critical element of ecosystem resilience seems to be the complexity of the relationships.²⁷⁵ 'Complex [eco]systems are characterized by multiple pathways of development (multiple states or basins of attraction), interacting periods of gradual and rapid change, feedbacks and non-linear dynamics, thresholds, tipping points and shifts (transitions) between pathways, and how such dynamics interacts across temporal and spatial scales.'²⁷⁶ As has been noted: 'Diversity within functional groups maintains the rate of ecosystem processes despite environmental fluctuations, if the individual species respond differently to environmental fluctuations. This phenomenon is called response diversity.'²⁷⁷

Ecosystem resilience is expressed in three ways: '(i) the magnitude of shock that the system can absorb and remain within a given state; (ii) the degree to which the system is capable of self-organization; and (iii) the degree to which the system can build capacity for learning and adaptation.'²⁷⁸ The first of these is the ecosystem's ability to resist perturbation. The second and third describe an ecosystem's ability to recover from the perturbation or, where recovery cannot happen because of fundamental change in environment or similar, to adapt to a new environment. Both of these latter processes require time (at an ecological scale).

²⁷⁵ This aspect is discussed by Downing, A. L. and Leibold, M. A. 'Species richness facilitates ecosystem resilience in aquatic food webs' (2010) 55 *Freshwater Biology* 2123–2137.

²⁷⁶ Folke, *et al.* fn 267 at 721; Carpenter, S. R., Bennett, E. M. and Peterson, G. D. 'Scenarios for ecosystem services: an overview'. (2006) 11(1) *Ecology and Society* 29–38 at 38.

²⁷⁷ Carpenter, S. R., Bennett, E. M. and Peterson, G. D. 'Scenarios for ecosystem services: an overview'. (2006) 11(1) *Ecology and Society* 29–38 at 38 citations omitted.

²⁷⁸ Folke, C., Carpenter, S., Elmqvist, T., Gunderson, L., Holling, C. S. and Walker, B. 'Resilience and Sustainable Development: Building Adaptive Capacity in a World of Transformations' (2002) 31(5) *AMBIO: A Journal of the Human Environment* 437–440 at 438.

In the context of Section 24(b) 'ecologically sustainable' would mean development or use of resources which allows the ecosystem to 'cope, adapt, or reorganize without sacrificing the provision of ecosystem service.'²⁷⁹ As such 'ecologically sustainable' can be inferred to mean prevention of or retarding of environmental perturbation so as to minimise the perturbation or maximise the adaptation. In this sense a non-renewable resource can be used in an ecologically sustainable manner (although the resource itself cannot be used in purely sustainable manner) provided that the ecosystem is given adequate time and retains adequate biodiversity to adapt where it cannot resist. Therefore, and unlike *Sustainable Development*, 'ecologically sustainable' can be given a firm meaning relevant to its context in Section 24(b)(iii) and it can be objectively assessed. Preferring this interpretation provides a basis for interpreting the remaining provisions of Section 24(b).

'Ecosystems are presumed to have a stable state that can be pushed across a threshold by one or a set of stressors to reach an alternative stable state. A shift to an alternative stable state of an ecosystem occurs when a change in an environmental driver produces large and persistent responses in an ecosystem, thereby pushing the ecosystem across a threshold'²⁸⁰

Ecological degradation would therefore occur where any perturbation or 'disturbance agent' which exceeded the threshold of the receiving ecosystem to absorb or cope with it. Even where there is sufficient time for the ecosystem to adapt to the perturbation it would still amount to ecological degradation as the original ecosystem has been irreversibly compromised and a new ecosystem with a new stable state will emerge. If insufficient time is afforded the system then the ecosystem will enter a terminal spiral as it is unable to achieve a new stable state.

Biodiversity is a principal indicator of ecosystem resilience and health but is not the final determinant and care is required. The precautionary principle has been adopted as a consequence of the uncertainty and complexity involved. However biodiversity (both species and process diversity) is a very useful barometer of ecological resilience and can be used to assess ecological degradation, conservation and ecologically sustainable development.

²⁷⁹ Folke, *et al.* fn 278 at 438.

²⁸⁰ Lin, B. B., and Petersen, B. 'Resilience, regime shifts, and guided transition under climate change: examining the practical difficulties of managing continually changing systems'. (2013) 18:1 *Ecology and Society* 28 – 37 at 30 citations omitted.

Conservation can be regarded as the active management of ecosystems to maximise their resilience. Increasingly ecosystem management rather than species management is being regarded as the optimal form of management and conservation.²⁸¹ Conservation therefore protects biodiversity and also actively manages ecosystems in order to do so.

'As conservation seeks to preserve very complex structures such as ecosystems, it is not possible to attribute to conservation a simplistic or segmented view. Conservation for resilience must take into account the interconnections between the various components of an ecosystem and it must include in the concept of "land" not only the forests and preserved landscapes, but also the landscapes intensely modified by humans.'²⁸²

That the same reasoning would apply to aquatic conservation is taken for granted. As a means for enhancing resilience conservation would also encompass rehabilitation and remediation although these can be problematic. Conservation should seek to protect the environment and enhance ecosystem resilience and preserve biodiversity.

'This leads, finally, to the conclusion that if humans can keep their alteration of nature within parameters that ecological systems have experienced in the past, the systems are likely to retain existing ecological functions over broad scales of time and place. The key question is whether scientists can identify the limits beyond which we risk ecological collapse, and whether we can develop laws and policies that will keep us within those limits.'²⁸³

4.2 The Nature of Environmental Rights

In exploring the nature of environmental law it has been noted²⁸⁴ that environmental law may derive its status as a right in three ways: firstly as an element of human rights law because the purpose of environmental protection is the preservation and enhancement of human welfare (an anthropocentric view);²⁸⁵ alternatively through an intrinsic right of the environment itself whilst recognising the humankind is merely a component of the wider

²⁸¹ Allen, C. R., Cumming, G. S., Garmestani, A. S., Taylor, P. D. and Walker, B. H. 'Managing for resilience' (2011) 17(4) *Wildlife Biology* 337-349.

²⁸² Demange, L. H. M. D. L., 'The Principle of Resilience' (2012) 30 *Pace Environmental Law Review* 695 at 714.

²⁸³ Bosselman, F., 'What Lawmakers Can Learn From Large-scale Ecology' (2001) 17 *Journal of Land Use and Environmental Law* 207 - at 219.

²⁸⁴ See for instance van Reenen, T. P., 'Constitutional Protection of the Environment: Fundamental (Human) Right or Principle of State Policy'. (1997) 4 *SAJELP* 269 – 290 at 275 – 276 and Theron-Nelson, C 'A Jurisprudential Overview of the Question What does the Right to a Decent Environment Mean?' (1999) 6 *SAJELP* 205-230 at 209-210.

²⁸⁵ 'The anthropocentric, human-centred approach holds, in an environmental context, that a healthy and sustainable natural environment should be holistically maintained for the sake of human well-being as opposed to for the environment's own sake.' Du Plessis, A., *Fulfilment of South Africa's Constitutional Environmental Right in the Local Government Sphere* (2008) LLD Thesis, North-West University at 29 footnote omitted.

environment and therefore 'human rights are subsumed under the primary objective of protecting nature as a whole' (an ecocentric²⁸⁶ view); the third approach is to recognise that human rights and environmental rights exist separately but in parallel, where they share 'a core of common interests and objectives' (an egocentric view). None of these three approaches is entirely satisfactory and a fourth alternative is proposed.

The approaches to environmental rights represent three distinct approaches but, in compartmentalising them, we possibly lose sight of the truly paradoxical nature of the human nature relationship. 'People and societies are integrated parts of the biosphere, depending on its functioning and life-support while also shaping it globally'.²⁸⁷

Biologically there can be no doubt that humans are animals and that in our primitive state we are a component of the natural world in exactly the same way that any other animal, or indeed any other organism, is. Although all organisms adapt to and modify their environments humankind's development has given it capacity unparalleled by other animals to dominate, control and regulate (at least to a point) the natural world. This capacity has also allowed humankind to shield itself from nature, in this regard we are no longer primitive but have buffered ourselves against many of the direct impacts of nature on us. Humans are also characterised by a will which can be directed to the conscious and deliberate modification of the natural environment with disregard to and, seeming impunity from, the environmental consequences of these modifications.²⁸⁸

'The history of life on earth has been a history of interaction between living things and their surroundings. To a large extent, the physical form and habits of the earth's vegetation and its animal life have been molded by the environment. Considering the whole span of earthly time, the opposite effect, in which life actually modifies its surroundings, has been relatively slight. Only within the moment of time represented by the present century has one species – man – acquired significant power to alter the nature of his world.'²⁸⁹

²⁸⁶ 'The ecocentric approach suggests that on the one hand, rights should be afforded to the natural environment and on the other hand, that existing environmental rights (as rights afforded to people) should be interpreted not in terms of the value they afford to humanity, but in line with the environment's intrinsic worth.' Du Plessis, A., fn 285 above at 35 footnote omitted.

²⁸⁷ Folke *et al.* fn 268 at 719 footnote omitted.

²⁸⁸ Some modifications include: the use of 'Agent Orange' (the defoliant 2,4-D and 2,4,5-T) during the Vietnam War (c1960's) in an attempt to defoliate large areas of jungle to make it more difficult for enemy forces to remain hidden; the draining of the fens in eastern England to produce arable farmland, this project is thought to have been begun in the 1630's although there might have been earlier attempts to do so; the widespread spraying of DDT to control the occurrence of the Tsetse Fly (*Glossina spp.*) and thereby to limit the occurrence of the livestock disease nagana in KwaZulu-Natal.

²⁸⁹ Carson, R., *Silent Spring* (1962) Crest Books, New York, Chapter 2 page 16.

Humans therefore have two simultaneous relationships with nature, they can be an integral part of nature, or they can be a domineering force directing nature. These two relationships co-exist at all times and therefore humankind is, at the same time, both a servant of nature (an integral part of nature subject to its forces) and a master of nature (a domineering force bending nature to its will); we are both the trustee and beneficiary²⁹⁰ and this paradox needs to be factored into the understanding of human-nature interactions. Environmental rights need to be appreciated in light of this paradoxical relationship; at one level these rights are anthropocentric – humans need the environment to have rights for purely selfish reasons but, at the same time, these selfish objectives will not be fulfilled over time unless the environmental rights have an ecocentric quality. The environment needs to be protected from humans and humans need to be protected from the environment. This would require environmental rights to have two simultaneous centres of focus. Environmental rights should not be regarded as either anthropocentric or ecocentric but as bicentric. The bicentric environmental right provides for anthropocentric protection of humans from their environment and for accumulation by humans of benefits from their environment while simultaneously and equally providing for ecocentric protection of the environment from humans and the stewardship²⁹¹ or trusteeship²⁹² role which humans have in respect of the environment.

This paradoxical bicentric relationship is further characterised by the fact that humans have interposed increasingly complex buffers between themselves and the natural world. The ‘thickness’ of the buffer represents the degree of disconnection between humans and nature. The buffer may be of three forms: it may be either an absolute shield, or it may alter some of the impacts and allow others through unaltered, or it may simply delay the passing on of the impacts. The alteration of the impacts may be either positive (amelioration) or negative (escalation) and a buffer will probably take a combination of the forms.

²⁹⁰ '[Brown Weiss] posits the present generation of humans as both beneficiaries of a planetary legacy passed down from the past *and* as trustees of the planetary legacy for future generations.' Brown Weiss is credited as being instrumental in developing the doctrine of intergenerational equity. Collins, L. M. 'Revisiting the Doctrine of Intergenerational Equity in Global Environmental Governance' (2007) 30 *Dalhousie Law Journal* 79 - 140 at 93 footnote omitted.

²⁹¹ 'Tipping points and thresholds highlight the importance of understanding and managing resilience. New modes of flexible governance are emerging. A central challenge is to reconnect these efforts to the changing preconditions for societal development as active stewards of the Earth System. We suggest that the Millennium Development Goals need to be reframed in such a **planetary stewardship** context combined with a call for a new social contract on global sustainability.' Folke, *et al.* fn 268 at 719.

²⁹² 'Through the concept of "public trusteeship", a stewardship ethic has been incorporated into South African natural resources law.' van der Schyff, E., 'Unpacking The Public Trust Doctrine: A Journey Into Foreign Territory' (2010) 13:5 *PELJ* 121 – 189 at 123.

As a result there is a chain reaction from the actions of humankind, through the buffer, to nature, through a second buffer, back to humankind. The actions of humankind ultimately filter back to humankind and there is a very real potential of mutually re-enforcing activities (a feedback loop is created) which can direct humankind into a spiral the direction of which depends on the nature of the activity. It is critical to this understanding that humans and nature are regarded as distinct elements of a cyclical indivisible²⁹³ whole. It is also important that the feedback loop is not linear, in a legal context the 'causal' link is present but mostly unprovable.

Ecocentric rights which seek to protect the environment whilst excluding the domineering role of humanity ignore a primary component of ecosystems, humanity, which has powers and capabilities beyond those of other species. 'Throughout history humanity has shaped nature and nature has shaped the development of human society. We are currently living in the Anthropocene era where most aspects of the functioning of the Earth system cannot be understood without accounting for the strong influence of humanity.'²⁹⁴ Likewise anthropocentric rights which favour humanity over intrinsic environmental health ignore the fact that humanity is part of and an integrated dependent of the environment. 'Although people modify ecosystems, there are also significant feedbacks from ecosystem change to livelihoods, health, economies, and societies that lead to changes in human systems, engendering further ecosystem change.'²⁹⁵ Anthropocentric rights which ignore this fact do not actually confer a long term benefit on the holder of such 'right' which should be more correctly regarded as a burden than as a benefit; in the long term such 'rights' are damaging.

A topical example which can illustrate the paradoxical relationship is to be found in global climate change. The IPCC²⁹⁶ has reported²⁹⁷ that it estimates that in the period between

²⁹³ Although in a different context the cyclical paradoxical nature of the relationship between humankind (development) and nature (environment) was recognised by Ngcobo J in the *Fuel Retailers* case where it was stated that 'Unlimited development is detrimental to the environment and the destruction of the environment is detrimental to development. Promotion of development requires the protection of the environment. Yet the environment cannot be protected if development does not pay attention to the costs of environmental destruction. The environment and development are thus inexorably linked.' *Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province, and Others* 2007 (6) SA 4 (CC) at [44].

²⁹⁴ Folke, C. 'Resilience and resilience—from single equilibrium to complex systems' (2003) 32(6) *AMBIO: A Journal of the Human Environment* 379-379.

²⁹⁵ Carpenter, S. R., Bennett, E. M. and Peterson, G. D. 'Scenarios for ecosystem services: an overview'. (2006) 11(1) *Ecology and Society* 29 - 38 at 30.

²⁹⁶ The United Nations Intergovernmental Panel on Climate Change.

1750 and 2011 somewhere between 470 and 640 PgC²⁹⁸ have been released into the atmosphere of which about 240 PgC have been retained in the atmosphere. This carbon was released as a consequence of anthropogenic fossil fuel combustion, cement production, and land use changes (mainly deforestation). The difference in carbon levels between what has been released and what has been retained indicates how much carbon has been taken up by ocean and terrestrial ecosystems. Best estimates (with a confidence of *highly likely*) are that between 125 and 185 anthropogenic PgC have been taken up by the oceans.

The retention of carbon in the atmosphere has resulted in unprecedented warming and this is immediately felt by humankind. However the increase in oceanic carbon uptake causes acidification of the oceans as CO₂ combines with sea water to form carbonic acid (H₂CO₃). Post the industrial revolution the pH of ocean surface water has decreased (i.e. become more acidic) by 0.1. (The pH scale is a logarithmic scale which runs from 0 – highly acidic, to 7 – neutral, to 14 – highly basic, the measured change of 0.1 is not insignificant and represents an approximately 26% increase in acidity). Higher levels of carbonic acid can impair the uptake of calcium carbonate by animals. Calcium carbonate is the principal source of calcium which is used by almost all animals to form bone, cartilage and exoskeletons. This, in turn, affects fisheries upon which humans rely heavily as a protein source. This is reflected in the warning given by the IPCC:

‘ocean acidification poses substantial risks to marine ecosystems, especially polar ecosystems and coral reefs, associated with impacts on the physiology, behavior, and population dynamics of individual species from phytoplankton to animals (*medium to high confidence*). Highly calcified mollusks, echinoderms, and reef-building corals are more sensitive than crustaceans (*high confidence*) and fishes (*low confidence*), with potentially detrimental consequences for fisheries and livelihoods. Ocean acidification acts together with other global changes (e.g., warming, decreasing oxygen levels) and with local changes (e.g., pollution, eutrophication) (*high confidence*). Simultaneous drivers, such as warming and ocean acidification, can lead to interactive, complex, and amplified impacts for species and ecosystems.’²⁹⁹

²⁹⁷ The facts and figures used in this discussion are taken from the IPCC AR5 (IPCC, 2013: *Climate Change 2013: The Physical Science Basis. Contribution of Working Group I to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* [Stocker, T.F., D. Qin, G.-K. Plattner, M. Tignor, S.K. Allen, J. Boschung, A. Nauels, Y. Xia, V. Bex and P.M. Midgley (eds.)]. Cambridge University Press, Cambridge, United Kingdom and New York, NY, USA, 1535 pp.). Any error in their interpretation or application is the author’s and not the IPCC’s. The information used was found at TS.2.8.1 pages 50 – 52, read with 295.

²⁹⁸ ‘1 Petagram of carbon = 1 PgC = 10¹⁵ grams of carbon = 1 Gigatonne of carbon = 1 GtC. This corresponds to 3.667 GtCO₂.’

²⁹⁹ IPCC WGII, *Climate Change 2014: Impacts, Adaptation, and Vulnerability SUMMARY FOR POLICYMAKERS* (31 March 2014) at page 18 footnotes and references omitted.

In this example humans have modified the environment through releasing CO₂ but the impacts of this are not felt directly.³⁰⁰ Instead the CO₂ is absorbed by the atmosphere which acts as a short-term buffer. From this short-term buffer CO₂ is absorbed by ecosystems (oceanic and terrestrial) which act as long-term buffers. The CO₂ retained in the atmosphere (short-term buffer) has had an almost instantaneous direct impact on humans. For example as felt through warming, storms and drought which were the first signs of global climate change. However the (long-term) environmental buffers, and in this case the ocean, transmit the effect of the anthropogenic CO₂ to a number of ecological processes through acidification and this compromises the environment. Humans are then impacted, not directly by this portion of the CO₂ (there are no life choking pockets of CO₂ floating around) nor by more acidic oceans (we are still able to sail, swim and extract salt) but through decreased protein supply. This decreased protein supply can be buffered by increased terrestrial production requiring increasing amount of fossil fuel based fertilisers and increased land clearances thus exacerbating this cycle.

Human modification of the environment and the resulting cyclical impacts are not new phenomena and cannot be solely attributed to post-industrial humans.³⁰¹ There can be no doubting that industrialisation increased both humanity's capability for modification and its consumption of resources necessitating modification. However humans have always had this capability. Diamond, in his prize-winning work *Guns, Germs and Steel*,³⁰² provides a convincing prehistoric example of this capability. Although this theory is not without challenge its logic is compelling.

According to Diamond³⁰³ humans arrived in Australia between 35,000 and 40,000 years ago. Their arrival coincided with the mass extinction of all large (i.e. heavier than 45 kilograms) animal species (excluding the red kangaroo).³⁰⁴ In his interrogation of human development

³⁰⁰ CO₂ is heavier than air and if it was not absorbed by the atmosphere there would be pockets of life choking CO₂ settling in low lying areas.

³⁰¹ A resonating theme is that environmental degradation is a consequence of post-industrial human's increased capabilities to modify the environment and coupled increasing consumption of resources. See for instance Okon E. E., 'The Environmental Perspective in the 1999 Nigerian Constitution' (2003) 5 *Environmental Law Review* 256 at 256. As will be seen this is not strictly speaking true.

³⁰² Diamond, J. *Guns, Germs and Steel: a short history of everybody for the last 13,000 years*. (2005) Vantage Books, London

³⁰³ A synopsis of Diamond's theory appears on pages 41 to 50 of his book.

³⁰⁴ 'Humans most likely played a decisive role in the demise of the megafauna in Australia and North America 45,000 and 13,000 years ago, respectively, and most certainly in Madagascar during the past 2,000 years.' Hanski, I. 'The World that Became Ruined' (2008) 9 *EMBO Reports Special Issue* s34 at s35.

Diamond postulates that one of the key foundations of human social development was the domestication of large animals. Few large animals are suitable candidates for domestication and, by exterminating the few large animal species then present, the ancient Australian Aborigines forsook any possibility of ever domesticating large animals. The lack of agricultural development condemned Australian Aborigines to life as hunter gatherers and prevented the social development found in Eurasia where first agriculture and then complex bureaucratic civilisations developed. Hunter gatherer societies were never able to develop this complexity because they never developed large population sizes with resultant social diversity. It must be stressed that the argument is not that this was the sole cause of different developmental pathways nor that, had the extermination of the large animals not occurred, agriculture would necessarily have followed. There are numerous causal factors and the availability of large animals is only one of these. However this pattern is mirrored by the movement of humans into North America approximately 13,000 years ago, this coincided with a similar extermination of a number of species of (although not all) large animals and similar pattern of non-development of agriculture or complex societies in North America³⁰⁵ (until the much later external introduction of agriculture) followed. These hunter gatherer societies were unable to resist or cope with subsequent invasion by the large bureaucratic societies. If Diamond is correct (and his argument is compelling) then these would be early examples of human modification of their environment and the cyclical nature of the impacts. By modifying their environments early humans constrained any possibility of further social development and left themselves vulnerable to subsequent invasion, partial extermination and finally domination. These consequences of this modification were unforeseeable and heavily buffered; although environmental they only manifested thousands of years later and as social impacts.

It is submitted that this bicentric cyclical paradox better explains the true relationship between humans and nature and therefore is a better interpretation of environmental rights than the egocentric (parallel), anthropocentric or ecocentric models referred to. Environmental rights are rights shared by nature and humans as, in the final analysis, there is no biological distinction between the two. However to simply regard humans as one more component of the natural world ignores the fact that humans have and will continue to have impacts far greater than other species. To argue that the environment can have rights exclusive of humans or that humans can have rights exclusive of the environment is flawed. The interrelationship has been aptly summarised:

³⁰⁵ Limited agricultural development in central and southern America gave rise to complex societies but these never domesticated large animals.

'Human action is changing the climate, land cover, oceans, and the biogeochemistry of the fundamental cycles that sustain life, and the diversity of life itself. These changes threaten the future availability of ecosystem services, defined as the benefits that people obtain from nature. Although people are buffered from the natural environment by culture and technology, ultimately our livelihoods, health, and even survival are completely dependent on ecosystem services.'³⁰⁶

4.3 Constructing Section 24

'Our Constitution is a wholly different kind of instrument. For present purposes it is sufficient to note that it is infinitely more explicit, more detailed, more balanced, more carefully phrased and counterpoised, representing a multi-disciplinary effort on the part of hundreds of expert advisors and political negotiators to produce a blueprint for the future governance of the country.'³⁰⁷

In 1990 the 'Nationalist' government of South Africa entered into negotiations with the ANC (African National Congress) dominated opposition groups (the so-called 'liberation' movement). It was these negotiations which lead to the formation of the Interim Constitution and to the first democratic elections in 1994. The democratically elected government then negotiated and finalised the Constitution in due course.³⁰⁸

Coinciding with the Constitutional processes were a number of environmentally significant developments. The 1992 Rio Conference and the Rio Declaration were seminal moments in the evolution of *Sustainable Development*³⁰⁹ along with *Caring for the Earth: A Strategy for*

³⁰⁶ Carpenter, S. R., Bennett, E. M. and Peterson, G. D., 'Scenarios for ecosystem services: an overview'. (2006) 11(1) *Ecology and Society* 29 - 38 at 29 (references omitted).

³⁰⁷ Kriegler J comparing the South African Constitution to that of the United States of America states. 'The United States Constitution stands as a monument to the vision and the libertarian aspirations of the Founding Fathers; and the First Amendment in particular to the values endorsed by all who cherish freedom. But they paint eighteenth century revolutionary insights in broad, bold strokes. The language is simple, terse and direct, the injunctions unqualified and the style peremptory. Our Constitution is a wholly...' *S v Mamabolo (E TV and Others Intervening)* 2001 (3) SA 409 (CC) at [40].

³⁰⁸ See generally Sarkin, J. 'The Drafting of South Africa's Final Constitution from a Human-Rights Perspective' (1999) 47 *American Journal of Comparative Law* 67 – 87 as discussed below.

³⁰⁹ 'The United Nations Conference on the Environment and Development (also known as the Earth Summit) was held in 1992 in Rio de Janeiro, Brazil and attended by approximately 20,000 people from 178 countries. Five documents enunciating the concept of ecologically sustainable development and recommending a programme of action for the implementation of the concept were signed at UNCED. They were:

- The *Rio Declaration on Environment and Development*;
- *Agenda 21*;

Sustainable Living. In addition to the *Rio Declaration* and *Agenda 21* the Rio Conference saw the publication of the *Convention on Biological Diversity*. Also in 1992; the United Nations published its widely-ratified UNFCCC (the United Nations Framework Convention on Climate Change). South Africa promulgated its Interim Constitution in 1993 and the Constitution in 1996. The early 1990's therefore represented an extremely fertile period in the formulation of environmental law and policy from a South African perspective.

The Constitutional negotiation³¹⁰ process appears to be critical to the interpretation of Section 24(b).³¹¹ This was a two phase process with the Interim Constitution being the product of a negotiated settlement where the primary role players were the Nationalist Government and the ANC led liberation movement. These two parties then formed a government of national unity and, through the Constitutional Assembly and employing a broadly consultative process, forged the Constitution which was subsequently adopted.³¹²

In drafting Section 24(b) the starting point was Section 29 of the Interim Constitution. Section 29 was both welcomed and criticised. Some of the criticisms³¹³ were listed by Glavovic as: ‘

- it is doubtful whether it is of horizontal application
- it does not impose the duty to uphold it on the state and all persons, including juristic persons;

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- The *Convention on Biological Diversity*;
 - The *Framework Convention on Climate Change*; and
 - The *Statement of Forest Principles*.’

From Preston, B. J. *Ecologically Sustainable Development in the Courts in Australia and Asia* A paper presented to a seminar on environmental law organised by Buddle Findlay, Lawyers, Wellington, New Zealand, 28 August 2006 at page 4, footnote omitted.

³¹⁰ Sachs prefers to regard the process as a ‘construction’ and argues against negotiation, by constructing a bill of rights a purpose built document is achieved. See Sachs, A. ‘Towards A Bill Of Rights In A Democratic South Africa’ (1990) 6 *SAJHR* 1 – 24 at 10 – 11.

³¹¹ Sarkin objectively describes this negotiation process in some detail. Sarkin, J., ‘The Drafting of South Africa's Final Constitution from a Human-Rights Perspective’ (1999) 47 *American Journal of Comparative Law* 67 - 87 at 68, footnote omitted.

³¹² Sarkin, in his comprehensive discussion of the process, pages 67 – 77 inclusive, records the adoption (page 72) thus: ‘As the two-year deadline for completion of the text approached, much of the final negotiations took place in all-night sessions. The text was finally adopted on 8 May, approved by an overwhelming majority of 80 out of 90 Senators and 321 out of 400 National Assembly members. The African National Congress (ANC) voted in favor, as did the Pan Africanist Congress (PAC), the National Party (NP) and the Democratic Party (DP). The African Christian Democratic Party (ACDP), holding two seats, was the only party to vote against the Constitution, while the white right-wing party, the Freedom Front, abstained.’ After amendment following certification by the Constitutional Court the final version was signed into law in Sharpeville on 10 December 1996. Sarkin, J., ‘The Drafting of South Africa's Final Constitution from a Human-Rights Perspective’ (1999) 47 *American Journal of Comparative Law* 67 – 87.

³¹³ See also Kotzé, L. J., ‘A Critical Survey of Domestic Constitutional Provisions Relating to Environmental Protection in South Africa’ (2007) 14 *Tilburg Law Review* 298 at 301 – 302, footnotes omitted.

- it is negatively phrased and thus qualitatively inferior to the other rights entrenched in [the bill of rights];
- it makes no reference to sustainable development or the wise use of natural resources;
- it makes no reference to the interests of future generations;
- it makes no reference to the minimisation of waste generation and pollution;
- it makes no reference to consideration of the environment in land use planning;
- it makes no reference to the protection of biodiversity;
- it makes no reference to the protection of our natural heritage (sites, wilderness and wildlife);
- it makes no reference to the promotion of environmental education and awareness.³¹⁴

Whilst it is not argued that the re-formulation of the environmental right as Section 24 (and in particular through the inclusion of Section 24(b)) was intended to address any or all of these criticisms it is clear that some were addressed when the draft of Section 24 (then proposed as Section 23), was produced.³¹⁵

The Nationalist Government's stance to the environment seems to be best illustrated through its Environment Conservation Act, no. 73 of 1989. This was based on a preceding parliamentary Bill which 'contained a far-reaching section which was akin to an environmental bill of rights.'³¹⁶ This section referred to itself as a 'National Policy for Environmental Conservation. Statement of principles' and, in accordance with the proposed section 3(3), 'All other laws shall be interpreted and administered in accordance with the principles and policy contained in this Act'³¹⁷ This Policy was subsequently promulgated³¹⁸ (just before the first democratic elections) in an amended format, by the Nationalist Government, as the 'General Policy in terms of the Environment Conservation Act 73 of 1989' the preamble³¹⁹ to this is set out below:

'The environmental policy is based on the following premises and principles:

[1] Every inhabitant of the Republic of South Africa has the right to live, work and relax in a safe, productive, healthy and aesthetically and culturally

³¹⁴ Glavovic, P. D., 'Environmental Rights as Fundamental Rights' (1996) 3 *SAJELP* 71 - 79 at 78.

³¹⁵ See section 1.3 above.

³¹⁶ Glazewski, J., 'The Environment, Human Rights and a New South African Constitution' (1991) 7 *SAJHR* 167 – 184 at 180 also see Lyster, R. 'The Protection of Environmental Rights' (1992) 109 *SALJ* 518 – 528 at 521.

³¹⁷ Section 3(3) of the Environment Conservation Bill as reported by Glazewski, J., 'The Environment, Human Rights and a New South African Constitution' (1991) 7 *SAJHR* 167 – 184 at 181.

³¹⁸ GN 51 of 1994 (Government Gazette 15428 of 21 January 1994) as per *Juta's Environmental Library* 30 September 2013, Jutastat Publications, South Africa.

³¹⁹ Paragraph numbering has been inserted for ease of reference.

acceptable environment and therefore also has a personal responsibility to respect the same right of his fellow man.

[2] Every generation has an obligation to act as a trustee of its natural environment and cultural heritage in the interest of succeeding generations. In this respect, sobriety, moderation and discipline are necessary to restrict the demand for fulfilment of needs to sustainable levels.

[3] Every inhabitant of the Republic of South Africa has the responsibility to regulate the size of his family to such an extent as to ensure that the population growth be kept within the confines of available resources so as to make possible a meaningful life for his descendants.

[4] The State, every person and every legal entity has a responsibility to consider all activities that may have an influence on the environment duly and to take all reasonable steps to promote the protection, maintenance and improvement of both the natural environment and the human living environment.

[5] The maintenance of natural systems and ecological processes and the protection of all species, diverse habitats and land forms is essential for the survival of all life on earth.

[6] Renewable resources are part of complex and interlinked ecosystems and must through proper planning and judicious management be maintained for sustainability. Non-renewable natural resources are limited and their utilisation must be extended through judicious use and maximum reuse of materials with the object of combating further over-exploitation of these resources.

[7] The concept of sustainable development is accepted as the guiding principle for environmental management. Development and educational programmes are necessary to promote economic growth, social welfare and environmental awareness, to improve standards of living and to curtail the growth in the human population. Such programmes must be formulated and applied with due regard for environmental considerations.

[8] A partnership must be established between the State and the community as a whole, the private sector, developers, commerce and industry, agriculture, local community organisations, non-Governmental organisations (representing other relevant players), and the international community so as to pursue environmental goals collectively.

Environmental Management System

[9] Each Minister, Administrator, local authority and government institution upon which any power has been conferred or to which any duty which may have an influence on the environment has been assigned by or under any act shall exercise such power and perform such duty with a view to promoting the

objectives stated in section 2 of the Environment Conservation Act, 1989 (Act 73 of 1989).

[10] Every Government department and institution will accept full accountability for the consequences that the activities within its field of responsibility may have on the environment.

[11] The Department of Environment Affairs must conduct a continuous process of consultation, co-ordination, policy formulation, planning, legislation, monitoring and evaluation that is designed to direct and influence the activities of all Government institutions, non-Governmental organisations, private entrepreneurs and other participants in such a way that policy objectives are pursued.

[12] Although environmental matters are primarily the responsibility of the Central Government, executive responsibilities should, as far as possible, be devolved to regional and provincial governments and local authorities according to national norms, standards and guidelines established by the Central Government. Regional governments will be responsible for all regional environmental matters. Regional governments must, however have the financial means and proven expertise to perform such functions.

[13] Organisations, companies and other players whose activities may have an impact on the environment must be encouraged to establish and implement formal environmental management systems based on acceptable standards and guidelines so as to enable them to exercise self-control over any of their activities that may influence the environment.'

This Policy was binding on '[e]ach Minister, Administrator, local authority and government institution upon which any power has been conferred or to which any duty has been assigned in connection with the environment by or under any law...'³²⁰

The second main role player, the ANC, had produced a document, 'A Bill of Rights for a New South Africa',³²¹ in 1990 and this was revised in 1993. These were drafts of what would, through negotiation, become the Interim and then Final Constitution respectively. Both provided for environmental rights and the revised text³²² is quoted below:

³²⁰ Section 3 of the Environment Conservation Act 73 of 1989 prior to amendment in 1992 and the subsequent repeal of this section.

³²¹ <http://www.anc.org.za/show.php?id=231> accessed 26 April 2014.

³²² Provisions relating to Land only have been omitted, see <http://www.anc.org.za/show.php?id=231> accessed 26 April 2014.

'Article 12 LAND AND THE ENVIRONMENT

(1) The land, the waters and the sky and all the natural assets which they contain, are the common heritage of the people of South Africa who are equally entitled to their enjoyment and responsible for their conservation.

(2) The system of property rights in relation to land shall take into account that it is the country's primary asset, the basis of life's necessities, and a finite resource.

Rights to Land

(3)...(11) omitted.

(12) All natural resources below and above the surface area of the land, including the air, and all forms of potential energy or minerals in the territorial waters, the continental shelf and the exclusive economic zone of South Africa, which are not otherwise owned at the time of coming into being of this Constitution, shall be vested in the state acting as trustee of the whole nation.

(13) The State shall have the right to regulate the exploitation of all natural resources, grant franchises and determine royalties subject to payment of just compensation in the event of interference with any existing title, mining right or concession.

Environmental Rights

(14) All men and women shall have the right to a healthy and ecologically balanced environment and the duty to defend it.

(15) In order to secure this right, the State, acting through appropriate agencies and organs shall conserve, protect and improve the environment, and in particular:

- a) prevent and control pollution of the air and waters and degradation and erosion of the soil;
- b) have regard in local, regional and national planning to the maintenance or creation of balanced ecological and biological areas and to the prevention or minimising of harmful effects on the environment;
- c) promote the rational use of natural resources, safeguarding their capacity for renewal and ecological stability.
- d) ensure that long-term damage is not done to the environment by industrial or other forms of waste;
- e) maintain, create and develop natural reserves, parks and recreational areas and classify and protect other sites and landscapes so as to ensure the preservation and protection of areas of outstanding cultural, historic and natural interest.

(16) Legislation shall provide for co-operation between the State, non-governmental organisations, local communities and individuals in seeking to

improve the environment and encourage ecologically sensible habits in daily life.

(17) The law shall provide for appropriate penalties and reparation in the case of any damage caused to the environment, and permit the interdiction by any interested person or by any agency established for the purpose of protecting the environment, of any public or private activity or undertaking which manifestly and unreasonably causes or threatens to cause irreparable damage to the environment.'

These two excerpts clearly indicate the respective policy positions of the two primary role players regarding environmental rights. Furthermore the policy positions clearly influenced the content of Section 24(b) and must therefore be strong indicators of the intention³²³ of the drafters of the Constitution.³²⁴ They will be referred to as the *Government Policy* and the *ANC Policy* respectively. It is also apparent that, despite differences, they are very similar in many regards.

The Government position was also influenced by the South African Law Commission which proposed a draft environmental right before 1991 (and the promulgation of the *Government Policy* in 1993):

"‘Everyone has the right not to be exposed to an environment which is dangerous to human health or well-being or which is seriously detrimental thereto and has the right to the conservation and protection of that environment.’"³²⁵

The Law Commission also reportedly proposed ‘that the *jus abutendi* (the common-law right of the owner of property to do as he likes with it) ought to be abolished’.³²⁶ This draft right is important as it indicates a clear ecocentric environmental conservation and protection element (these are not linked to or measured by human health or well-being) in addition to

³²³ Although a contextual and purposive interpretation is preferred (see ‘Constitutional Interpretation’ section 1.1 above) the drafters’ intention can still be a useful starting point. For a discussion of the problems of interpretation based on intention see Davis, D., ‘Overview of the 1993 Interim Constitution and 1996 Constitution’ in Davis, Cheadle and Haysom (eds.) *Fundamental Rights in the Constitution: Commentary and Cases*. Cape Town, Juta and Co., (1997), pages 1-24.

³²⁴ It is assumed that, in preparing the Interim Constitution, the focus was on the more immediate political and fundamental freedom rights. Certainly section 29 of the Interim Constitution seems to be a curt rendition of two clearly more complex positions. Presumably this was, as with the whole Interim Constitution, a stopgap measure as well as being a trade off in a larger political game. The ‘trade off’ argument is advanced by Kotzé, L. J., ‘A Critical Survey of Domestic Constitutional Provisions Relating to Environmental Protection in South Africa’ (2007) 14 *Tilburg Law Review* 298 at 301.

³²⁵ Lyster, R., ‘The Protection of Environmental Rights’ (1992) 109 *SALJ* 518 – 528 at 527 citation omitted.

³²⁶ Lyster, R., ‘The Protection of Environmental Rights’ (1992) 109 *SALJ* 518 – 528 at 527.

the anthropocentric health and well-being environmental rights. Respectively the progenitors of Section 24(b)(i), Section 24(b)(ii) and Section 24(a). The proposal to limit property ownership rights is an important factor as will be seen when the question of reasonableness in limiting rights (a possible deprivation of property rights) is discussed later on.

The intention of the drafters is an important interpretive tool but its importance should not be overstated. The, more important, purposive approach to constitutional interpretation requires an assessment of the putative purpose of the constitutional provision within its textual parameters. In doing this the purposive context is important. Furthermore constitutional provisions need to remain fluid to address the situation as it is and not as it was when the constitution was drafted. In this regard a very brief look at some of the environmental issues facing South Africa is useful as addressing these environmental issues must be the purpose of an environmental right.

4.4 Environmental Context

On a global scale biodiversity has declined by 30% while demand for natural resources has doubled since 1966 and it takes the biosphere one and a half years to replenish the renewable resources consumed by humans every year.³²⁷ Biodiversity is an important measure of an ecosystem's resilience and its ability to provide ecosystem goods and services, the value of which can be significant. The IPCC paints a disturbing picture of current and future global climate change and South Africa will be directly affected.³²⁸ Hanski notes the decline in mammal and bird species thus:

‘Almost all of the mammalian and bird species known to science — numbering some 15,000 — have been assessed for their conservation status: 1–2% of these species have gone extinct in the past 400 years, and another 12% of birds and 23% of mammals are now classified as threatened. Among the other vertebrates, only 5% of the species are sufficiently well known to allow for classification; among those, 1–5% have gone extinct and a staggering 40–70% are threatened.’³²⁹

³²⁷ The facts and figures quoted here are unverified and have been taken, verbatim, from the biennial; WWF, *Living Planet Report 2012 – Summary* (2012) Gland, Switzerland.

³²⁸ IPCC, 2013: Climate Change 2013: The Physical Science Basis. Contribution of Working Group I to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change.

³²⁹ Hanski, I., ‘The World that Became Ruined’ (2008) 9 *EMBO Reports Special Issue* s34 at s35.

In a South African context:³³⁰ nearly a fifth of South Africa's total land area has been transformed³³¹ and 'KwaZulu-Natal, Gauteng and the North West are amongst the provinces that have had the greatest loss of natural habitat. And if the remaining natural areas continue to be transformed into crops and forestry or turned over to mining or urban sprawl at the current rate, there will be little to no natural vegetation left in these provinces by 2050, outside of protected areas'.³³² Only about 25% of terrestrial ecosystems are formally protected and 35% are completely unprotected, 10% of South Africa's wetlands are regarded as being protected and only about 9% of the coastline is situated in marine protected areas.³³³

Biodiversity is threatened to different extents: There are 754 species of bird of which 681 are classified as being 'of least concern'; there are 297 species of mammal of which 232 are classified as being 'of least concern'; there are 118 species of amphibian of which 96 are classified as being 'of least concern'; and 44 species reptiles of which zero are least concern. One species of mammal was declared extinct and the rest range between 'lower risk' to 'critically endangered'.³³⁴ About 600 invasive alien species have been recorded and these threaten indigenous biodiversity.³³⁵ While both deep sea and inshore fish catches are in steady decline.³³⁶

Resource consumption is increasing: Wood and fossil fuels are important domestic energy sources, the number of households with access to electricity has gone from 8,975,000 in 2002 to 12,361,000 in 2011.³³⁷ Coal consumption has steadily increased.³³⁸ The total number of motor vehicles on South Africa's roads has increased by 19.35% between 2006 and 2011 and of these private vehicles account for 66.28% of the total number.³³⁹ The human population has grown from 44.56 million in 2001 to 50.59 million in 2011,³⁴⁰ although

³³⁰ The facts and figures used here were sourced from Department of Environmental Affairs, South Africa *Environmental Sustainability Indicators: Technical Report 2011* (2011) Department of Environmental Affairs, Pretoria and South African National Biodiversity Institute. *Life: the state of South Africa's biodiversity 2012*. (2013) South African National Biodiversity Institute, Pretoria.

³³¹ *Technical Report* fn 330 at 38.

³³² SANBI *Life: the state of South Africa's biodiversity 2012*. (2013) at 12.

³³³ SANBI *Life: the state of South Africa's biodiversity 2012*. (2013) at 13, 18 and 37.

³³⁴ *Technical Report*, fn 330 at 33.

³³⁵ SANBI *Life: the state of South Africa's biodiversity 2012*. (2013) at 48.

³³⁶ *Technical Report*, fn 330 at 46.

³³⁷ *Technical Report*, fn 330 at 29.

³³⁸ *Technical Report*, fn 330 at 71.

³³⁹ *Technical Report*, fn 330 at 73.

³⁴⁰ *Technical Report*, fn 330 at 82.

the growth rate is declining.³⁴¹ Carbon emissions per capita have increased steadily since 2005 and are at the highest levels ever. They appear set to continue this trend³⁴² and this will exacerbate the global climate change problems.

South Africa is resource constrained: South Africa has consistently exceeded the ecological carrying capacity of the country since 1996.³⁴³ Water is in short supply and in the 19 declared water management areas only 6 are projected to have a surplus capacity by 2025.³⁴⁴

Although the complexity of environmental issues deserves a more thorough study; what has been touched upon above indicates some of the issues facing humanity and the environment. An important feature of these issues is that much of the environment occurs outside of formally protected areas. This places humans firmly in the 'natural' environment and means that each individual can have a direct impact upon the environment. Furthermore pollution, consumption, conservation and land transformation can all happen at the level of the individual and can have significant local and global impacts.

The environmental context, outlined above, paints a grim picture for the future of both humankind and the environment. There is clear need for law to address these issues and an environmental right, such as Section 24 and in particular Section 24(b), must have, as its primary purpose, protection of the environment and, by doing so, benefitting humanity.

³⁴¹ *Technical Report*, fn 330 at 84.

³⁴² *Technical Report*, fn 330 at 171.

³⁴³ *Technical Report*, fn 330 at 93.

³⁴⁴ *Technical Report*, fn 330 at 102.

Part Five: A Purposive and Generous Interpretation of Section 24(b)

5.1 Fundamental or Progressive Right?

It has been stated that: 'Section 24 establishes a fundamental environmental right (in the substantive sense) ...[and]... is an anthropocentric right.'³⁴⁵ Whist the former is accepted the nature of the right, with respect, remains to be determined.

Section 24 is divided into two parts, (a) and (b). Section 24(a) reads as: '[e]veryone has the right to an environment that is not harmful to their health or well-being'. This represents what can be described as a negative fundamental human right. Section 24(b)(iii) (as an example of Section 24(b)) is best described as a positive social fundamental right allowing for formal participation by the right holder.³⁴⁶ However there is an element of a directive principle of State policy directive to this right. The State is charged with doing something i.e. developing the law 'through reasonable legislative and other measures'. Murphy J stated in this regard that:

'Section 24(a) of the Constitution guarantees the fundamental right of everyone to an environment that is not harmful to their health or well-being. Section 24(b) imposes programmatic and positive obligations on the State to protect the environment through reasonable legislative and other measures that prevent pollution and ecological degradation; promote conservation; and secure ecologically sustainable development, while promoting justifiable economic and social development.'³⁴⁷

This reasoning has not yet been confirmed by the Constitutional Court and anyway does not exclude other possible interpretations of Section 24(b). A strict interpretation of Section 24(b) as being purely programmatic ignores the apparent intention of the drafters who, as discussed previously, expressed ecocentric leanings. There is also a practical contradiction between 24(a) and 24(b) which is discussed later on.

³⁴⁵ Du Plessis, A., *Fulfilment of South Africa's Constitutional Environmental Right in the Local Government Sphere* (2008) LLD Thesis, North-West University at 342 footnotes omitted.

³⁴⁶ For a discussion of these principles refer to van Reenen, T. P., 'Constitutional Protection of the Environment: Fundamental (Human) Right or Principle of State Policy'. (1997) 4 *SAJELP* 269 – 290 particularly at 270 -273.

³⁴⁷ *HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2006 (5) SA 512 (T) at [16].

The inclusion of an element of a policy directive into a fundamental right results in the right as a whole being both a subjective right and, in part, objective law. 'Most constitutional environmental provision[s] are neither typical fundamental rights nor typical directive principles, but simultaneously contain elements of both types of mechanism.'³⁴⁸ And therefore this blending of the two is not unusual in constitutional environmental rights. An example of where such blending does not occur is in the Namibian Constitution where no fundamental environmental right is established in the 'bill of rights'³⁴⁹ but a clear environmental policy directive³⁵⁰ exists in chapter eleven, Principles of State Policy. The state is charged with the task of developing law but no individual acquires a subjective right in respect of the environment.³⁵¹ Similarly the Nigerian Constitution (of 1999) seemingly only provided a non-justiciable environmental directive as opposed to a fundamental right.³⁵²

The positive element of the positive right stems from the policy directive upon the state to protect the environment 'through reasonable legislative and other measures'. Similar directives can be found elsewhere in the Constitution's Bill of Rights in the socio-economic rights dealing with property,³⁵³ housing³⁵⁴ and healthcare, food, water and social security³⁵⁵ and education.³⁵⁶ Section 24(b) can be distinguished from these other rights in that these other rights contain a proviso limiting the steps which the state must take to those 'within its available resources' and that this occurs 'progressively, no such limitations are imposed in Section 24(b).'³⁵⁷ This distinction suggests that Section 24(b) is an 'original right of participation' whilst the other rights referred to are less 'original rights' but more of the nature of 'derivative rights'. 'An original right of participation recognizes a direct claim of the individual against the state for conferral of some good or service. A derivative right grants

³⁴⁸ van Reenen, T. P., 'Constitutional Protection of the Environment: Fundamental (Human) Right or Principle of State Policy'. (1997) 4 *SAJELP* 269 – 290 at 274.

³⁴⁹ Chapter Three of the Namibian Constitution is headed 'Fundamental Human Rights and Freedoms'.

³⁵⁰ Article 95(l) of the Namibian Constitution states that, in promoting the welfare of the people, 'The State shall actively promote and maintain the welfare of the people by adopting, *inter alia*, policies aimed at the following: maintenance of ecosystems, essential ecological processes and biological diversity of Namibia and utilization of living natural resources on a sustainable basis for the benefit of all Namibians, both present and future; in particular, the Government shall provide measures against the dumping or recycling of foreign nuclear and toxic waste on Namibian territory.' See fn 349 above.

³⁵¹ For a discussion of this see Obbes, D., 'Maintaining Biological Diversity – A Namibian Constitutional Perspective' (1999) 6 *SAJELP* 161 -170.

³⁵² As discussed by Okon E. E., 'The Environmental Perspective in the 1999 Nigerian Constitution' (2003) 5 *Environmental Law Review* 256.

³⁵³ Section 25(5).

³⁵⁴ Section 26(2).

³⁵⁵ Section 27(2).

³⁵⁶ Section 29(1)(b).

³⁵⁷ This distinction is important and will be discussed later on, for the present it is accepted that the state bears this responsibility but this will also be discussed more fully later on.

participation to the individual only in the framework of provided goods and services. The initial decision to provide either of the latter remains in the discretion of the government'.³⁵⁸ In the case of the rights referred to it is probably more correct to regard these as being made available subject to the objective resources of government than to the subjective discretion of government.

Section 29(1) of the Constitution sets out the 'right to education'. As with Section 24 section 29(1) is composed of two parts, part (a) is a fundamental right stating that: 'Everyone has the right to a basic education...', and a definite positive directive to the State in part (b): 'Everyone has the right to further education, *which the state, through reasonable measures, must make progressively available and accessible.*' (The 'progressive element' has been emphasised). Section 29(1) has been interpreted by the Constitutional Court and this interpretation provides very useful insight on the nature of Section 24 given their similarities and differences.

'It is important, for the purpose of this judgment, to understand the nature of the right to "a basic education" under section 29(1)(a). Unlike some of the other socio-economic rights, this right is immediately realisable. There is no internal limitation requiring that the right be "progressively realised" within "available resources" subject to "reasonable legislative measures". The right to a basic education in section 29(1)(a) may be limited only in terms of a law of general application which is "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom". This right is therefore distinct from the right to "further education" provided for in section 29(1)(b). The state is, in terms of that right, obliged, through reasonable measures, to make further education "progressively available and accessible."³⁵⁹

This interpretation strongly supports the interpretation of Section 24 used above. The relevance of the omission of the 'progressive element' remains to be interrogated. Certainly the lack of a 'progressive element' implies with a great deal of certainty that Section 24(b) is 'immediately realisable'.

³⁵⁸ van Reenen, T. P., 'Constitutional Protection of the Environment: Fundamental (Human) Right or Principle of State Policy'. (1997) 4 *SAJELP* 269 – 290 at 272, for a general discussion on constitutional rights see Brandl, E. and Bungert, H., 'Constitutional Entrenchment Of Environmental Protection: A Comparative Analysis Of Experiences Abroad' (1992) 16 *Harvard Environmental Law Review* 1 – 100 at 3 – 14.

³⁵⁹ *Governing Body of the Juma Masjid Primary School and Others v Essay NO and Others* 2011 (8) BCLR 761 (CC) at [37].

It is submitted that Section 24(a) and Section 24(b) are separate rights and that Section 24(b) is not simply a programmatic formulation of Section 24(a).³⁶⁰ The first is a negative right³⁶¹ and, based on the reasoning of Yacoob J in the *Grootboom* case,³⁶² we can infer that the court will hold that there is 'a negative obligation placed upon the State and all other entities and persons to desist from preventing or impairing the right [to an environment that is not harmful to [human] health or well-being'³⁶³]. Section 24(b) is a separate right and can stand alone, and independently, of Section 24(a). With reference to the *Grootboom* case³⁶⁴ we can hold that Section 24(b):

'speaks to the positive obligation imposed upon the State. It requires the State to devise a comprehensive and workable plan to meet its obligations in terms of the subsection. However [Section 24(b)] also makes it clear that the obligation imposed upon the State is not an absolute or unqualified one. The extent of the State's obligation is defined [in part] by ...the obligation to 'take reasonable legislative and other measures'...'

Like the right to housing which formed the basis of the discussion in *Grootboom* given above, Section 24(b) creates a positive duty on the State typical of second generation (or socio-economic) rights³⁶⁵ but arguably, through section 24(b)(i) in particular, also creates a negative obligation³⁶⁶ similar to that created in Section 24(a) and provides guidelines on how the right is to be developed. Section 24 is therefore a peculiar right and has similarities with

³⁶⁰ This viewpoint is supported by du Plessis, A., 'Adding Flames to the Fuel: Why Further Constitutional Adjudication is Required for South Africa's Constitutional Right to Catch Alight' (2008) 15 *SAJELP* 57 – 84 at 61 and by Kotzé, L. J., 'A Critical Survey of Domestic Constitutional Provisions Relating to Environmental Protection in South Africa' (2007) 14 *Tilburg Law Review* 298 at 307 – 308.

³⁶¹ Couzens in his critique of the *Fuel Retailers* case notes: 'S 24(a) provides that everyone has the right "to an environment that is not harmful to their health or well-being;..."'; which is very different from the right "to a healthy environment". The latter is a positive right; and the former a negative right. To explain the difference with an example [in the case of the negative right]: were a litigant against the State to claim that his or her constitutional right was infringed by a polluted environment, the State could remedy the problem by moving the person...; whereas, [in the case of a positive right]..., the State could remedy the situation only by placing the environment itself into a healthy condition.' Couzens, E., 'Filling Station Jurisprudence: Environmental Law in South African Courts and the Judgement in *Fuel Retailers Association of Southern Africa v Director-General Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province, and Others*' (2008) 15 *SAJELP* 23 – 56 at 51.

³⁶² *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) at [34].

³⁶³ From Section 24(a) of the Constitution.

³⁶⁴ *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) at [38].

³⁶⁵ This also appears to be the conclusion of du Plessis, A., 'Adding Flames to the Fuel: Why Further Constitutional Adjudication is Required for South Africa's Constitutional Right to Catch Alight' (2008) 15 *SAJELP* 57 – 84 at 62.

³⁶⁶ The omission of the proviso limiting the obligation imposed upon the state which is found in each of the three socio-economic rights listed means that the right is both an absolute, negative, right and a positive progressive right. Furthermore the right to have 'the environment protected...through reasonable legislative and other measures which prevent pollution and ecological degradation' (s24(b)(i)) qualifies as a negative right.

the socio-economic rights referred to but, importantly, is a justiciable^{367, 368} negative right.³⁶⁹ Arguably only the requirements to promote conservation and to promote justifiable development are truly positive directives, the balance are negatively framed. Prevention of pollution and prevention of ecological degradation are both negatively framed, and this permits them to be negative rights. The lack of the progressive element means that they are immediately justiciable³⁷⁰ and the lack of a directive specifying against whom action can be taken opens the door to the possibility of the right being exercised both vertically and horizontally. Whilst Section 24(b) has elements of a directive measure it has, probably correctly, been described as being '**more in the nature** of a directive principle'³⁷¹ rather than as a directive principle *per se*.

Section 24(b) should therefore be regarded as being a fundamental human right characterised by being an original right of participation which incorporates an element of a policy directive requiring the State to take positive steps to realise the right and guiding the State in how to do so. Reference to Section 24(b) generally and to Section 24(b)(iii) in particular as a fundamental right must be seen in light of this.

³⁶⁷ Kotzé is not as adamant in this regard but states that 'This contention [i.e. that Section 24 is justiciable on its own] is substantiated by the argument that the environmental right requires no further legislative definition than any of the other rights (for example, the right to life) in the Bill of Rights, and hence no specific acts to facilitate legislative implementation and enforcement.' Kotzé, L. J., 'A Critical Survey of Domestic Constitutional Provisions Relating to Environmental Protection in South Africa' (2007) 14 *Tilburg Law Review* 298 at 332.

³⁶⁸ Where legislation has been passed which purport to implement Constitutional right then a litigant has to rely on such legislation and not the right. If it is alleged that the legislation is defective then the 'litigant may not bypass that legislation and rely directly on the Constitution without challenging that legislation as falling short of the constitutional standard.' *South African National Defence Union v Minister of Defence and Others* 2007 (5) SA 400 (CC) at [51].

³⁶⁹ Feris reasons that 'section 24 is unique' in that it imposes vertical and horizontal positive obligations. Her reasoning is limited to Section 24(a) which 'purports that private actors shoulder some of the custodial duties ... the duties flowing from section 24(a) and resting on private actors may be of a slightly more moderate nature [than those of the State]. At a minimum, it includes the duty of care standard as it applies in environmental law' but regards Section 24(b) as applying only to the State. Feris, L., 'The Public Trust Doctrine and Liability for Historic Water Pollution In South Africa' (2012) 8:1 *Law of Environment and Development Journal* 1 – 18 at 17.

³⁷⁰ In *Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC) at [57] O'Regan J states: 'That obligation [the progressive element] requires the State to take reasonable legislative and other measures progressively to achieve the right of access to sufficient water within available resources. It does not confer a right to claim 'sufficient water' from the State immediately.' Conversely a lack of the progressive element would imply that the right could be claimed immediately.

³⁷¹ *HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2006 (5) SA 512 (T) at [17] emphasis added.

In discussing Section 24(b) it is significant³⁷² to note that, unlike the socio-economic rights discussed previously, the positive directive given to develop the right is not limited by the resources available to the State, nor is there an injunction requiring the right to be developed progressively over time. There is also no specific directive aimed at the State. These distinctions are important.³⁷³ The omission of the 'progressive elements' strongly indicates that the right is more of a fundamental right than it is a socio-economic right and that it may be of horizontal application.

5.2 Horizontal or Vertical Application?

Usually it is the State which bears the positive duty to promote³⁷⁴ a right even where the right is a negative one.

'[S]ocio-economic rights (like the right to a basic education) may be negatively protected from improper invasion. Breach of this obligation occurs directly when there is a failure to respect the right, or indirectly, when there is a failure to prevent the direct infringement of the right by another or a failure to respect the existing protection of the right by taking measures that diminish that protection. It needs to be stressed however that the purpose of section 8(2) of the Constitution is not to obstruct private autonomy or to impose on a private party the duties of the state in protecting the Bill of Rights. It is rather to require private parties not to interfere with or diminish the enjoyment of a right. Its application also depends on the "intensity of the constitutional right in

³⁷² Feris makes the same observation and questions whether or not S24(b) is a socio-economic right Feris, L., 'The socio-economic nature of section 24(b) of the Constitution – some thoughts on *HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism* (HTF)' (2008) 23 *SAPR/PL* 194 – 207 at 202 - 204. Feris then proceeds on the basis that it is a distinguishable socio-economic right because of the lack of the progressive element and the resource element. While authors such as Kotzé and du Plessis regard Section 24(b) as being a socio-economic right and do not draw this distinction. Kotzé, L. J., 'A Critical Survey of Domestic Constitutional Provisions Relating to Environmental Protection in South Africa' (2007) 14 *Tilburg Law Review* 298 at 307 – 308; and Du Plessis, A., 'South Africa's Constitutional Environmental Right (Generously) Interpreted: What is in it for Poverty?' (2011) 27 *SAJHR* 279 – 307 at 282 and 300 although du Plessis has previously commented on this distinction she regards Section 24(b) as a purely socio-economic right. Du Plessis, A., *Fulfilment of South Africa's Constitutional Environmental Right in the Local Government Sphere* (2008) LLD Thesis, North-West University at 354 – 355. Kidd 'simply assumes that this responsibility [the positive duty in Section 24(b)] is directed at the state' when discussing Section 24 in broad terms. Kidd, M *Environmental Law* (2nd ed) (2011) Juta & Co., Cape Town at 24. Whilst not dealing specifically with this point the *Bill of Rights Handbook* sets out the 'Environment' right in Chapter 24 and clearly distinguishes it from the 'Socio-Economic Rights' set out in chapter 26. Currie, I and De Waal, J *The Bill of Rights Handbook* (6th ed) (2013), Juta & Co., Cape Town.

³⁷³ As stated by Mogoeng CJ: 'I keep in mind the established principle of interpretation that where the same words are used in the same statute, they should be given the same meaning, unless the context indicates otherwise. The converse is also true.' *Oriani-Ambrosini v Sisulu, Speaker of The National Assembly* 2012 (6) SA 588 (CC) at [27] footnotes omitted.

³⁷⁴ Section 7(2) of the Constitution.

question, coupled with the potential invasion of that right which could be occasioned by persons other than the State or organs of State".³⁷⁵

A private entity has a duty not to interfere or 'invade' the right but does not normally share the State's obligation to promote the right.

Section 24(b), specifying that the realisation of the right is 'through legislative' measures clearly places the responsibility upon the various legislative spheres of the State. The simultaneous use of 'other measures' though allows other branches of government to bear this responsibility and also opens up the possibility that it is not the State alone who bears this duty.

Where the directive is aimed at the State the range of possible 'other measures' is not constrained.

"[O]ther measures' may be construed to mean, amongst others, administrative measures executed in terms of environmental governance mandates relating to issues such as protection of natural resources, regulation of pollution, enforcement of environmental laws, and policy development. 'Other measures' may further include measures of an administrative, technical, financial and educational nature."³⁷⁶

And the Constitutional Court has held that:

'A court considering reasonableness will not enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent. The question would be whether the measures that have been adopted are reasonable. It is necessary to recognise that a wide range of possible measures could be adopted by the State to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that the measure adopted falls within the range of reasonableness, this requirement is met.'³⁷⁷

'Other measures' therefore requires both 'reasonableness' and the necessity to give content to the basic right. Whether or not this could be extended to non-State entities is uncertain.

'The Constitution envisages that legislative and other measures will be the primary instrument for the achievement of social and economic rights. Thus it places a positive obligation upon the State to respond to the basic social and

³⁷⁵ *Governing Body of the Juma Masjid Primary School and Others v Essay NO and Others* 2011 (8) BCLR 761 (CC) at [58] footnotes omitted.

³⁷⁶ Kotzé, L. J., 'A Critical Survey of Domestic Constitutional Provisions Relating to Environmental Protection in South Africa' (2007) 14 *Tilburg Law Review* 298 at 308 footnotes omitted.

³⁷⁷ *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes and Others (Centre on Housing Rights and Evictions and Another, Amici Curiae)* 2010 (3) SA 454 (CC) at [366] footnotes omitted.

economic needs of the people by adopting reasonable legislative and other measures. By adopting such measures, the rights set out in the Constitution acquire content, and that content is subject to the constitutional standard of reasonableness.³⁷⁸

Section 24(b) will clearly apply in a vertical manner as between the State and its inhabitants.³⁷⁹ The positive duty requirement is therefore a right for the benefit of everyone exercisable against the State.³⁸⁰ Section 24 has been interpreted³⁸¹ as imposing an 'onerous constitutional mandate' on government officials to promote conservation and protection of the environment' and that they 'owe the public a duty to ensure ecologically sustainable development.' This is in keeping with the positive element of the right³⁸² but what is important is that an aggrieved person can use this mandate to direct the State against a private party to compel the private entity, through reasonable legislative and other measures, to perform a positive duty. In this regard the right is vicariously justiciable against private entities.

Section 24(b) will also apply in a horizontal manner, i.e. bind a natural or juristic person, 'if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.'³⁸³ This means that, if it is appropriate, Section 24(b) can be enforced directly against a private person.

Du Plessis argues that the 'obligations imposed by section 24(b) are **in the main** directed at government – the legislature, executive and judiciary.'³⁸⁴ Her reasoning for reaching this conclusion is not immediately clear. Legislative measures, by their very nature, can only apply to the legislature and not to the judiciary or to the executive and there is no indication within Section 24(b) that the injunction is directed at any particular person or institution so as

³⁷⁸ *Mazibuko and Others v City of Johannesburg and Others* 2010 (4) SA 1 (CC) at [66]

³⁷⁹ In terms of Section 8(1) of the Constitution.

³⁸⁰ Kotzé, L. J. and du Plessis, A., 'Some Brief Observations on Fifteen Years of Environmental Rights Jurisprudence in South Africa' (2010) 3:1 *Journal of Court Innovation* 157 – 176 at 158.

³⁸¹ *Khabisi NO and Another v Aquarella Investment 83 (Pty) Ltd and Others* 2008 (4) SA 195 (T) at [27].

³⁸² 's 24(b) imposes positive obligations on the state to protect the environment 'through reasonable legislative and other measures that prevent pollution . . . while promoting justifiable economic and social development' *MEC for Agriculture, Conservation, Environment and Land Affairs v Sasol Oil (Pty) Ltd and Another* 2006 (5) SA 483 (SCA) at [14].

³⁸³ Section 8(2) of the Constitution.

³⁸⁴ du Plessis, A., 'Adding Flames to the Fuel: Why Further Constitutional Adjudication is Required for South Africa's Constitutional Right to Catch Alight' (2008) 15 *SAJELP* 57 – 84 at 71, emphasis added and footnotes omitted.

to include these two branches of the State. Section 8(1) of the Constitution explicitly states that all three branches of the State and all organs of State are bound and section 7(2) requires the State to 'respect, protect, promote and fulfil the rights in the Bill of Rights.' There is, however, no indication in the wording of Section 24(b) itself directing the State (other than its legislative parts) to perform a positive duty. The conclusion that all parts of the State bear this positive duty is no doubt correct, but it is implicit rather than explicit.³⁸⁵ Also, why state that the imposition is 'in the main'? This would only apply if other non-state entities were also directed to fulfil the obligation.

Although there is an implicit positive duty on all parts of the State these other parts cannot perform legislative functions but they would be bound by any legislation so produced. The use of 'other measures' broadens the ambit of the directive to include non-legislating branches of the State. However, if one is going to interpret 'legislative and other measures' to include non-legislating branches of the State then it seems equally permissible to apply them to other non-State entities. Put another way, holding the State liable to fulfil 'other measures' requires a reading in of sections 7(2) and 8(1) of the Constitution. This reading in is not disputed but what other provisions or considerations could be brought into play in addition to or in place of section 8(1), could section 8(2) not also be invoked with equal legitimacy?

In discussing the continued State obligation to deliver water, despite having delegated responsibility to do so to private entities, Welch argues that the State cannot contract out of its duties and obligations and that a horizontal application of the right³⁸⁶ is required particularly given the delegation of the State's authority and responsibility to private entities.

'Critics of horizontal application argue that constitutions regulate the public rather than the private sphere. This argument seems rooted in the notion of natural law, which prohibits government interference with private activities. However, this notion of natural law allows non-state entities to violate basic human rights without accountability. Because globalization has led to a growing amount of corporate control over some of the most basic human needs, human rights obligations should apply to the private sphere. In other

³⁸⁵ 'Section 24(b) imposes programmatic and positive obligations on the State to protect the environment through reasonable legislative and other measures...' *HTF Developers* case at [16] and 's 24(b) imposes positive obligations on the state to protect the environment 'through reasonable legislative and other measures that prevent pollution . . . while promoting justifiable economic and social development'.' *Sasol Oil (SCA)* at [14] footnote omitted.

³⁸⁶ Section 27(1)(b) of the Constitution.

words, "[i]f a bill of rights is there to create a 'culture of justification' by those who wield political power, one would question the wisdom of letting those who wield other forms of power akin to state power, or of a nature resulting in violations of individuals' or group rights, escape similar accountability."

The argument against horizontal application of the Constitution to the private sphere would render many constitutional provisions superfluous. The increased number of private actors supplying water and other basic rights would be free to ignore the basic rights recognized under the Constitution without consequence.³⁸⁷

The principle of this argument has been approved, in part, by the Constitutional Court which stated: 'Our Constitution ensures, ..., that government cannot be released from its human rights and rule of law obligations simply because it employs the strategy of delegating its functions to another entity.'³⁸⁸ The public nature of environmental actions supports this interpretation. To argue that Section 24(b) should not apply in a horizontal manner would render the right superfluous. Welch's argument can be distinguished on the basis that her argument is focussed on private entities exercising the delegated authority (and obligations) of the State; whereas environmental actions are performed by private entities based on their inherent powers and not on State authority. The basis for arguing a horizontal application of the positive duty elements of Section 24 is elaborated below.

In the *Juma Masjid* case³⁸⁹ the Constitutional Court has considered when a private entity (in this case a Trust³⁹⁰) may be burdened with a positive duty by a Constitutional right. This case involved an allegation that a Trust owed a positive duty to learners in terms of section 29(1)(a). Whether or not the private entity bore this duty depended on whether or not 'by providing the premises to a public school, the Trust was performing a public function within the definition of "administrative action" in terms of the Promotion of Administrative Action Act'.³⁹¹ In reaching its decision the court noted in passing:

'Traditionally, because of the clear distinction between public law and private law realms, a private owner could evict any tenant provided that the

³⁸⁷ Welch, A. R., 'Obligations of State and Non-State Actors Regarding the Human Right To Water Under the South African Constitution' (2005) 5 *Sustainable Development Law and Policy* 56 at 62-63.

³⁸⁸ *Micro Finance Case* at [40].

³⁸⁹ *Governing Body of the Juma Masjid Primary School and Others v Essay NO and Others* 2011 (8) BCLR 761 (CC).

³⁹⁰ Interestingly a trust is not strictly speaking a juristic person but rather a collection of natural persons in the form of trustees.

³⁹¹ *Governing Body of the Juma Masjid Primary School and Others v Essay NO and Others* 2011 (8) BCLR 761 (CC) at [16].

requirements of *rei vindicatio* were satisfied. Private entities were held to be free to engage in their economic and social interests without state interference. As a result, over emphasis on the differences between the exercise of private and public power often sheltered **private power used for public purposes**.³⁹²

Ultimately, despite the Trust performing a public (administrative) purpose,³⁹³ it was held that the nature of the right and, in this case the State's obligations under the same right, made it 'clear that there is no primary positive obligation on the Trust to provide basic education to the learners. That primary positive obligation rests on the [State].'³⁹⁴ The fact that the State bore the primary duty excluded the Trust's liability.

The *Juma Masjid* case is illuminating, the court's reasoning strongly indicated that a private entity performing a public (administrative) purpose could, and in this case did, result in the private entity bearing not only the negative element of the right but also the positive duty. Seemingly: only by the ruling that the private entity's positive duty was secondary to the State's prevented a finding that the private entity was liable for fulfilling the positive element of the right.

Using the reasoning of the *Juma Masjid* case³⁹⁵ we could infer that the positive elements of Section 24(b) should be exercised by a private entity in the following circumstances:

1. The private entity was exercising a public power for a public purpose (or function), or
2. The private entity was exercising a private power but for a public purpose. And (in both cases)
3. The private entity bore the primary duty to fulfil the right, to the exclusion of the State.

There doesn't seem to be any doubt that the nature of Section 24(b) and in particular aspects of avoiding ecological degradation, promoting conservation, pollution prevention, ecologically sustainable development and ecologically sustainable use are all functions which can be exercised by private entities. It therefore follows that the nature of the positive duty can possibly be imposed on a private entity where the action (either private or public power) is for a public purpose or of an 'administrative environmental nature'.

³⁹² *Governing Body of the Juma Masjid Primary School and Others v Essay NO and Others* 2011 (8) BCLR 761 (CC) at [55] emphasis added and footnotes omitted.

³⁹³ '[The Trust] performed the public function of managing, conducting and transacting all affairs of the [School] in the most advantageous manner, including the payment of the costs of various items which the [Governing Body] and the Department ought to have provided.' *Governing Body of the Juma Masjid Primary School and Others v Essay NO and Others* 2011 (8) BCLR 761 (CC) at [59].

³⁹⁴ *Governing Body of the Juma Masjid Primary School and Others v Essay NO and Others* 2011 (8) BCLR 761 (CC) at [57].

³⁹⁵ *Governing Body of the Juma Masjid Primary School and Others v Essay NO and Others* 2011 (8) BCLR 761 (CC).

In determining whether or not a private entity is performing a public purpose we need to consider the administrative nature of environmental actions.

5.3 Environmental Administrative Actions

Administrative law is part of public law which governs law used for public functions or in the public purpose. There has been considerable intrusion of this otherwise public law into the arena of private law (the law applying to and binding private entities and private persons). Burns notes this:

‘The distinction between public law and private law has long been a subject of debate in South African legal circles and a number of criteria, none of which were entirely satisfactory, have been used to illustrate this difference. The penetration of public law into the sphere of private law has been discernable for some considerable time...as a result of increased public regulation of private activities, the private performance of public service and the growth of corporatism in modern states.’³⁹⁶

Can it be argued that the ‘penetration of public law into the sphere of private law’ has resulted in private entities bearing a positive environmental duty? Any entity, State or private, with a duty to act in the public interest could conceivably be regarded as performing an administrative action and various private entities have been held to do so.³⁹⁷ If a private body can exercise a power over people not contractually linked to it then it may well be performing an administrative action and therefore be acting in the public purpose.³⁹⁸

A private entity, in making a decision which impacts upon the environment, might be regarded as performing an administrative action. The nature of the environment makes it not only possible but unavoidable that a negative modification of the environment will have a negative impact upon all persons within that environment. Given that there is only one true ecosystem, the biosphere (or ecosphere), any negative modification of the environment will affect all persons.

³⁹⁶ Burns, Y., *Administrative Law Under the 1996 Constitution* (1999) Butterworths, Durban at 41 footnotes omitted.

³⁹⁷ See *Dawnlaan Beleggings (Edms) Bpk v Johannesburg Stock Exchange* 1983 (3) SA 344 (W), *Coetzee v Comitis* 2001 (1) SA 1254 (C), *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Ano* 2007 (1) SA 343 (CC) and *Mobile Telephone Networks (Pty) Ltd v SMI Trading CC* (2012) (6) SA 638 (SCA) respectively.

³⁹⁸ As discussed by Hoexter, C., *Administrative Law in South Africa* (2nd Ed) 2012 Juta & Co. Claremont at 189 - 193.

In the case of *Dawnlaan Beleggings*³⁹⁹ a stock exchange was held to have been licensed because it was in the public interest to do so and had rules imposed upon it 'to safeguard and further the public interest.'⁴⁰⁰ This led the court to hold that:

'Strictly speaking, a stock exchange is not a statutory body. However, unlike companies or commercial banks or building societies formed under their respective statutes, **the decisions of the committee of a stock exchange affect not only its own members or persons in contractual privity with it, but the general public and indeed the whole economy.** It is for that reason that the Act makes the public interest paramount. To regard the [stock exchange] as a private institution would be to ignore commercial reality and would be to ignore the provisions and intention of the Act itself. It would also be to ignore the very public interest which the Legislature has sought to protect and safeguard in the Act.'⁴⁰¹

The changes wrought by the Constitution have led to the courts extending the range of public policy (or public interest):

'[C]onsiderations of public policy cannot be constant. Our society is an ever-changing one. We have moved from a very dark past into a democracy where the Constitution is the supreme law, and public policy should be considered against the background of the Constitution and the Bill of Rights. One can think of many situations which would, prior to 1994, have been found not to offend public policy which would today be regarded as inhuman. Examples are so plentiful that I do not believe that it is necessary for me to mention them.'⁴⁰²

There can be little argument that environmental protection falls squarely within public interest. Furthermore, to paraphrase the excerpt from *Dawnlaan Beleggings*: environmental decisions of the private entities affect not only its own members or itself or persons in contractual privity with it, but the general public and indeed the whole economy. Section 24(a) with its anthropocentric focus is indisputably a ground for public interest, at least insofar as the public is directly impacted by an environment which is rendered harmful to their health or well-being. Section 24(b) would only qualify if it is accepted that the continued good health of the environment, from an ecocentric perspective, is in the public interest. The importance of environmental concerns and the interrelationship between humans and the environment

³⁹⁹ *Dawnlaan Beleggings (Edms) Bpk v Johannesburg Stock Exchange* 1983 (3) SA 344 (W).

⁴⁰⁰ *Dawnlaan Beleggings* at 362 A-B.

⁴⁰¹ *Dawnlaan Beleggings* at 364 H -365 A, emphasis added.

⁴⁰² *Coetzee v Comitis* 2001 (1) SA 1254 (C) at [31].

support the qualification of an ecocentric environmental right as being within the public interest.⁴⁰³

May and Daly make the observation that, in environmental public interest litigation very often the distinctions between private and public law are blurred and the roles of public and private entities may even be reversed.

‘These difficult questions of public policy may, in some instances, even require rethinking the location and the very validity of the public/private line, as governments are held responsible for the environmental degradation caused by their licensees and as corporations are required to take on public goods like environmental clean-up. Environmental litigation may often in fact invert the normal expectations relating to the roles of public and private parties. Whereas traditional constitutional rights litigation pits the private individual against the public authority, environmental litigation often pits members of the public against a private entity (thus invoking the principle of the horizontal application of constitutional rights and obligations). Moreover, in many of these cases, private individuals are asserting public rights, whereas the government is facilitating private gain’⁴⁰⁴

This role reversal enhances the reasoning that the public duty of the private entity is to protect the environment.

The environmental action of a private entity, which is an act or omission within an environmental context and which is in the public interest, therefore meets one of the primary requirements of administrative action. Indeed it is the public interest element, where all people and not only those with contractual privity with the actor, are affected by the environmental action, which is definitive. The public interest element is only one of the requirements for an action to constitute administrative action. ‘[A]t the core of the definition of administrative action is the idea of action (a decision) “of an administrative nature” taken by a public body or functionary’⁴⁰⁵ Environmental action is inherently action of an administrative nature. As stated by Nugent JA: ‘Administrative action is rather, in general terms, the conduct of the bureaucracy (whoever the bureaucratic functionary might be) in carrying out

⁴⁰³ Ecocentric protection can be related to human health for instance: ‘Fundamental human rights to life and liberty, for example, cannot be achieved without adequate environmental conditions of clean water, air, and land.’ May, J. R. and Daly, E., ‘Vindicating Fundamental Environmental Rights Worldwide’ (2009) 11 *Oregon Review of International Law* 365 - 439 at 367; see also Cullet, P., ‘Definition of an Environmental Right in a Human Rights Context’ (1995) 13:1 *NQHR*. 25 - 40 at 26.

⁴⁰⁴ May, J. R. and Daly, E., ‘Vindicating Fundamental Environmental Rights Worldwide’ (2009) 11 *Oregon Review of International Law* 365 - 439 at 414 footnote omitted.

⁴⁰⁵ Nugent JA’s summation of the definition of ‘administrative action’ as set out in the Promotion of Administrative Justice Act no. 3 of 2000 from *Grey’s Marine Hout Bay (Pty) Ltd v Minister of Public Works* 2005 6 SA 313 (SCA) at [22].

the daily functions of the state which necessarily involves the application of policy, usually after its translation into law, with direct and immediate consequences for individuals or groups of individuals.⁴⁰⁶ Environmental actions by a private entity exercising an inherent power rather than State authority (as an organ of State)⁴⁰⁷ or which are not of a bureaucratic nature (i.e. made by a natural person in his or her capacity as a natural person) would not qualify as administrative action and this argument is not intended to suggest otherwise. Environmental actions are inherently though, of a public nature in that their impacts are not confined to persons who have consented to such action occurring or who would necessarily, in the common-law, have injunctive or damages relief for an unlawful action. This means that private entities engaging in environmental actions are engaging in a public purpose.

Conceivably environmental action may be taken by any one of three actors. The first an Organ of State, the second a private entity acting with some sort of state authority and the third a private entity acting in a purely private capacity. In many respects private entities will have the greatest environmental impacts.⁴⁰⁸ The actions of an Organ of State are covered by the explicit legislative requirement of Section 24(b), read with the general obligations imposed upon the State through section 7(2) of the Constitution, and environmental actions would seemingly fall squarely within the parameters of administrative action. A private entity, acting in a purely private capacity, would, in effecting an environmental action, not qualify as a public body or functionary and therefore the environmental action would not qualify as administrative action. Additionally there may not be a bureaucratic decision making process

⁴⁰⁶ *Grey's Marine Hout Bay (Pty) Ltd v Minister of Public Works* 2005 6 SA 313 (SCA) at [24]

⁴⁰⁷ Section 239 of the Constitution defines an 'organ of state' to mean—'(a) any department of state or administration in the national, provincial or local sphere of government; or (b) any other functionary or institution—(i) exercising a power or performing a function in terms of the Constitution or a provincial constitution; or (ii) exercising a public power or performing a public function in terms of any legislation, but does not include a court or a judicial officer;'.⁴⁰⁸

⁴⁰⁸ Dianne Saxe notes the following in discussing corporates and their environmental liability:

- '(a) they are major sources of environmental degradation, although by no means the only sources;
- (b) they wield extensive economic and political power;
- (c) larger corporations commit a disproportionate number of violations of the law;
- (d) corporations handle the most dangerous types of pollutants – individuals rarely have the resources or the need to handle heavy metals, radioactive waste or chemical residues;
- (e) the environmental degradation which corporations cause is relatively concentrates and large in scale compared to the activities of individuals; as a result, corporate activity is more likely to overwhelm natural equilibria;
- (f) corporations have very extensive resources with which to reduce pollution, resources which they have accumulated in part by using up clean air, clean water and other public goods; and
- (g) the localization and scale of corporate pollution typically make it easier to control than the equivalent amount of pollution from individuals'

Saxe, D *Environmental Offences: Corporate Responsibility and Executive Liability* (1990) Aurora Ontario, Canada Law Book at 21.

in the case of a natural person. Despite not qualifying as administrative action an environmental action remains action of an administrative nature as the impacts are felt by people otherwise completely unconnected to the actor. A private entity may well act with some sort of state authority. In *Dawnlaan Beleggings* the actor was a statutorily licenced stock exchange, in the *Comitis Case*⁴⁰⁹ the National Soccer League's rules were constitutionally challenged on grounds of public policy despite being rules of a private organisation, in the *MTN Case*⁴¹⁰ MTN was operating in terms of a state licence to operate a cellular telecommunications network and in the *Micro Finance Case*⁴¹¹ a private entity was deemed an Organ of State by virtue of the function it performed. Private entities may act with State authority (e.g. delegated functions and powers, licences and concessions) or with State sanction (permits and authorisations). There is therefore a likelihood of some private entities engaging in administrative action when taking environmental actions. If a private entity is to be bound to the positive duty element of Section 24(b) for performing an environmental action because it has State authority to do so but would escape any obligation for the same environmental action where such authority is absent (either through a failure to obtain such authority or where it was not required) then the provisions of Section 24(b) would be considerably weakened. In such circumstances achieving the purposes of Section 24(b) would be compromised.

The intrusion of public law into private law relationships is a function of both the increasingly administrative or public nature of actions and / or the increasing use of private entities to perform state functions. The Constitutional Court has observed that 'private institutions were increasingly being used to perform state functions and, ... that the nature of the functionary was of little consequence. On this basis, the crucial inquiry ... was whether the [institution] exercised public power'.⁴¹² Environmental action is of the nature of a public power given that it impacts persons who are not directly linked to the actor. Significant fundamental human rights can be affected, e.g. the right to life, the right to equality, the right to human dignity, the right to health care, food and water and the right to an environment not harmful to health or well-being⁴¹³ by environmental actions.

⁴⁰⁹ See fn 402.

⁴¹⁰ *Mobile Telephone Networks (Pty) Ltd v SMI Trading CC* (2012 (6) SA 638 (SCA).

⁴¹¹ *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Ano* 2007 (1) SA 343 (CC).

⁴¹² *Micro Finance Case* at [22] footnotes omitted.

⁴¹³ Constitution sections 11, 9, 10, 27 and 24(a) respectively.

Reference to the administrative nature of an environmental action is therefore not to imply that environmental action always constitutes administrative action. Rather it is a recognition that private entities can and often do exercise public functions and powers when impacting on the environment. Environmental actions are public by nature in that, although possibly buffered, they ultimately impact upon the general public. The legal requirements set out in *Dawnlaan Beleggings* for substantive qualification as administrative actions seem to be met by environmental actions. In some instances the public functionary and bureaucratic requirements might also be met.

The test suggested by *Juma Masjid case* requires only that the private entity be engaging in a public purpose and that it bears the primary public duty. The source of its authority is not important. Environmental actions are an expression of public purpose, the remaining question is therefore whether or not the private entity bears the primary duty. There are practical reasons supporting this argument.

Given that many environmental actions will be undertaken in the course of a private entity enjoying its private rights it would not be unjustified for the entity to bear the primary duty when exercising such rights. Indeed, as the State would not be involved, there can seldom be an instance where the private entity does not do so.⁴¹⁴ Private entities stand to benefit financially through their negative impacts upon the environment and often profit greatly therefrom. They should therefore bear a corresponding positive duty. Without a corresponding positive duty the objectives of Section 24 would be constantly eroded without recourse. The positive duty would mean that, in taking an environmental action, a private entity would be required to promote the protection of the environment through preventing pollution, preventing ecological degradation, promoting conservation and securing the ecologically sustainable development and the ecologically sustainable use of natural resources.

The creation of such a moral duty might be regarded as weakening the fundamental right. However this is not necessarily so. Authors have suggested that the purpose of a fundamental environmental right is not purely to create a justiciable right.

⁴¹⁴ This approach was argued as being necessary by Winstanley: 'Further, many activities which impact on the right of the individual to a healthy environment are performed by private individuals or companies and not the state.' Winstanley, T., 'Constitutional Environmental Protection' (1995) 1 *SAJELP* 85 -97 at 88.

'It is therefore quite possible that fundamental environmental rights are included in constitutions not with the expectation that they will be realized or judicially enforced, but with the hope that they will, at most, influence the attitudes of policymakers, maybe the public, and perhaps, in the long term, encourage people within the nation to take environmental concerns into account.'⁴¹⁵

An aspirational right is not without value. 'An environmental statement of public policy may have positive effects on both political and societal levels. It may raise the level of environmental consciousness in the government and in society as a whole, enhancing the likelihood of future initiatives towards environmental protection. In this sense it may serve an "impulse" function.'⁴¹⁶ The Constitution must 'play a creative and dynamic role in the expression and the achievement of the ideals and aspirations of the nation, in the articulation of the values bonding its people and in disciplining its Government.'⁴¹⁷ This value would be considerably enhanced if the aspirational provision could, when warranted, be given legal and not merely aspirational effect to.

In the *HTF Developers case*⁴¹⁸ the High Court described Section 24(b): 'Despite its aspirational form, or perhaps because of it, s 24(b) gives content to the entrenched right envisaged, by specifically identifying the objects of regulation, namely the prevention of pollution and environmental degradation; the promotion of conservation; and the securing of ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.'⁴¹⁹ This reasoning does not seem to imply that aspirational equates to non-justiciable,⁴²⁰ rather it would suggest that, in a South African context, a right might be both aspirational and fundamental. The Constitutional Court has further stated that: 'The Bill of Rights is not a set of (aspirational) directive principles of State policy - it is intended that the State should make whatever arrangements are necessary to

⁴¹⁵ May, J. R. and Daly, E., 'Vindicating Fundamental Environmental Rights Worldwide' (2009) 11 *Oregon Review of International Law* 365 - 439 at 408.

⁴¹⁶ Brandl, E. and Bungert, H., 'Constitutional Entrenchment of Environmental Protection: A Comparative Analysis of Experiences Abroad' (1992) 16 *Harvard Environmental Law Review* 1 - 100 at 95 footnote omitted.

⁴¹⁷ *Government of the Republic of Namibia and Another v Cultura 2000 and Another* 1994 (1) SA 407 at 418 quoted with approval by Mahomed J in *S v Mhlungu* 1995 (3) SA 867 (CC) at [8].

⁴¹⁸ *HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2006 (5) SA 512 (T).

⁴¹⁹ *HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2006 (5) SA 512 (T) at [17]. Feris regards the use of 'aspirational' as inappropriate given that Section 24(b) is justiciable. Whilst such questioning is correct it is not clear whether 'aspirational' was used to imply that the right was not actionable or that it could be both aspirational and justiciable at the same time. See Feris, L., 'The socio-economic nature of section 24(b) of the Constitution - some thoughts on HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism (HTF)' (2008) 23 *SAPR/PL* 194 - 207.

⁴²⁰ 'The word 'aspirational' suggests a mere hope, dream or desire, that is, that which we want but might never attain.' Feris, L., 'The socio-economic nature of section 24(b) of the Constitution - some thoughts on HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism (HTF)' (2008) 23 *SAPR/PL* 194 - 207 at 205.

avoid rights violations.⁴²¹ In doing so the Constitutional Court appears to have opened the door to a situation where a right may be both aspirational and justiciable at the same time, it can be both the carrot and the stick. This seems to accord with the notion that a right may both positively 'influence the attitudes of...the public' whilst containing justiciable provisions. If this is so then Section 24(b) 'gives [justiciable] content' to the Section 24 right to an environment not harmful to one's well-being and directs the process required to reach this point. A protected environment is an aspirational goal as fundamental as the notion of an 'open and democratic society [which] the Constitution has set as our aspirational norm.'⁴²²

Imposing such a positive duty on private entities is supported by reference to both the *Government Policy* and the *ANC Policy*. The former states, at [4]:

'The State, every person and every legal entity has a responsibility to consider all activities that may have an influence on the environment duly and to take all reasonable steps to promote the protection, maintenance and improvement of both the natural environment and the human living environment.'

and at [8]:

'A partnership must be established between the State and the community as a whole, the private sector, developers, commerce and industry, agriculture, local community organisations, non-Governmental organisations (representing other relevant players), and the international community so as to pursue environmental goals collectively.'

And the latter states, at (14):

'All men and women shall have the right to a healthy and ecologically balanced environment and the duty to defend it.'

And at (16):

'Legislation shall provide for co-operation between the State, non-governmental organisations, local communities and individuals in seeking to improve the environment and encourage ecologically sensible habits in daily life.'

It is clear from these extracts that the drafters of the Constitution shared similar views on the requirement that the positive environmental duty was to be borne by both State and private

⁴²¹ *Sanderson v Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC) at [35].

⁴²² *S v Mamabolo (E TV and Others Intervening)* 2001 (3) SA 409 (CC) at [37].

entities including 'all men and women' and indeed 'every person'. In discussing the intended nature of programmatic (Second and Third Generation) Rights one of the key ANC negotiators and architects of the Bill of Rights, Albie Sachs, stated the intention to require both the State and private entities to improve conditions for people's health. Such conditions would naturally include environmental rights.

'Consideration thus needs to be given to a Bill of Rights as a legal programme and not simply as a set of justiciable interests. A constitutional document that is programmatic in character presupposes that certain major social goals are set out in the document, **and public and private entities are placed under a legal duty to work towards their realization.** The Second [and Third] Generation of rights lend themselves more to treatment of this kind than to the justiciable First Generation kind.'⁴²³

This avowed intention appears to have been carried forward in the *ANC Policy* and there is no reason to conclude that it did not find its way, ultimately, into Section 24(b).

International constitutions similarly impose a positive duty upon their citizens. The Uruguayan constitution was amended to record that "the protection of the environment is of common interest."⁴²⁴ Such a positive duty was incorporated into a purely directive provision of the Indian Constitution in 1976 which:

'provides similarly in Article 51A, Clause (g), that it shall be the duty of every citizen of India to protect and improve the natural environment including forests, lakes, rivers and wildlife and to have compassion for living creatures. Thus there is both a constitutional pointer to the State and a constitutional duty of the citizens not only to protect but also to improve the environment and to preserve and safeguard the forests, the flora and fauna, the rivers and lakes and all the other water resources of the country. The neglect or failure to abide by the pointer or to perform the duty is nothing short of a betrayal of the fundamental law which the State and, indeed, every Indian, high or low, is bound to uphold and maintain.'⁴²⁵

Article 48A of the Indian Constitution places a positive duty on the State to 'protect and improve the environment' and these two Articles 'symbolise the need for collaboration between the State and the people in evolving a more ecologically sound order.'⁴²⁶ This positive duty is clearly stated and existed before the *Rio Conference* in 1992. It is perhaps

⁴²³ Sachs, A., 'Towards A Bill of Rights in a Democratic South Africa' (1990) 6 *SAJHR* 1 – 24 at 14.

⁴²⁴ May, J. R. and Daly, E., 'Vindicating Fundamental Environmental Rights Worldwide' (2009) 11 *Oregon Review of International Law* 365 - 439 at 373.

⁴²⁵ Decision of the Himachal Pradesh High Court given in *Kinkri Devi and Anr. vs State Of Himachal Pradesh and Ors.* 29 May, 1987. AIR 1988 HP 4 at [6] page 4.

⁴²⁶ Okon E. E., 'The Environmental Perspective in the 1999 Nigerian Constitution' (2003) 5 *Environmental Law Review* 256 at 273.

telling that the importance and inherent value of the environment was enshrined (although as a directive policy rather than a fundamental right) by a country which is less industrialised than the 'western powers' and whose population is accordingly less buffered against environmental impacts. Given South Africa's history its human population is similarly exposed and this augments the desirability of a similar positive duty in the country. The final question in this regard would seemingly be: is the obligation consistent with the purpose of Section 24(b) of the Constitution?

Apart from private entities profiting from environmental actions there are additional practical reasons why, in South Africa especially, a horizontal application is required.

South Africa has a strong traditional leadership which enforces customary law in what are sometimes referred to as 'traditional areas'. As noted by du Plessis: 'A significant number of South Africans still reside in the country's rural areas and various of these areas are home to traditional communities. ...Although not regulating this relationship itself, the Constitution suggests that in South Africa traditional leadership should be regarded as part of local government in the spherical composition of government.'⁴²⁷ It is unclear whether or not traditional leaders would constitute an organ of state. The Constitution deals with traditional leadership in a vague and noncommittal manner in sections 211 and 212. If traditional leaders are not organs of State then Section 24(b) would need to apply to non-organs of State (i.e. private entities) as otherwise a significant portion of South Africa's population would not be afforded environmental protection by their *de facto* local administration. Du Plessis argues⁴²⁸ that traditional leadership should be regarded as forming part of local government and that this would provide for the positive duty of Section 24⁴²⁹ to apply. The same objective could be reached, without stretching the bounds of local government to include hereditary traditional leaders within the scope of democratically elected and Constitutionally empowered local government, by applying Section 24(b) in horizontal manner.

⁴²⁷ du Plessis, A., "'Local Environmental Governance" and The Role of Local Government in Realising Section 24 of The South African Constitution' (2010) 21 *Stellenbosch Law Review* 265 – 297 at 278 footnotes omitted.

⁴²⁸ du Plessis, A., "'Local Environmental Governance" and The Role of Local Government in Realising Section 24 of The South African Constitution' (2010) 21 *Stellenbosch Law Review* 265 – 297 at 278 – 279.

⁴²⁹ du Plessis appears to equate Section 24 to 'socio-economic human rights' and her argument has been interpreted on this basis.

The interpretation that Section 24(b) creates a positive duty on both public and private entities has legislative support in the form of s28(1) of NEMA which provides that: 'Every person who causes, has caused or may cause significant pollution or degradation of the environment must take reasonable measures to prevent such pollution or degradation from occurring, continuing or recurring'. Whilst legislative provisions should not be used to interpret Constitutional rights this section seems to lend support to the argument that there is no prohibition on applying such rights in a horizontal manner. By requiring that 'every person... must take reasonable measures to prevent such pollution or degradation from occurring' a clearly positive duty is imposed on everyone and this agrees with the interpretation of Section 24(b) as argued above.

A further, and in some ways alternative argument, is that although framed as a positive right, environmental rights are actually negative rights.⁴³⁰ Conceptually the starting point is a healthy environment; pollution, ecological degradation and non-ecologically sustainable development and use threaten this state of affairs and therefore represent an invasion. Only the requirements to 'promote conservation' and to 'promote justifiable economic and social development' are truly positive obligations. And as such an invasion of a negative right is defensible against a private entity. The Constitutional Court (in examining the right to adequate housing⁴³¹) confirms 'that there is a negative content to socio-economic rights'⁴³² and concludes that:

'It is not necessary in this case to delineate all the circumstances in which a measure [by a private entity] will constitute a violation of the negative obligations imposed by the Constitution. However, in the light of the conception of adequate housing described above I conclude that, at the very least, any measure which permits a person to be deprived of existing access to adequate housing [i.e. an existing realised right], limits the rights protected in section 26(1) [i.e. the positive duty provision].'⁴³³

Seemingly this would mean that, even where a right is framed in the positive, an invasion of a realised positive right by a private entity is equivalent to the invasion of a negative right. A healthy environment is, historically, the putative environmental starting point and therefore amounts to a realisation of the positive elements of Section 24. A private entity's invasion of a realised positive right would therefore be justiciable. Even if Section 24(b) is seen as a

⁴³⁰ Bruckerhoff, J. J., 'Giving Nature Constitutional Protection: A Less Anthropocentric Interpretation of Environmental Rights' (2008) 86 *Texas Law Review* 615 - 646 at 627.

⁴³¹ Section 26 of the Constitution.

⁴³² *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC) at [33].

⁴³³ *Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC) at [34].

purely positive, programmatic, right the peculiar nature of the environment would render it a right justiciable against private entities.

5.4 A Question of Reasonableness

It has been argued that Section 24(b), in as much as it imposes a positive duty, imposes such duty upon private entities as well as the State. This duty is, however, not as onerous as it might be. This duty must, at all times be reasonable. Furthermore: all rights are subject to any inherent limitations and are also subject⁴³⁴ to the limitation of rights.⁴³⁵ Different rights may conflict with each other and will need to be balanced against each other. Thus a decision to pollute may be taken in furtherance of the right to property⁴³⁶ and the right to freedom of trade,⁴³⁷ this decision may constitute justifiable economic development⁴³⁸ or it may be legally justifiable as an exercise of a right in 'an open and democratic society based on human dignity, equality and freedom'.⁴³⁹ No right in the Bill of Rights is absolute and by imposing a positive duty the objectives of Section 24 can be met despite the lawful invasion of the negative right.

The purpose of environmental protection would not be met if there was no positive duty on everyone. Reliance upon government as bearing the sole positive duty would be inadequate.

'During the last few years the debate on the responsibilities of private actors for fostering sustainable development has been emerging, because the problem-solving capacity of governments is - as is evident from many legal, policy, and economic studies - somewhat limited. Because a sustainable society is a collective interest, it is necessary to reconsider the role of societal actors and the need for shared responsibilities to enable the transition towards a sustainable society.'⁴⁴⁰

Furthermore:

'But to resolve these problems caused by the cumulative effects of unidirectional, incremental change, society must undertake measures to reverse trends that are well entrenched and involve the cumulative effect of

⁴³⁴ Section 7(3) of the Constitution.

⁴³⁵ Section 36 of the Constitution.

⁴³⁶ Section 25 of the Constitution.

⁴³⁷ Section 22 of the Constitution.

⁴³⁸ In terms of Section 24(b)(iii).

⁴³⁹ Section 36(1) of the Constitution.

⁴⁴⁰ van Rijswijk, H. F. M. W. in an editorial: 'The Road to Sustainability: How Environmental Law Can Deal with Complexity and Flexibility' (2012) 8:3 *Utrecht Law Review* 1 at 3.

millions of individual activities, the impact of any one of which may seem innocuous.⁴⁴¹

South African common-law of negligence tends not to impose a positive legal duty on persons. However there are exceptions. In the liability of a farmer for the consequences of a fire which he did not start but which started on his property the (then) Rhodesian Appellate Division discussed circumstances in which a positive legal duty might arise.

'Whether a moral duty exists will not, in the majority of cases, be difficult to decide. The problem,..., is always to decide whether the moral duty should be translated into a legal duty. The resolution of this problem is not an exact science; on the contrary, the Court, after assessing all the relevant factors must of necessity come to what is essentially a value judgement in order to do justice between the parties.'⁴⁴²

With reference to the present discussion it is interesting to note that there is legal recognition of a moral duty which does not automatically translate into a legal duty but may, when it is in the interests of justice do so. Might this not be regarded simply as being a case of 'reasonableness'?

Attributing any form of liability to private entities for a failure to perform a duty in terms of Section 24(b) might be likened to South Africa's common law position regarding delictual (tortious) claims based on 'pure economic loss'. "Pure economic loss" in this context connotes loss that does not arise directly from damage to the plaintiff's person or property but rather in consequence of the negligent act itself, such as a loss of profit, being put to extra expenses or the diminution in the value of property.⁴⁴³ Liability flows from the negligent act and has economic consequences; environmental harm would similarly flow from the act itself and might not result in measurable (or actionable) 'damage to person or property' but might, instead 'put [a person] to extra expense' (e.g. increased costs of water purification or medical expenses) or diminish the value of property (e.g. chronic pollution or degradation may reduce property values). The assessment of wrongfulness requires a careful determination of public policy. 'What then are the considerations of policy that are of particular relevance in this case? First, as always in claims of this kind, is the spectre of the

⁴⁴¹ Bosselman, F., 'What Lawmakers Can Learn From Large-scale Ecology' (2001) 17 *Journal of Land Use and Environmental Law* 207 - at 219 at 274 - 275 footnotes omitted.

⁴⁴² *King v Dykes* 1971 (3) SA 540 (RA) 545 H – 546 D, this reasoning seems to have been approved in *Sea Harvest Corporation (Pty) Ltd and another v Duncan Dock Cold Storage (Pty) Ltd and another* [2000] 1 All SA 128 (A) at [22].

⁴⁴³ *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority* 2006 (1) SA 461 (SCA) at [1].

imposition of liability in an indeterminate amount for an indeterminate time to an indeterminate class'.⁴⁴⁴ An enquiry based on public policy is made to prevent the spectre of indeterminate liability being raised and a similar enquiry would provide a reasonable limitation on liability arising out of Section 24(b). Fault (i.e. negligence or intent) and causation would also be required in order for legal redress and therefore a universal positive duty would not automatically give rise to claims unless fault and causation were also present.

It would appear that the common-law could be developed, in line with the positive duty and the question of reasonableness, by the courts to provide for the positive duty of Section 24(b) without such imposition becoming unjust. A positive duty imposed on private entities would not automatically result in indeterminate liability. At its entry it merely imposes a moral duty, where justice requires and public policy dictates this moral duty may become a legal duty. As a positive legal duty it may be compelled but damages would only flow where fault and causation were also present.

Every action a person takes has the potential to impact upon the environment and an impact upon the environment is, eventually, felt by everyone. From a perspective of offsetting a negative impact the positive duty should be proportional to the negative impact of the environmental administrative action. A small negative impact would only require a small positive action to offset it and the duty would therefore be proportional to the action and therefore would be reasonable. Conversely a severe negative impact will impose a proportional positive duty, and this would be reasonable. An absolute legal positive duty, in the absence of an environmental action, should not be imposed on private entities.

However certain impacts will be too small to quantify or even to appreciate. These micro-impacts may not be registered but, in terms of cumulative effects, eventually the cumulative impact is felt.⁴⁴⁵ Even if a micro-impact can be absorbed by and dissipated within the environment it still has a negative consequence. This necessitates an overall positive duty on everyone if the objective of environmental protection is to be realised. This overall

⁴⁴⁴ *Freddy Hirsch Group (Pty) Ltd v Chickenland (Pty) Ltd* 2011 (4) SA 276 (SCA) at [40].

⁴⁴⁵ Ozone depleting CFC's in aerosol cans are an example. Each person contributes a tiny portion each day but the cumulative impacts are severe.

positive duty is, proportionally a small one. It should not overly burden any individual but, by taking certain small positive steps, the right to environmental protection can be realised.

The element of 'reasonableness' in socio-economic rights has been stated as 'requir[ing] nothing more of the state than is achievable within its available resources'⁴⁴⁶ but this has to be seen in the context of the explicit *Progressive Element* within such rights. In the case of education:

'The State is required to take reasonable legislative *and* other measures. Legislative measures by themselves are not likely to constitute constitutional compliance. Mere legislation is not enough. The State is obliged to act to achieve the intended result, and the legislative measures will invariably have to be supported by appropriate, well-directed policies and programs implemented by the Executive. These policies and programs must be reasonable both in their conception and their implementation. The formulation of a program is only the first stage in meeting the State's obligations. The program must also be reasonably implemented. An otherwise reasonable program that is not implemented reasonably will not constitute compliance with the State's obligations.'⁴⁴⁷

In Section 24(b) reasonableness should apply in the context of proportionality. Where an entity (including the State) has a large impact on or obtains a large economic benefit from the environment then the requirements imposed by the positive duty would be proportionally large. Where the opposite is the case then the requirements imposed by the positive duty are proportionally smaller. This is in keeping with the dictum in the *Grootboom Case*: 'In determining whether a set of measures is reasonable, it will be necessary to consider housing problems in their social, economic and historical context and to consider the capacity of institutions responsible for implementing the program'⁴⁴⁸ by making the measures proportional they should be in keeping with the entities' capacity to implement them. This capacity can be taken to include the capacity of and nature of traditional leadership.

The State bears an additional positive duty to produce legislative measures. Furthermore the State must, within its available resources, implement 'other measures': these could include fiscal measures, policy measures, education programmes, implementation, enforcement etc.

⁴⁴⁶ du Plessis, A., 'Adding Flames to the Fuel: Why Further Constitutional Adjudication is Required for South Africa's Constitutional Right to Catch Alight' (2008) 15 *SAJELP* 57 – 84 at 77.

⁴⁴⁷ *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) at [42].

⁴⁴⁸ *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) at [43].

The issue of reasonableness would then apply to the resources the State makes available in proportion to the scale of the problems which need to be addressed.

A distinction between the socio-economic rights and Section 24 is that there is no requirement in Section 24 for the progressive realisation of the underlying fundamental right; in this case either the right contained in Section 24(a), namely the right to an environment that is not harmful to a person's health or well-being, or, in Section 24(b), the right to have the environment protected. The underlying rights to further education,⁴⁴⁹ of access to adequate housing,⁴⁵⁰ of access to health care services, access to sufficient food and water and access to social security⁴⁵¹ are all finite objectives: therefore the progressive realisation of these rights is an achievable goal. The right to have the environment protected is not a finite goal, rather it requires constant ongoing application to prevent erosion of and to realise the objective.

Decisions to negatively impact upon the environment will be legitimately taken every day, if not every hour, if not every second: these decisions will be taken in the furtherance of legitimate rights. The State lacks the capacity to micro-manage all of these impacts. The State's finite resources and, by implication its inability to micro-manage the realisation of Section 24(b), has been recognised by the Constitutional Court which has been loath to interfere with the executive's decisions on allocation of resources.⁴⁵²

The interpretation of Section 24(b) proposed thus far is an admittedly generous one. However it does appear to accord with the intention of drafters, the textual and contextual interpretation as well as achieving the argued purpose of the Section in addressing environmental protection. By applying a proportionality requirement to the positive duty and recognising that reasonableness always requires an assessment of actual resources this generous interpretation is reasonable.

⁴⁴⁹ Section 29 of the Constitution.

⁴⁵⁰ Section 26 of the Constitution.

⁴⁵¹ All three fall under Section 27 of the Constitution.

⁴⁵² *Soobramoney v Minister of Health, Kwazulu-Natal* 1998 (1) SA 765 (CC) at [11].

Where the positive duty is limited to the State (and for the purposes of discussion to ignore the hypothesis that private entities could, and should, bear the positive duty too) then 'reasonable' needs to be interpreted in the context in which it is used. Authors⁴⁵³ have interpreted 'reasonable' to have the same meaning as the Constitutional Court's reasoning in socio-economic rights enquiries such as used in the *Grootboom* case. There can be little doubt that the Court's reasoning will apply to use of 'reasonable' in Section 24(b). 'Reasonableness' applies not only to the nature of the measures but to their implementation too:

'The reasonableness review...look[s] at an array of different factors, such as, that: the measures taken by government are comprehensive and coordinated; the financial and human resources needed to implement such measures have been made available; the measures are both reasonably conceived and reasonably implemented. The measures taken by all public authorities must be balanced and flexible, should be designed to respond to short-, medium- and long-term needs of society, and may not exclude certain members of the public society.'⁴⁵⁴

However there are two critical distinctions between a true socio-economic right and Section 24(b). The first of these is Section 24(b)'s omission of the progressive element and its implementation is not conditional upon the availability of State resources. Secondly, the fulfilment of socio-economic rights requires infrastructure which, in turn, requires resources and time inputs. The socio-economic rights cannot be immediately justiciable as there will always be a lag between need and realisation. The historical context of South Africa and the colonial and apartheid legacies exacerbate this lag. Environmental protection does not require any infrastructure; it is an immediately justiciable negative right. It is implementable by human behaviour alone. The argument to suggest that 'reasonable' in Section 24(b) 'must surely be interpreted to function as a limitation measure in that government needs only to fulfil the specific objectives of Sections 24(b)(i)-24(b)(iii) insofar as it has the requisite financial and human resources to do so,'⁴⁵⁵ must, with respect, be rejected. Rather the question of reasonableness, as it relates to legislative and other State measures, must

⁴⁵³ See for instance Kotzé, L. J., 'A Critical Survey of Domestic Constitutional Provisions Relating to Environmental Protection in South Africa' (2007) 14 *Tilburg Law Review* 298 at 334 and also du Plessis, A., 'Adding Flames to the Fuel: Why Further Constitutional Adjudication is Required for South Africa's Constitutional Right to Catch Alight' (2008) 15 *SAJELP* 57 – 84 at 77 for discussion and further references.

⁴⁵⁴ Du Plessis, A., 'South Africa's Constitutional Environmental Right (Generously) Interpreted: What is in it for Poverty?' (2011) 27 *SAJHR* 279 – 307 at 302 footnotes omitted also see Du Plessis, A., *Fulfilment of South Africa's Constitutional Environmental Right in the Local Government Sphere* (2008) LLD Thesis, North-West University, at 381 – 382.

⁴⁵⁵ Kotzé, L. J., 'A Critical Survey of Domestic Constitutional Provisions Relating to Environmental Protection in South Africa' (2007) 14 *Tilburg Law Review* 298 at 334 also see du Plessis, A., 'Adding Flames to the Fuel: Why Further Constitutional Adjudication is Required for South Africa's Constitutional Right to Catch Alight' (2008) 15 *SAJELP* 57 – 84 at 77.

surely mean that the legislative and other measures imposed by the State cannot be unreasonable. There can be little doubt that true environmental protection (to the exclusion of other human rights) could best be implemented through draconian legislative and other measures. An absolute prohibition on further infrastructure development or the burning of coal for electricity generation would no doubt achieve considerable environmental protection (at least in the short term) but would be manifestly unreasonable (and ultimately unsustainable and counter-productive).

Where the 'other measures' impose a resource obligation on the State then reasonableness must take into account the State's resources. Legislative and other measures to protect the environment could well impose restrictions on private rights.⁴⁵⁶ For instance restrictions placed on land use probably amount to a deprivation of property rights but may be required to protect biodiversity and ecosystem services e.g. wetland protection. Legislation, policy, judicial interpretation, development of the common-law, education etc. do not require significant State resources and accordingly reasonable must mean that the measures implemented are reasonable as to their impact on other rights rather than in reference to State resources.

If the hypothesis of a private entity positive duty is supported then this interpretation of 'reasonable' should apply (along with the interpretation discussed previously) to the private entity too. The environmental right is unlike other socio-economic rights as it requires, primarily, implementation at a personal behavioural level rather than costly infrastructure. Thus individuals could have a positive duty to recycle, to use energy sparingly, to refrain from littering and to protect biodiversity. These other measures are both reasonable and implementable by private entities; whereas a duty to build a school or provide potable water would be an unreasonable imposition upon a private entity.

⁴⁵⁶ In the (as yet unreported) case of *Le Sueur and Another v Ethekekwini Municipality and Others* (9714/11) [2013] ZAKZPHC 6 (30 January 2013) private property owners objected to the local government's (the eThekweni Metro's) amended town planning scheme which provided for the Durban Metropolitan Open Space System. The property owners alleged that the D-MOSS amounted to 'expropriation by stealth' at [17] as the D-MOSS, with the avowed intention of environmental protection, limited property owner's rights in respect of their properties as parts or the whole where zoned for conservation purposes and were thus undevelopable. Interestingly the judgement was based, in part, upon a ruling that Section 24(b) created a justiciable right and imposed a positive duty on the local government to implement 'other measures' e.g. D-MOSS to achieve its fulfilment (see at [19]). It would have been interesting had the State justified its authority based on the public trust doctrine and the principle of subsidiarity.

5.5 Anthropocentric or Ecocentric?

The acid test in determining whether a right is anthropocentric or ecocentric is whether the right seeks to protect humans or whether it seeks to protect 'all forms of life'.⁴⁵⁷ Section 24(b) appears to be clearly ecocentric, its purpose is to protect the environment, through the mechanisms contained in its three subsections. There is no indication that either human well-being or human health is a criterion in determining a threshold for this right. Conversely Section 24(a) is intended to protect 'everyone' and protects human health and well-being. As such it is clearly anthropocentric. With its focus on ecological elements and the preceding discussion Section 24(b) should not be restrictively interpreted as a mere programmatic directive to achieve the rights in Section 24(a).

While Section 24(b) seems to be clearly directed at environmental protection, mainly through preservation of ecological systems and conservation, it has possibly anthropocentric elements. Firstly the right is in favour of 'Everyone' and secondly, and more importantly, the environment is protected 'for the benefit of present and future generations'. The first element is clearly a reference to the fact that the right can be exercised by everyone and therefore anyone, as such it does not determine whether or not the right is anthropocentric. The second element may be simply recording an intragenerational and intergenerational component in keeping with the concepts of *Sustainable Development* or *Sustainability* as the case may be as well as being a feature of emergent international environmental law. It may also be a situation of giving the rights a human focus assuming their overall environmental bias. One may also argue, from an ecocentric perspective, that generations could apply equally to other organisms and not necessarily only to humans, but in truth generations must be presumed to refer to humans and to intragenerational and intergenerational rights. Does the requirement that the protection of the environment is for the benefit of humankind render the rights anthropocentric?⁴⁵⁸

The textual meaning of Section 24(b) seems to be clear, the environment is to be protected through measures which prevent pollution, prevent ecological degradation, promote

⁴⁵⁷ Bruckerhoff, J. J., 'Giving Nature Constitutional Protection: A Less Anthropocentric Interpretation of Environmental Rights' (2008) 86 *Texas Law Review* 615 - 646 at 618.

⁴⁵⁸ Bruckerhoff has suggested that an intergenerational provision is characteristic of a weakly anthropocentric right. Bruckerhoff, J. J., 'Giving Nature Constitutional Protection: A Less Anthropocentric Interpretation of Environmental Rights' (2008) 86 *Texas Law Review* 615 - 646 at 633.

conservation or which ensure ecologically sustainable development and use. All of these actions apply to the environment and not to humans. So the environment is protected through positive environmental actions. Unlike Section 24(a), protection is not linked to human health and well-being: it is clearly directed at the environment. In the circumstance it would not be in keeping with the rest of Section 24(b) to give the word 'benefit' too much weight. It must also be noted that to leave environmental protection to a point where negative effects manifest themselves in human health and well-being may well leave it too late for a meaningful intervention. There is therefore a need to protect the environment before it becomes a measurable human health or well-being issue.⁴⁵⁹

'Benefit' is an imprecise term and it would be difficult to interpret it to mean that Section 24(b) was geared to human interest and away from the environment *per se*. That humans can benefit from a protected or enhanced environment is not contrary to an ecocentric right. *Caring for the Earth* described itself as 'a strategy for a kind of development that provides real improvements in the quality of human life and at the same time conserves the vitality and diversity of the Earth.'⁴⁶⁰ Human well-being can be reconciled with the ecocentric approach, an approach where humans are part of the environment and the environment is worthy of protection for its intrinsic value whilst recognising the role a healthy environment plays in human well-being.⁴⁶¹

By referring to the content of the directive elements it is clear that an ecocentric interpretation is correct, environmental protection is achieved without reference to

⁴⁵⁹ Bruckerhoff, J. J., 'Giving Nature Constitutional Protection: A Less Anthropocentric Interpretation of Environmental Rights' (2008) 86 *Texas Law Review* 615 - 646 at 624.

⁴⁶⁰ *Caring for the Earth*, page 8.

⁴⁶¹ Thus a statement such as: 'The scope of [Section 24] is therefore extensive. It does not confine itself to protection against conduct harmful to health, but seeks also by, *inter alia*, the promotion of conservation and ecologically sustainable development, to ensure an environment beneficial to our 'well-being'.'^{*} Might, as it does, convey an anthropocentrism but this anthropocentrism should not, automatically exclude an underlying ecocentrism. This is particularly so as the judge then goes on to comment that 'The term 'well-being' is open-ended and, manifestly, is incapable of precise definition. Nevertheless, it is critically important in that it defines for the environmental authorities the constitutional objectives of their task.'^{*} It is unclear and, with respect, untenable that a constitutional objective is defined in such an open ended manner. It would have been far more beneficial had an objective ecocentric approach been used to 'define...the constitutional objective'. The question of well-being can then be approached on a subjective basis from an objectively determinable base of environmental health which prevents the enquiry from being completely open-ended. This would, with due respect, be a more legally sound approach to have taken. ^{*} *HTF Developers* case at [18]. The anthropocentric approach can be contrasted to the Supreme Court of Appeals statement: 's 24(b) imposes positive obligations on the state to protect the environment 'through reasonable legislative and other measures that prevent pollution . . . while promoting justifiable economic and social development'. '^{**} which appears to be ecocentric in that the human well-being requirement is left out. ^{**} *Sasol Oil* (SCA) case at [14] footnote omitted.

humankind but on the basis of ecological conservation. The use of 'while promoting justifiable economic and social development' in Section 24(b)(iii) would be redundant if the whole of Section 24(b) was anthropocentric; the fact that this proviso is included strongly indicates that the right is ecocentric and requires the proviso to limit its applicability to retard other, anthropocentric, human rights. The correct interpretation of Section 24(b) must therefore be as an ecocentric right.

The use of 'justifiable' is indicative of the ecocentric approach. Clearly it is envisaged that economic development and social development will compromise the environment otherwise they would not be used as a proviso in a right designed to protect the environment. The question then is; from whose perspective must the compromise be justified? Humans are obviously the drivers of the economic and social development and therefore any such development would be justified from an anthropocentric perspective, the only possibility where this would not be the case would be where the developments posed an immediate risk to human health or well-being. In such a case Section 24(a) could be invoked. It therefore seems that the only logical interpretation is that the justification must relate to the environment. The justification relates to a purely environmental perspective as there is no direct measurable harm to humans or their well-being otherwise Section 24(a) would apply. On this basis Section 24(b)(iii) is strongly ecocentric as it considers the merits of economic and social development from the perspective of the environment.

Whilst not wanting to stretch the bounds of a purely textual interpretation too far: it may be possible to infer that the change from the phrase 'to have their environment protected' as contained in the proposed section 23(b) of the Constitution to the actual 'to have the environment protected' in Section 24(b) was significant. 'Their' implies a possessive element and may also imply a proximity element. By changing 'their' to 'the' the possessive, possibly anthropocentric, element is lost. Furthermore, the proximity element is also lost, thus a person can seek to enforce the right to protect a part of the environment physically distant and also, legally remote from such person.

This alone should be sufficient purposive justification for regarding Section 24(b) as an ecocentric right. Human health and well-being are buffered from the environment. To rely on anthropocentric assessment of environmental protection would mean that the greater the

buffering the more remote the result of the harm is from the cause of the harm. Metaphorically this remoteness means that, in addressing environmental protection anthropocentrically, one would, in effect, be treating the symptoms (i.e. human health and well-being) of a disease (i.e. environmental deterioration) without ever addressing its cause (i.e. pollution, ecological degradation and non-ecologically sustainable development and use). Additionally the cause and the symptom are not necessarily linearly connected (e.g. burning fossil fuels impacts on fishing). An ecocentric approach would address the cause of the problem and, hopefully, offer a cure. Amelioration of the symptoms would naturally follow. On the other hand treatment of the symptoms only without providing a cure will lead to inevitable decline and death of the patient.

5.6 'Benefit of Present and Future Generations'

At first glance this seems to be a relatively simply provision. With regard to *Sustainable Development*, Kates *et al.*⁴⁶² posed the question of over what period must development be sustainable. '[The period] has been defined from as little as a generation — when almost everything is sustainable — to forever — when surely nothing is sustainable.'⁴⁶³ Simply answered, nothing lasts forever and therefore how far into the future can *Sustainable Development* be pushed? Section 24(b) appears to answer this by simply requiring that all future generations benefit. The spectre of impossibility is therefore raised.

To address this issue two points are noted. The first is the argument that Section 24(b) does not refer to *Sustainable Development* but rather it requires that the 'environment [be] protected'. By ensuring and preserving ecological resilience as opposed to advocating development it is conceivable that the environment can be protected *ad infinitum*. This is not to imply that the environment and its component ecological processes will remain unchanging forever but conscious management to achieve enhanced ecological resilience would equate to environmental protection and fulfil this requirement. Extraneous factors such as natural erosion, natural climate change, natural droughts and floods and natural extinctions will continue to occur but ecosystems which retain their adaptive capacities would

⁴⁶² Kates, R. W., Parris, T. M. and Leiserowitz, A. A., 'What is Sustainable Development? Goals, Indicators, Values and Practice.' (April 2005) *Environment: Science and Policy for Sustainable Development*, Volume 47, Number 3, 8–21 at 12.

⁴⁶³ Kates *et al.* fn 462 at 12.

remain resilient and environmental protection would be achieved. It must also be recalled that humans form part of the environment and therefore environmental protection would include 'human ecosystem' resilience along with 'natural ecosystem' resilience. So, while development can never be sustained forever the environment can, on this basis, be protected forever.

The second issue relates to what is meant by 'present and future generations'. On the one hand the simplistic meaning of 'forever' (as used above) seems to answer this. However there are subtleties which need to be addressed.

Generations are not discrete events. Humans are not born at regular intervals but continuously (unlike some other animals which have regular discretely spaced seasonal reproductive events). This means that the future generation exists contemporaneously with the present generation. In truth there is only one generation which has existed, uninterrupted since humans first evolved and will continue until their ultimate extinction.⁴⁶⁴ This conundrum aside: does the reference to 'future generations' imply that some, as yet unborn and unconceived person has a fundamental right in terms of the Constitution?⁴⁶⁵

Whilst our law has afforded rights to unborn fetuses these rights only manifest when the fetus is born alive and the right must have arisen after conception.⁴⁶⁶ At most the so called *nasciturus* fiction has a nine month time horizon as opposed to the potentially infinite time horizon contemplated in Section 24(b). This raises the question, if rights are given to future generations then against whom can these rights be enforced? By the time the future rights

⁴⁶⁴ The thought might have been expressed thus: 'In my own perception, the message of *solidarity* in time — conveyed by inter-generational equity — projects itself both ways, into the future and the past, encompassing future as well as past generations'. Judge Cançado Trindade's separate opinion in the *Pulp Mills* case at [125].

⁴⁶⁵ 'Streams of African customary law also include a notion of ownership/ stewardship of land by the collective, including future generations. One Ghanaian chief has explained that in this conceptualization, "land belongs to a vast family of whom many are dead, a few are living, and [a] countless host are still unborn."' Collins, L. M., 'Revisiting the Doctrine of Intergenerational Equity in Global Environmental Governance' (2007) 30 *Dalhousie Law Journal* 79 - 140 at 95 footnote omitted.

⁴⁶⁶ The Supreme Court of Appeal has approved Hiemstra J's description of the *nasciturus* fiction given in the case of *Pinchin and Another NO v Santam Insurance Co Ltd* 1963 (2) SA 254 (W) at 260 A-C which is 'I hold that a child does have an action to recover damages for pre-natal injuries. This rule is based on the rule of the Roman law, received into our law, that an unborn child, if subsequently born alive, is deemed to have all the rights of a born child, whenever this is to its advantage. There is apparently no reason to limit this rule to the law of property and to exclude it from the law of delict.' *Road Accident Fund v Mtati* [2005] 3 All SA 340 (SCA) at [6] to [8].

are infringed the culprits are no more. Such future rights can only be exercised by the injured against the injured as the causal generation will be pre-deceased by the time that the injured can act. Making the rights future dependent would not serve the primary directive of present environmental protection. Future dependent rights would, instead of protecting the environment, be a case of remediating past damage or claiming compensation for such damage. As such the provision becomes meaningless.

An alternative interpretation is to render the future rights actionable by the present generation on behalf of the future generation. This interpretation is appealing because, if the environment is not protected in the present, it cannot be protected in the future. The present generation could conceivably exercise these future rights either 'in the public interest' or, if the courts permit, 'on behalf of another person who cannot act in their own name' or 'in the interest of a [future] class of persons'.⁴⁶⁷ A possible problem here is that a court would have to interpret 'person' to include a putative member of a possible future generation. The *nasciturus* fiction has been deemed necessary because a foetus is not regarded as being a person and it seems unlikely that a hypothetical future generation would be regarded as being a person. The exerciser of the future right would therefore presumably have to rely on 'public interest'.

Feris suggests⁴⁶⁸ that in considering the needs of children already born a court would be applying an aspect of intergenerational equity. This may be partially correct but it must be noted that children already born would logically constitute the present generation although yet to attain full rights. This lack of rights is addressed through section 28 of the Constitution which protects children's rights. In discussing intergenerational rights in light of Section 24(b) the High Court in *BP Southern Africa* quotes with approval a 1971 *ratio*:

'The idea which prevailed in the past that ownership of land conferred the right on the owner to use his land as he pleased is rapidly giving way in the modern world to the more responsible conception that an owner must not use his land in a way which may prejudice his neighbours or the community in which he lives, and that *he holds his land in trust for future generations*. Legislation dealing with such matters as town and country planning, the conservation of natural resources, and the prevention of pollution, and regulations designed to ensure that proper farming practices are followed, all bear eloquent testimony

⁴⁶⁷ Section 38 of the Constitution sets out these and other qualifications of person who may approach a court to allege the infringement of or threat to a Constitutional right.

⁴⁶⁸ Feris, L., 'Environmental Rights and *Locus Standi*' in Paterson and Kotzé (eds.) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) at 142 – 143.

of the existence of this more civilised and enlightened attitude towards the rights conferred by ownership of land.⁴⁶⁹

This judgment, and the later court's approval of it, is interesting as indicates that intergenerational rights are not a new legal concept, that they are not limited to existing children's rights and it also introduces the concept of a trust doctrine which is binding on private entities.

A further alternative has been suggested⁴⁷⁰ which is to ignore the issue of the future generation and to focus exclusively on the present generation. As the present generation is constantly cycling if the environment is protected for the present generation *in toto* then, by implication, the environment will be protected for the future generation. Thus intragenerational equity achieves intergenerational equity. This might well be the most practical way to assess whether or not environmental protection is in the benefit of future generations. If the environment is protected here and now in a manner which facilitates ecological resilience and adaptability rather than a preservationist frozen moment we will achieve the objective. This requires absolute environmental protection failing which ecological resilience will be gradually eroded until ecosystem collapse is inevitable. The use of children's rights and the reasoning of Feris might provide the required legal basis to achieve this goal and fulfil Section 24(b). *Sustainable Development* which permits a proponent determined (subjective) focus to determine what constitutes sustainable development cannot use this methodology (of focusing on the present generation and thereby automatically providing for future generations) as it lacks the necessary objectivity. The lack of objectivity makes it nearly impossible, in terms of *Sustainable Development*, to conceive a true future benefit as the future remains uncertain.

The intragenerational model must be seen in the light of the fact that it is not proposed here to imply that the rights of the future generation cannot exist or are less important than the present generation rights.⁴⁷¹ Rather it is offered as a practical method, in the context of

⁴⁶⁹ The ratio of MacDonald ACJ of the (then) Rhodesia Appellate Division in *King v Dykes* 1971 (3) SA 540 (RA) 545 G - H quoted in *BP Southern Africa (Pty) Ltd v MEC For Agriculture, Conservation, Environment and Land Affairs* 2004 (5) SA 124 (W) at 143 B - C, the emphasis is as it appears.

⁴⁷⁰ Collins, L. M., 'Revisiting the Doctrine of Intergenerational Equity in Global Environmental Governance' (2007) 30 *Dalhousie Law Journal* 79 - 140 at 113 - 115.

⁴⁷¹ For a criticism of the purely intragenerational rights approach see Brown Weiss, E., 'A Reply to Barresi's "Beyond Fairness to Future Generations"' (1997) 11 *Tulane Environmental Law Journal* 89 - 97.

Section 24(b), to measure, assess and assure environmental protection for the benefit of the future generation.

5.7 'Benefit' and the Public Trust Doctrine

'Intergenerational equity embodies the notion that the present generation holds the earth's resources in trust for future generations.'⁴⁷²

Any lasting concern that the use of 'benefit' imparts an anthropocentrism to Section 24(b) can also be dispelled by reference to the second paragraph of the *Government Policy* which states that:

'Every generation has an obligation to act as a trustee of its natural environment and cultural heritage in the interest of succeeding generations. In this respect, sobriety, moderation and discipline are necessary to restrict the demand for fulfilment of needs to sustainable levels.'

The word 'benefit' is also suggestive of the State's duty as trustee of the environment. This would be in accordance with the public trust doctrine. Trust law requires that the bare dominium of an asset be held by a trustee for the benefit of someone else (a beneficiary). The public trust doctrine would place the State in such a fiduciary position⁴⁷³ with respect to the asset, in this case 'the environment'. 'Benefit' might therefore imply a situation of public trust where the present and future generations are the beneficiaries of the public trust so created.

'The essence of the public trust is that the State, as trustee, is under a fiduciary duty to deal with the trust property, being the common natural resources, in a manner that is in the interests of the general public. Hence, the State cannot alienate the trust property unless the public benefit that would

⁴⁷² Boer, B., 'Institutionalising Ecologically Sustainable Development: The Roles Of National, State, And Local Governments In Translating Grand Strategy Into Action' (1995) 31:2 *Willamette Law Review* 307- 358 at 319.

⁴⁷³ 'Locke stated in his *Second Treatise on Civil Government* (1685) that governments merely exercise a "fiduciary trust" on behalf of their people. Pound suggests that the role of states in the management of common natural resources must be limited to "a sort of guardianship for social purposes"'. van der Schyff, E., 'Unpacking The Public Trust Doctrine: A Journey Into Foreign Territory' (2010) 13:5 *PELJ* 121 – 189 at 123 footnotes omitted.

result outweighs the loss of the public use or “social wealth” derived from the area.⁴⁷⁴

Similarly:

‘The public trust doctrine creates a legal obligation for the sovereign to hold certain natural resources in trust for its people, and at the same time it places a custodial duty on the sovereign to protect and preserve these resources for present and future generations. The public trust doctrine has been described as ‘an ancient legal precept of public ownership of important natural resources’.⁴⁷⁵

The public trust doctrine is seemingly based on the Roman legal principle of *res communes* in terms of which the State held ‘property’ on behalf of everyone.⁴⁷⁶ ‘Ownership’⁴⁷⁷ therefore vested equally in everyone and the beneficial rights are administered on everyone’s behalf and for their general benefit by the State as trustee.⁴⁷⁸ It is critical to distinguish this situation from other forms of trusteeship where the subject matter is capable of true ownership and is therefore owned by the trustee.

The concept of public trust is in keeping with Roman Law and can be found, in principle, in the *ANC Policy*⁴⁷⁹ as well as the *Government Policy*⁴⁸⁰ and appears to have been brought

⁴⁷⁴ Preston, B. J., *Ecologically Sustainable Development in the Courts in Australia and Asia* A paper presented to a seminar on environmental law organised by Buddle Findlay, Lawyers, Wellington, New Zealand, 28 August 2006 at pages 38 -39 footnote omitted.

⁴⁷⁵ Feris, L., ‘The Public Trust Doctrine and Liability for Historic Water Pollution In South Africa’ (2012) 8:1 *Law of Environment and Development Journal* 1 – 18 at 5 footnote omitted .

⁴⁷⁶ Feris describes the Roman concept of *res communes* forming part of the English Law Public Trust Doctrine. Feris, L., ‘The Public Trust Doctrine and Liability for Historic Water Pollution In South Africa’ (2012) 8:1 *Law of Environment and Development Journal* 1 – 18 at 5; see also van der Schyff, E., ‘Unpacking The Public Trust Doctrine: A Journey Into Foreign Territory’ (2010) 13:5 *PELJ* 121 – 189 at 125 – 126 and at 132 for similar reasoning.

⁴⁷⁷ *Res omnium communes* are generally regarded as being *res extra commercium* which means that they are not capable of being owned in their natural state (although parts can be ‘captured’ and controlled and therefore owned in such captured state. See Van Der Merwe, G. G. ‘Things’ in Joubert, W. A., Faris, J. A. and Harms, L. T. C. *The Law of South Africa* (First Reissue) (2002), Butterworths, Durban pages 101-355 at [213] – [214].

⁴⁷⁸ LAWSA Vol 27 First Edition describes Common things ‘(*res omnium communes*) [as being] things which by natural law are common to mankind and therefore insusceptible of private ownership. Examples are the air and running water. These things are to be enjoyed in common by all living persons conforming with the use for which nature had intended them.’ (Van Der Merwe, G. G. ‘Things’ in Joubert, W. A., Faris, J. A. and Harms, L. T. C. *The Law of South Africa* (First Reissue) (2002), Butterworths, Durban pages 101-355 at [213]) footnotes omitted. They are distinct from State assets which were regarded as *res publicae*. ‘Like common things, public things can be used freely by the general public but, unlike common things, they do not belong to the community as a whole but to the state.’ (Van Der Merwe, G. G. ‘Things’ in Joubert, W. A., Faris, J. A. and Harms, L. T. C. *The Law of South Africa* (First Reissue) (2002), Butterworths, Durban pages 101-355 at at [214]) footnotes omitted.

⁴⁷⁹ Interestingly enough the *ANC Policy* at (12) preferred to vest ‘all natural resources below and above the surface area of the land, including the air, and all forms of potential energy or minerals in the territorial

into post Constitutional legislation dealing with natural resources.⁴⁸¹ The public trust doctrine therefore seems to be, in principle, a legally acceptable premise and resonates with Section 24(b)'s use of 'everyone' and 'benefit'.

Where the State acts as a Trustee and where the beneficiaries are as diverse a group as the inhabitants of South Africa then it would simplify administration of the subject matter (i.e. the environment) if an objective test were employed. Reference to ecological sustainability would provide such a test; it is divorced from subjectivity and can be objectively and scientifically assessed in an impartial way. Feris argues that Section 24(b) constitutionally prescribes a 'custodial obligation on government as the public trustees of South Africa's water resources'.⁴⁸² This argument is supported but extended to the environment as a whole. A contention supported by s 2(4)(o) of NEMA which explicitly states that 'The environment is held in public trust for the people...'.⁴⁸³

The question of 'benefit' would be problematic in the context of *Sustainable Development* as this would require an assessment of an immediate, developmental, benefit subjectively assessed against the immediate environmental cost and then an extrapolation of both of these into some, unascertainable and hypothetical, future. 'A critical question that remains unanswered both nationally and in international environmental law is whether there is a universal way of measuring the sustainability of a given development model'.⁴⁸³ However these problems are sidestepped by the objective directive to protect the environment. A functioning (if not actually healthy) environment is a *sine qua non* of human survival. Protection of the environment is therefore, axiomatically, to the benefit of future generations. This requires no assessment of financial or developmental benefit or other subjective consideration. It will also not permit economic conjuring. Simply put, it is objectively and universally beneficial to protect the environment i.e. to manage for ecological resilience.

waters, the continental shelf and the exclusive economic zone of South Africa,' in the State 'acting as trustee of the whole nation'.

⁴⁸⁰ See fn 317.

⁴⁸¹ See for instance s 2(4)(o) of NEMA 'The environment is held in public trust for the people...'; s3(1) of the National Water Act, no. 36 of 1998 'As the public trustee of the nation's water resources the National Government...'; and s 3(1) of the Mineral and Petroleum Resources Development Act, no. 28 of 2002 'Mineral and petroleum resources are the common heritage of all the people of South Africa and the State is the custodian thereof for the benefit of all South Africans.'

⁴⁸² Feris, L., 'The Public Trust Doctrine and Liability for Historic Water Pollution In South Africa' (2012) 8:1 *Law of Environment and Development Journal* 1 – 18 at 13.

⁴⁸³ Murombo, T., 'From Crude Environmentalism to Sustainable Development: *Fuel Retailers*' (2008) 125(3) *SALJ* 488 – 504 at 496.

The State may exercise its mandate as Trustee either as an independent 'person' or it may do so as the manifestation of the executive will of 'everyone'. Because the root of the public trust doctrine lies in the Roman principle of *res communes* and not in *res publicae* the latter interpretation is preferred. In which case the actual trustees are 'everyone' but for practical reasons their will is executed by a democratically elected State (the presence of 'everyone' in Section 24(b) echoes this conclusion). This latter interpretation seems to accord with the *Government* and *ANC Policy* positions (as well as the directive principles of the Indian Constitution and the public trust doctrine) and if it is accepted would lend support to the argument that the positive duty elements of Section 24(b) are borne by everyone and not only the State. It has also received judicial approval in the High Court:

'The attainment of this [Section 24(a)] objective or imperative confers upon the authorities a stewardship, whereby the present generation is constituted as the custodian or trustee of the environment for future generations.'⁴⁸⁴

A position strongly reinforced by the Constitutional Court in *Fuel Retailers*:

'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.'⁴⁸⁵

Although 'benefit' might give Section 24(b) an anthropocentric tone it might, more plausibly, instead imply a relationship of trusteeship. If this is the case then any anthropocentric tone would be diminished. In the circumstances, 'benefit' is insufficient to characterise the whole of Section 24(b) as anthropocentric, and it must be regarded as, primarily, an ecocentric right. Read with the primarily anthropocentric Section 24(a) the whole of Section 24 can be regarded as capturing the spirit of the bicentric cyclical paradoxical human / environmental right.

One final aspect of 'benefit of present ... generations' remains to be dealt with. Intragenerational equity has been used as an argument to support the concept of

⁴⁸⁴ *HTF Developers* case at [19].

⁴⁸⁵ *Fuel Retailers* case at [102].

‘environmental justice’. Kidd appears prepared to accept ‘that the concept of [environmental] justice is concerned with the distribution of benefits and burdens in a society’.⁴⁸⁶ While environmental justice appears to be an accepted concept in the USA where it serves to protect ‘minorities and the poor’ its translated content and application in a South African context appears to be less certain.^{487,488} It is not suggested that Section 24(b) imports the concept into South African law but rather that it could be used to illuminate the requirement that environmental protection is for the benefit of everyone. The blanket requirement that ‘environmental protection benefits the present generation’ would seem to suggest and, by implication, require that the benefits are equally distributed throughout society both now and in the future.

‘Thus, intragenerational equity,..., is concerned with the equitable distribution of environmental costs and benefits from developmental activities. In this sense intragenerational equity attempts to achieve justice between [persons]. In particular, intragenerational equity attempts to achieve justice between rich and poor’.⁴⁸⁹

This interpretation would accord with the public trust doctrine which, by implication, requires the trust ‘capital’ to be fairly used for all the beneficiaries. Conversely, environmental protection would impose burdens in the form of constraints upon development. Although these are not expressly mentioned; developmental burdens must naturally flow from environmental protection and these too need to be fairly and equitably distributed. This is a particular issue in the South African context.

⁴⁸⁶ Kidd, M., ‘Environmental justice - a South African perspective’ (1999) *Acta Juridica* 142 – 162 at 149; for a discussion of Environmental Justice in the USA context see Monsma, D., ‘Equal Rights, Governance, and the Environment: Integrating Environmental Justice Principles in Corporate Social Responsibility’ (2006) 33 *Ecology Law Quarterly* 443 – 498 at 450 – 472.

⁴⁸⁷ Although it is expressly recognised and provided for s 2(4)(c) of NEMA: ‘Environmental justice must be pursued so that adverse environmental impacts shall not be distributed in such a manner as to unfairly discriminate against any person, particularly vulnerable and disadvantaged persons.’

⁴⁸⁸ For example ‘[E] environmental justice is an all-encompassing notion that affirms the use value of life, all forms of life, against the interests of wealth, power and technology... In this context, environmental rights are tools that can be used to legitimise claims and challenge power relations vis-à-vis government, mining, business or industry, or private powerholders; and whether in the form of confrontation, engagement or litigation. And environmental justice is a platform that holds the potential to collectively mobilise and vindicate unsatisfied social needs.’ Dugard, J. and Alcaro, A., ‘Let’s Work Together: Environmental And Socioeconomic Rights In The Courts’ (2013) 29 *SAJHR* 14 – 32 at 18.

⁴⁸⁹ Tladi, D., ‘Intragenerational Equity: A New Name for International Environmental Justice’ (2003) 9 *Fundamina* 197 – 204 at 198 footnote omitted.

5.8 'Pollution', 'Ecological Degradation' and 'Conservation'

The grammatical or textual interpretation of the Section 24(b)(i) and Section 24(b)(ii) has been given previously. The concept of ecological degradation has also been dealt with and pollution is given its widely accepted meaning.

Conservation must, in the context, mean conservation of the environment and its underlying ecological processes. Conservation is distinct from preservation. Preservation is used in environmental circles to describe protection against change and harm whilst conservation implies a positive management function whilst simultaneously protecting the underlying resource. Thus conservation does not preclude use and active management but requires also preservation of the resource. As such, and in the context of Section 24(b)(ii) it means the prudent use of the environment whilst preserving the environment's integrity.

In this regard conservation can also be applied to non-renewable resources. Although these will ultimately be depleted they can be conserved, i.e. made to last longer, with resultant slower harm. Conservation can occur both by improving technology e.g., in the case of coal used for electricity generation (more efficient generators would consume less coal per unit of output) and through better end-user technology as well as more prudent end-user behaviour. Better technology and more prudent use would result in less electricity being consumed for the same work (e.g. using 'energy saver' light bulbs in the place of incandescent light bulbs) and a reduction in wasteful use (e.g. leaving lights on unnecessarily), resulting in extended duration of coal reserves. Conservation would then also allow the environment longer to assimilate the pollution with a possibly less detrimental impact on its ecosystems. The private positive duty is clear in this example.

5.9 'Ecologically Sustainable Development'

Ecologically sustainable development means that the short term advances secured by humankind must not compromise ecological integrity of and thereby be harmful to the environment. An assessment of ecological sustainability could only properly be made where the dependency of humans on the environment is factored in; ultimately this is an enquiry

based on assessing short term gains against long term harm but must be assessed from the environment's perspective as this is where the harm initially manifests itself. The buffering effects contemplated in the cyclical paradoxical model of the human environmental relationship means that the harm (negative impact) may not be directly and immediately transmitted to humankind but rather it will be transmitted to a distant (in either time or space) human population. Therefore the impacts must be assessed at the environmental level and from the environment's perspective. An ecocentric interpretation of Section 24(b) and the use of ecological resilience seem to be the most appropriate tool for this purpose.

Ecosystems cannot be preserved unchanging, they are dynamic systems in a constant state of perpetual flux. Sustaining an ecosystem therefore cannot be equated to preserving an ecosystem, rather the underlying ecological processes need to be protected so that the ecosystem can remain resilient. Ecologically sustainable development would therefore be development which, prior to commencing, recognises the ecological processes and then commences in a manner which does not fatally compromise these processes.

In this regard the requirement is that ecological sustainable development is secured. There needs to be a reasonable assurance that ecological sustainability will be achieved, it is not enough to merely aim for this goal but there must be a reasonable certainty of achievement.

5.10 Ecologically Sustainable 'Use of Natural Resources'

In *Caring for the Earth* sustainable use of resources is described as follows:

'Ensure that uses of renewable resources are sustainable.

Renewable resources include soil, wild and domesticated organisms, forests rangelands, cultivated land, and the marine and freshwater ecosystems that support fisheries. A use is sustainable if it is within the resource's capacity for renewal.

Minimize the depletion of non-renewable resources.

Minerals, oil, gas and coal are effectively non-renewable. Unlike plants, fish or soil, they cannot be used sustainably. However, their "life" can be extended,

for example, by recycling, by using less of a resource to make a particular product, or by switching to renewable substitutes where possible....⁴⁹⁰

These concepts present a number of practical problems when viewed from the perspective of Section 24(b)(iii)'s requirement of 'ecologically sustainable use of natural resources'.

Firstly, over what time period is a resource's capacity for renewal measured? A possibly apocryphal example comes from the story of the white rhino (*Ceratotherium simum*).

'At the end of 1893 a few white rhino were said to inhabit the low, inaccessible, tsetse fly haunted country between the lower courses of the Black and White Umfolozi rivers in Zululand. Over the rest of Southern Africa they were extinct. The long and terrible slaughter was surpassed only by the extermination of the bison in North America.'⁴⁹¹

From these approximately 437 last remaining animals⁴⁹² their former habitats were successfully re-populated so that 'by 1965 the International Union for the Conservation of Nature was able to declare that the animal had been saved, and it was removed from the Class A Protection List.'⁴⁹³ Whilst the exact dates, the surviving numbers and whether or not the general extinction was absolute may be questioned: there can be no doubt that the approximately 437 animals, through preservation and then conservation allowed the resource to renew itself in the years between 1953 when the animals were counted and 1965. Does the 'long and terrible slaughter' constitute sustainable use of a renewable resource? Instinctively the answer must be 'no' and therefore the question of the time period will need to be determined in such a way that the resource numbers remain at a constant level rather than experiencing unnatural dramatic fluctuations. The use of the resource should approximate the changes in number that would occur in a normally functioning ecosystem or which would allow the resource to renew itself within one generation.

With regard to non-renewable resources; can their use ever be sustainable? If 'sustainable' means to preserve a non-renewable resource in perpetuity then its use can never be sustainable.⁴⁹⁴ If however sustainable means to prolong or extend the use then, conceivably, sustainable use of a non-renewable resource is possible. Given the understanding that

⁴⁹⁰ *Caring for the Earth* at pages 9 and 10.

⁴⁹¹ Player, I., *The White Rhino Saga* (1972) Collins, London at page 33.

⁴⁹² These animals were counted by aerial survey in 1953. Player, I. *The White Rhino Saga* (1972) Collins, London at page 37.

⁴⁹³ Player, I., *The White Rhino Saga* (1972) Collins, London at page 15.

⁴⁹⁴ Philosophically one could argue that a resource which is not used ceases to be a resource and therefore that perpetual preservation of resource is logically impossible.

neither the environment nor its underlying ecological processes can be preserved, unchanging in perpetuity; using sustainability to mean prolong rather than only maintain is permissible. Time is an environmental resource as much as space is.

Use of a resource (renewable or non-renewable) must also be interpreted from the environment's perspective. Whilst harvesting a renewable resource might be conducted in a manner which allows that resource to renew itself; its depletion, albeit temporary, will have a knock on effect on other ecological processes within the environment. Similarly the use of a non-renewable resource, which will ultimately lead to the depletion of the resource, must be assessed from the perspective of the impact of the use on the environment. The use of a resource in a manner which compromises the environment's integrity and which compromises the underlying ecological processes renders the use of that resource ecologically unsustainable and would thus be prohibited. In assessing the ecological sustainability (or not) of resource use the use must be assessed from the perspective of the resource and also from the perspective of the environment. By implication therefore Section 24(b) must be ecocentric to achieve its purpose.

The concept of *Sustainable Development* suffers from a lack of focus. In the *Pulp Mills Case*, the ICJ had formulated an earlier order relating to the dispute:

‘that such use should allow for sustainable development which takes account of “the need to safeguard the continued conservation of the river environment and the rights of economic development of the riparian States”’⁴⁹⁵

It would appear that the one party to the dispute, Argentina, had interpreted this requirement ‘to allow for *Sustainable Development*’ to mean that ‘principles of international law ensuring protection of the environment. ..., the principles of sustainable development, prevention, precaution and the need to carry out an environmental impact assessment’ should be applied to the project.⁴⁹⁶ Conversely Uruguay (as the other party) argued that the project was necessary to its *Sustainable Development* as a state and therefore the issue had to be seen, not at a project level, but at the state level.⁴⁹⁷ By focussing the requirement at an ecological level, as Section 24(b)(iii) appears to have done, this confusion is resolved.

⁴⁹⁵ *Pulp Mills Case* at [75] footnotes omitted.

⁴⁹⁶ *Pulp Mills Case* at [55].

⁴⁹⁷ *Pulp Mills Case* at [152].

In assessing the ecological sustainability of a development the sustainability of the development needs to be assessed in its own right and from the perspective of the receiving environment. It would seem that the assessment of the use or development *per se* would conform to the principles of *Sustainable Development* while the impact on the environment would necessitate an application of *Sustainability* principles.

5.11 'Justifiable Economic and Social Development'

The grammatical interpretation of Section 24(b)(iii) used prefers the separation of justifiable economic development from justifiable social development. (Although as noted 'socio-economic' has become an accepted term and the two could be conjoined). The separation is also preferable from a contextual perspective based on the three pillar concept of *Sustainable Development* and, most importantly, from a purposive South African perspective.

The three pillar concept addresses the historical position where economic development (i.e. built infrastructure and accumulated monetary wealth) has not always improved the lives of the general human population. The advancement of economic development which did not confer a simultaneous social benefit is regarded as being unbalanced and therefore the economic development would be unsustainable and contrary to the concept of *Sustainable Development*. It is important to bear the distinction between economic development on the one hand and social development on the other in mind when interpreting Section 24(b)(iii) as the two are not synonymous.

In a South African context social development is critical. As a consequence of its colonial and apartheid history South Africa is a country of extreme social injustice. Quoting figures from 1994 (the official end of the apartheid state) Kidd paints a grim picture of both an absolute lack of social development as well as its gross racial bias.⁴⁹⁸ Categories listed by Kidd include unemployment, electrification, potable water, infant mortality, sanitation and

⁴⁹⁸ Kidd, M., 'Environmental justice - a South African perspective' (1999) *Acta Juridica* 142 – 162 at 149 – 151.

housing. The Constitution has been regarded as being instrumental in addressing this social and economic inequality:

'We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or to adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order. For as long as these conditions continue to exist that aspiration will have a hollow ring.'⁴⁹⁹

Table One records census data relating to various social development criteria. It must be noted that, in the context of South Africa's history, there is considerable variation between racial groupings and this variation is not reflected in Table One. Whilst commendable effort by government has addressed many social development issues there remains considerable work to be done. Key aspects which appear from Table One include the fact that 8.6% of the population have absolutely no formal education and that only 28.9% have completed formal schooling, almost 70% of South Africa's population have dropped out of the school system before completing their schooling. Almost 20% of all households had no access⁵⁰⁰ to piped water in 1996 and in 2011 there were still almost 9% of households without any access to piped water and 5.2% of households have no toilets. Infant mortality is high and nearly 65% of households have no access to the internet. Social development, despite some 17 years remedial effort (between 1994 and 2011), remains of paramount importance as an absolute requirement and there is also an urgent need to redress its racial bias.

In addition to the need for social development outlined above there is a concomitant need for economic development. Economic development is a *sine qua non* of social development (environmental protection is a *sine qua non* of social existence). Unemployment, whilst listed as a social inequality, is also an economic inequality. Without economic development unemployment will not be reduced. The world's highest GINI Index value of 63.1 points to a gross inequality in economic development between the 'haves' and the 'have nots'. South Africa is not a poor country.

⁴⁹⁹ *Soobramoney v Minister of Health, Kwazulu-Natal* 1998 (1) SA 765 (CC) at [8].

⁵⁰⁰ Access includes private access and communal access to e.g. standpipes.

Category	1996	2001	CS 2007	2011
Total Population	40,583,573	44,819,778	48,502,059	51,770,560
Percentage of school going population (5-24yrs old) in pre-school	-	4.2%	-	0.9%
Percentage of school going population (5-24yrs old) in school	-	91.7%	-	93.0%
Percentage of school going population (5-24yrs old) in College	-	1.4%	-	2.6%
Percentage of school going population (5-24yrs old) in University or Technicon	-	2.3%	-	3.0%
Percentage of Population aged 20 yrs + with no schooling	19.1%	17.9%	-	8.6%
Percentage of Population aged 20 yrs + completed primary schooling	7.4%	6.4%	-	4.6%
Percentage of Population aged 20 yrs + completed high schooling	16.3%	20.4%	-	28.9%
Percentage of Population aged 20 yrs + completed higher education	7.1%	8.4%	-	11.8%
Average annual household income	-	ZAR 85,883*	-	ZAR 103,204
Households in Formal Dwellings	65.1%	68.7%	70.6%	77.6%
Households in Traditional Dwellings	18.3%	14.8%	11.7%	7.9%
Households in informal or other dwellings**	16.6%	16.7%	17.7%	14.5%
Households with own piped water	60.8%	62.3%	69.4%	73.4%
Households with other access to piped water	19.6%	22.7%	19.2%	11.4%
Households with no access to piped water	19.7%	15.0%	11.4%	8.8%
Households with flushing toilets**	-	51.9%	57.8%	60.1%
Households with other toilets**	-	34.5%	29.9%	32.7%
Households with no toilets	-	1.6%	8.3%	5.2%
Households with electrical lighting	58.2%	69.7%	80.1%	84.7%
Households with electricity for cooking	47.5%	52.2%	66.4%	73.9%
Households with electricity for heating	46.3%	49.9%	58.7%	58.8%
Households with Municipal refuse collection	54.3%	57.2%	61.6%	63.6%
Households with access to refuse dump**	35.8%	34.3%	31%	30.1%
Households with no refuse disposal	9.7%	8.5%	7.1%	5.4%
Households with own personal computer	-	8.5%	15.6%	21.4%
Households with home access to internet**	-	-	-	24.9%
Households with no access to internet	-	-	-	64.8%
Mortality*** ≤ 4 yrs old** (5 yrs)	-	-	-	12.0%
Mortality*** 5 - 19 yrs old** (15 yrs)	-	-	-	4.0%
Mortality*** 20 - 34 yrs old** (15 yrs)	-	-	-	19.0%
Mortality*** 35 - 64 yrs old** (30 yrs)	-	-	-	40.7%
Mortality*** ≥ 65 yrs old** (35+ yrs)	-	-	-	24.2%
Employment (Labour absorption) rate Males	-	-	-	46.0%
Employment (Labour absorption) rate Females	-	-	-	33.6%

Table One: Census Data

Comparison of the three official post democracy censuses (1996, 2001 and 2011) together with the results of a 'Community Survey' in 2007 which cannot be regarded as an official census. '-' indicates that data are lacking. All figures are taken from Statistics South Africa *Census 2011*.

*The actual figure of ZAR 48,385 has been adjusted for 77.5% cumulative inflation (see *Census 2011* page 41).

**Categories have been combined.

***Total number of deaths as a percentage of total mortality less mortality in unspecified age classes.

The World Bank's listing of national GDP values as at 2012 places South Africa in 29th position out of a total of 189 nations.⁵⁰¹ The World Bank has produced a second measure which is the *Total Wealth*⁵⁰² of nations. This places South Africa, as at 2005, in the upper half of the 'upper middle income' band of nations, a position it held in 1995 too. This would suggest that real, per capita, development has not occurred at a particularly impressive rate. As *Total Wealth* measures traditional wealth measures and natural capital; given the advances made in social development the fact that South Africa's *Total Wealth* has remained relatively flat⁵⁰³ might suggest that economic development has occurred at the expense of natural capital depletion and that these have balanced each other out. The high GINI Index is especially concerning as it indicates that the economic development which has occurred has not been translated into broad social development because wealth has accumulated in an unbalanced manner. This disjuncture alone points to the need to regard economic development separately from social development. In a South African context these are truly two separate legs of the cooking pot and must, in interpreting Section 24(b)(iii) be dealt with as such.

In applying Section 24(b)(iii) ecologically sustainable development has to be 'secured' in order to protect the environment. The incorporation of the directive 'secured' suggests a peremptory instruction which requires achievement and not merely a best effort. This directive though may be limited by the proviso, the directive to promote justifiable development. The word 'promote' imparts a positive obligation and thus twin, seemingly, opposing imperatives are created; the peremptory directives to secure ecological sustainable development whilst promoting justifiable development. It is submitted that the securing of ecologically sustainable development is an absolute requirement and that the duty to promote justifiable development is secondary to this requirement. The ordering of the two directives supports this interpretation, ecologically sustainable development must be secured while promoting justifiable developments and not *vice versa*.

What would constitute 'justifiable' in this regard? There is a clear need for both economic development and, especially, social development in South Africa. (Both types of

⁵⁰¹ World Development Indicators database, World Bank, 7 May 2014 accessed on 24 May 2014 through <http://databank.worldbank.org/data/download/GDP.pdf> .

⁵⁰² The International Bank for Reconstruction and Development / The World Bank, *The changing wealth of nations: measuring sustainable development in the new millennium*. (2011) The World Bank, Washington DC

⁵⁰³ See fn 501 at 167.

development require resource use to some extent and therefore, in this part development is used to indicate both development and / or use). Development could potentially be divided into two types, the first would benefit a wide sector of society and would not contribute to widening wealth divide (i.e. not increase the GINI Index) while providing necessary social upliftment or betterment. The second might or might not be geared to social betterment but it would, ultimately, not qualify as being justified as the nett result would either be ecologically unsustainable and / or would not meet the twin requirements of economic and social betterment. It would be impossible to canvass the full range of possibilities here.

One point to consider in any application of this provision to the facts of a matter is that economic measures, such as the valuation of ecosystem goods and services or the valuation of natural capital, translate environmental components into monetary terms. While these are useful comparative tools it must be remembered that in doing this the intrinsic, non-anthropocentric, values of the environment (and its ecosystems) are ignored. The concern is that there could be a monetary trade-off. Trade-offs in environmental services are difficult to evaluate as they require a projection of future needs and resources.⁵⁰⁴ This would not constitute 'justifiable' as the fundamental requirement is to secure ecologically sustainable development and not to achieve a possible trade-off or monetary balancing of the books. The use of 'justifiable' should not be regarded as a licence to sacrifice the environment in the pursuit of development. Instead it should probably be regarded as excluding frivolous, unnecessary, undesirable or purely profit orientated development. Most importantly though; promotion of justifiable economic development requires that the development is ecologically compatible or ecologically appropriate and that it results in a social benefit too. South Africa's need for economic and social development should not override the focus of Section 24(b)(iii) which is to secure ecologically sustainable development (or use of resources) and is not to promote development as such. It may be possible to categorise Section 24(b)(iii) as integrating development into environmental protection rather than the *Sustainable Development* integration of environmental concern into pro-development objectives.

Whilst ecosystem goods and services valuations should not be used as a basis for assessing 'justifiable economic development' they do have an import in addition to their use as a comparative measure. The growing acknowledgment that natural capital constitutes an

⁵⁰⁴ See for instance Carpenter, S. R., Bennett, E. M. and Peterson, G. D., 'Scenarios for ecosystem services: an overview.' (2006) 11(1) *Ecology and Society* 29 – 38.

element of the economy means that economic development is not automatically antagonistic to environmental protection. Environmental protection, insofar as it increases or preserves natural capital, is economic development. Enhanced ecological resilience will lead to enhanced ecosystem goods and services and therefore environmental protection as contemplated here is a form of economic development. (Similarly it is also a form of social development although possibly the social benefits accrue not only from ecosystem services (e.g. recreation, health benefits etc.) but also from the intrinsic intangible environmental elements (e.g. a sense of belonging, spiritual well-being etc.).

The relationship between poverty and the environment is intricate. Poverty and ecological degradation are often associated with each other but it must be noted that 'the growth of human, social, and manufactured capital can degrade natural capital and ecosystem services.'⁵⁰⁵ It appears to be accepted practice that natural capital is surrendered to achieve economic growth and that, when economic growth has been assured, the harm can be remedied. This approach has rightly been condemned by du Plessis in discussing poverty alleviation. The author emphatically states that:

'This approach is unsound, illogical and 'potentially dangerous in policy terms'. It does injustice to the severity of the long-term impact of poor environmental quality on the lives of people, it disregards the irreversibility of some forms of environmental harm and it does not recognise the consequences that cumulative environmental impacts may have on people's health and well-being'.⁵⁰⁶

This approach treats natural capital as though it were financial capital and

'that by treating the environment like any other commodity, it fails to take into account the unique aspects of the environment. The cumulative and synergistic nature of the impact of human activity on ecological support systems and biodiversity is inconsistent with the marginal analysis employed in the neoclassical microeconomic model and the assumption of divisibility. The public goods represented by the environment are not readily reduced to private ownership through which the general equilibrium of the market could assure allocative efficiency. Natural capital, once spent, cannot necessarily be replaced, for many environmental impacts are irreversible.'⁵⁰⁷

⁵⁰⁵ Carpenter, S. R., Bennett, E. M. and Peterson, G. D., 'Scenarios for ecosystem services: an overview.' (2006) 11(1) *Ecology and Society* 29 - 38 at 35.

⁵⁰⁶ Du Plessis, A., 'South Africa's Constitutional Environmental Right (Generously) Interpreted: What is in it for Poverty?' (2011) 27 *SAJHR* 279 - 307 at 286 footnote omitted.

⁵⁰⁷ Smith, S. L., 'Ecologically Sustainable Development: Integrating Economics, Ecology, and Law' (1995) 31:2 *Willamette Law Review* 261 - 306 at 294 footnotes omitted.

5.12 Section 24 Interpreted

Section 24(b) is to be interpreted as a fundamental right imposing both negative and positive obligations on everyone. The positive duties apply horizontally subject to an element of proportionality and reasonableness. Section 24(b) is ecocentric and has as its purpose the protection of the environment through preventing pollution, preventing ecological degradation and promoting conservation of the environment. Section 24(b)(iii) requires that, in addition to the positive duties imposed by (i) and (ii) development and the use of natural resources must be ecologically sustainable i.e. ecologically compatible. This compatibility extends to both the development and the use. Only ecologically compatible development is to be promoted in terms of Section 24(b)(iii). As such Section 24(b)(iii) is not a developmental right, it is an environmental protection right. Its wording is 'carefully phrased and counterpoised'⁵⁰⁸ and is not 'simply the result of clumsy drafting'⁵⁰⁹ as feared.

The overall purpose of Section 24(b) is to protect the environment now and in the long term. Its ecocentric focus distinguishes it from Section 24(a) which is anthropocentric and protects humans from their environment. Section 24(b) protects the environment from humans and this fits into the bicentric cyclical paradoxical model proposed previously. In this way each is a side of the same coin. Furthermore this interpretation is in keeping with the apparent purpose of Section 24 as deduced from the contextual concepts of *Sustainable Development*, *Sustainability* and the presumed intention of the drafters.

South African environmental laws are fragmented between spheres of government, across subject matter and across institutions.⁵¹⁰ Having a single environmental right would act as a touchstone allowing the range of role players to apply the various pieces of legislation and to ensure that the objectives of the laws are met. By making this right an objective environmental right there is less chance of subjective factors weakening its purpose.

⁵⁰⁸ See fn 307 above.

⁵⁰⁹ See fn 11 above.

⁵¹⁰ This aspect is discussed by Kotzé, L. J., 'Improving Unsustainable Environmental Governance in South Africa: The Case for Holistic Governance' (2006) 9 *PELJ* / *PER* 1 – 44.

Section 24 as a whole can be regarded as an example of the bicentric environmental right. Section 24(b) protects the environment from humans. Section 24(a) protects humans from the environment. Together they provide for a bicentric environmental right. With reference to Section 24(a) it must be noted that the protection of humans from their environment will not be limited to buffering the negative consequences of a lack of environmental protection. The cyclical paradox regards humans, at one level, as being components of the ecosystem. As such humans are merely one of the animal species making up an ecosystem. This would mean that humans are also vulnerable to purely natural environmental dangers. These dangers may be especially acute in the South African context, and would include: predation (e.g. by lions, leopards, hyenas, crocodiles and sharks), poisoning (e.g. snake bites, poisonous plants and fungi), food conflicts (e.g. elephant and large herbivore damage of crops, other herbivore competition and stock losses to predation), animal confrontations (e.g. elephants, hippopotami, buffalo and other large animals can cause non predation death), vector borne diseases (e.g. rabies, malaria, sleeping sickness (nagana), bilharzia and anthrax) and natural disasters (e.g. floods and droughts). All of these dangers occur naturally in the environment and humans, in terms of Section 24(a), have a fundamental right not to be harmed by them. The negative nature of Section 24(a) means that the State must not aggravate or exacerbate these risks but is not under a general positive duty to remove the risks. However other positive developmental rights might impose a positive duty in this regard. Development which aggravates these dangers would presumably be contrary to Section 24(a) and environmentally harmful measures to avert these dangers would conflict with Section 24(b), a truly paradoxical situation requiring development to tread a narrow path between the two. Finally, Section 24(b) cannot, in this context, be assumed to 'give content to the entrenched right envisaged'⁵¹¹ in Section 24(a). A truly healthy natural environment would pose significant natural threats to human health and well-being.

One final point to consider in reaching the conclusion that Section 24(b) is an environmental protection right and not a *Sustainable Development* right flows from an assessment of the primary principle of *Sustainable Development* and the nature of the Bill of Rights as a whole. *Sustainable Development* is unashamedly anthropocentric in nature and, strictly speaking, is a developmental right. The primary principle of *Sustainable Development* is the integration principle. This has been recognised as an emergent or possibly fully-fledged international legal principle, it has also been recognised as having legal status in South African municipal

⁵¹¹ Per Murphy J in *HTF Developers (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* 2006 (5) SA 512 (T) at [17].

law by virtue of its international status⁵¹² and by virtue of its inclusion in national legislation.⁵¹³ The integration principle can be regarded as promoting economic (monetary wealth) development but requiring that environmental (and social) factors be considered in the pursuit of monetary wealth. In this regard the environmental impact assessment mechanisms set out in NEMA confirm this; in conducting an assessment 'of the potential consequences or impacts of activities on the environment [procedures] must include, with respect to every application for an environmental authorisation and where applicable, investigation of mitigation measures to keep adverse consequences or impacts **to a minimum**'.⁵¹⁴

If it is accepted that Section 24(b) is a purely ecocentric right (and Section 24 as a whole is an environmental and not a developmental right) how then can *Sustainable Development* be Constitutionally permissible? The Bill of Rights contains 27 substantive human rights including Section 24. These 26 other rights are all anthropocentric and most, if not all, of them can be used as a basis for economic and / or social development. Whilst it may be possible to use some of these other rights for purposes of environmental protection⁵¹⁵ Barresi posits that there are 'hazards [in] seeking to achieve environmental sustainability using substantive rights guarantees that are not explicitly environmental'.⁵¹⁶ Whilst other rights inherently promote social and economic development there is only one substantive right explicitly protecting the environment.

A number of other rights in the Bill of Rights immediately come to mind and could, legitimately and without unduly stretching the bounds of interpretation, be used to foster both

⁵¹² Per Ngcobo J in *Fuel Retailers* [46] – [56] inclusive; also see *BP Southern Africa* case at 144 C – D.

⁵¹³ Section 1(1) of NEMA defines sustainable development to be '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;'.⁵¹⁴

⁵¹⁴ Section 24(4)(b)(ii) of NEMA emphasis added. This seems to contradict a founding principle of NEMA, the public trust principle (s2(4)(o), which requires that '...the environment must be protected....'.⁵¹⁵

⁵¹⁵ Arguments for environmental protection could, for example, conceivably be made under rights: to life, of dignity, equality, freedom and just administrative action to name a few. Some of these rights and their applicability to environmental protection are discussed by Kotzé, L. J., 'A Critical Survey of Domestic Constitutional Provisions Relating to Environmental Protection in South Africa' (2007) 14 *Tilburg Law Review* 298 - 337. For a detailed analysis of the 'intersections' between Section 24 and other Constitutional provisions see Du Plessis, A., *Fulfilment of South Africa's Constitutional Environmental Right in the Local Government Sphere* (2008) LLD Thesis, North-West University, at 362 – 379.

⁵¹⁶ Barresi, P. A., 'The Right to an Ecologically Unimpaired Environment as a Strategy for Achieving Environmentally Sustainable Human Societies Worldwide' (2009) 6 *Macquarie Journal of International and Comparative Environmental Law* 3 at 5.

social and economic development. These include: the socio-economic rights to housing, health care, water services, freedom of trade and education; and the first generation rights of life, equality, human dignity and children's rights. The Constitution takes development further however. Section 152 states that one of the objects of local government is 'to promote social and economic development' (note the omission of ecologically justifiable requirement of Section 24(b)(iii)) and this object is given peremptory weight by Section 153 which insists that:

'A municipality must-

- (a) structure and manage its administration and budgeting and planning processes to give priority to the basic needs of the community, and to promote the social and economic development of the community; and
- (b) participate in national and provincial development programmes.'

In turn provincial government must assist local government in achieving their functions (which must include the development objectives).⁵¹⁷ All public administration (which applies to the administration of all spheres of government (i.e. National, Provincial and Local), all organs of State and all public enterprises)⁵¹⁸ in South Africa is governed by a number of principles including that: 'Public administration must be development-oriented.'⁵¹⁹

To couch Section 24, or Section 24(b), or even Section 24(b)(iii) as a *Sustainable Development* right would be an exercise in redundancy and the only tangible result would be to lose an environmental right. The objectives of *Sustainable Development* can be met without an explicit right; through the integration of an environmental right into the matrix of socio-economic and human developmental rights as well as the developmental policy directives contained elsewhere in the Constitution. The need for social and economic development is neither disputed nor denied but this need is amply provided for. Two of the three *Sustainable Development* pillars are well catered for. The third is universally regarded as being necessary and this is environmental protection. The objective of environmental protection cannot be met without an explicit ecocentric environmental right and therefore Section 24(b)(iii) would lose its purpose if regarded as a recordal of *Sustainable Development*. But the objectives of *Sustainable Development* (if that was indeed the goal) could still be met by a purely environmental Section 24 with its ecocentric Section 24(b). Section 24(b) and in particular Section 24(b)(iii) is not a recordal of *Sustainable*

⁵¹⁷ Section 155(6) of the Constitution.

⁵¹⁸ Section 195(2) of the Constitution.

⁵¹⁹ Section 195(1)(c) of the Constitution.

Development. Rather, the concept of *Sustainable Development* can be achieved using the whole Constitution, Section 24(b) is the sole true environmental protection right in the Constitution, it is, together with Section 24(a) the third pillar.

Part Six: Conclusion

Section 24 of the Constitution has been interpreted in a textual (grammatical)⁵²⁰, contextual⁵²¹ and purposive⁵²² manner and found to encapsulate both an anthropocentric right in Section 24(a) and an ecocentric right in Section 24(b). As such it seems to be best described as a bicentric right.⁵²³ A novel description proposed in this dissertation.

Section 24(b) differs from South African socio-economic rights and probably should not be regarded as being a socio-economic right. In lacking a progressive element and a State directive it has been argued that it is an immediately justiciable right and that it is capable of vertical and horizontal application. These are features not apparent in socio-economic rights. Common-law principles exist as a foundation to accommodate this interpretation and can be developed in due course.⁵²⁴

Section 24(b) was found to be a gateway for the introduction of; a true ecocentric right, the public trust doctrine and ecological resilience into South African law.⁵²⁵ The National Environmental Management Act, no. 107 of 1998 was found to be the source of many of the principles underpinning *Sustainable Development* in the South African context.⁵²⁶

In contrasting Section 24(b) to *Sustainable Development* the concept of *Sustainable Development* was examined as a basis for a legal right and as a basis for law. *Sustainable Development* was found to lack a precise meaning and is rejected as a basis for either a

⁵²⁰ See sections 1.4 and 3 of this dissertation.

⁵²¹ See section 4 of this dissertation.

⁵²² See section 5 of this dissertation.

⁵²³ See section 4.2 of this dissertation.

⁵²⁴ This was discussed in section 5 and in particular 5.2.

⁵²⁵ This was discussed in section 5 and in particular 5.5, 5.6, 5.7 and 5.9.

⁵²⁶ This was discussed in section 2 and in particular 2.3.

right or law. At best it is a procedural principle or goal directing an integration of social development and environmental protection considerations into its primary, economic, development objective.⁵²⁷ This requires a subjective assessment which is problematic as a legal doctrine. Section 24 was found to be an environmental right and therefore not a formulation of *Sustainable Development*. Instead Section 24 can be used as the environmental leg in achieving *Sustainable Development* and through ecological resilience, provides an objective means to assess the sustainability of any proposed activity.⁵²⁸

The purpose of Section 24 can be achieved by using ecological resilience to measure and assess environmental protection. The balancing mechanism inherent in the Constitution together with its social development and economic development rights and directives can be balanced against the environmental right that is Section 24. This balancing act can be used to achieve the desired result, either pro-developmental *Sustainable Development* or the more environmentally sound *Sustainability*. It is this balancing mechanism which will allow South Africa to best address the social development imperatives it faces whilst allowing it to shift focus as and when appropriate.⁵²⁹

⁵²⁷ This was discussed in section 2 and summarised in 2.2.8.

⁵²⁸ See section 5.12 in this regard.

⁵²⁹ This was discussed in section 5 and in particular 5.9, 5.10 and 5.11.

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